

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED

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By Brian Cotta, Clerk

MLT
Deputy

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY RAY JOHNSON, JR.,

Defendant and Appellant.

F071640

(Super. Ct. No. BF151825A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Laura Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Wolf, Greenfield & Sacks, Gerald B. Hrycyszyn, Michael A. Albert, Justin C. Colannino, Dana M. Delger, Justin Brooks, Alexander Simpson, Linda Starr and Paula M. Mitchell for Innocence Project, Inc., California Innocence Project, Northern California Innocence Project and Loyola Law School's Project for the Innocent; Stephanie Lacambra and Christopher Walsh for Electronic Frontier Foundation; Kenneth I. Clayman, Public Defender, Jennifer Friedman, Deputy Public Defender, Richard Torres, Clinton Hughes and Jessica Goldthwaite for Los Angeles County Public Defender and The Legal Aid Society, DNA Unit; Brett Max Kaufman, Brandon Buskey, Rachel Goodman, Vera Eidelman, Andrea Woods and Peter Bibring for American Civil Liberties

Union and American Civil Liberties Union of Southern California as Amici Curiae on behalf of Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Caely E. Fallini, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Billy Ray Johnson, Jr. appeals following his conviction on 24 counts, including multiple counts of forcible rape, robbery and burglary, among other charges. Appellant's charges also included multiple firearm enhancements and prior conviction enhancements. In this appeal, appellant raises evidentiary and procedural concerns. With respect to his evidentiary concerns, appellant contends he was not provided with needed discovery regarding the DNA analyses used to support his conviction, and that he was improperly precluded from presenting certain expert testimony related to that DNA testing. He is joined in the first of these issues by multiple amicus submissions related to the contention that source code underlying certain computer generated ad-mixture DNA analyses, including those done by TrueAllele in this case, must be produced to ensure an adequate defense.¹ Procedurally, appellant contends the trial court wrongly failed to declare a mistrial during the jury selection process, that the prosecutor improperly dismissed jurors from the venire, and that he should be resentenced on the firearm enhancements. Appellant also asks this court to review the *Pitchess*² hearing held regarding his request for evidence of police bias.

¹ Briefs were received from: (1) Innocence Project, Inc., California Innocence Project, Northern California Innocence Project and Loyola Law School's Project for the Innocent; (2) Electronic Frontier Foundation; (3) Los Angeles County Public Defender and The Legal Aid Society, DNA Unit; and (4) American Civil Liberties Union and American Civil Liberties Union of Southern California, Inc. The court thanks the amici for their excellent briefing in this matter and has fully reviewed and considered the positions expressed.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

This court recognizes the important disputes underlying appellant's evidence-based positions and the amicus briefing submitted. Clarifying the circumstances necessary to trigger production of source code related to mathematically-complicated and machine-derived DNA evidence and the scope of testimony from experts discussing such methodology when used to support a conviction is a matter of great concern in future cases. However, despite the attempt to frame these issues as critical to this case, we do not reach them. Rather, in this case the overwhelming evidence of guilt, exclusive of the specifically contested DNA results, demonstrates that any failure to produce such evidence or permit certain expert testimony was harmless. We therefore express no opinion on when such source code or testimony should be allowed. After considering the various issues raised in this appeal, we generally affirm appellant's conviction but remand for reconsideration on the firearm enhancement issues.

FACTUAL AND PROCEDURAL BACKGROUND

This case revolves around four burglaries and sexual assaults that occurred between late June and late August 2013.³ Appellant was ultimately charged and convicted with perpetrating all four attacks and appeals from those convictions. Given the variety of issues raised by appellant, we will first generally recount the events, including relevant evidence from the trial, before generally recounting relevant aspects of how the trial unfolded. Additional factual detail will be provided as each relevant legal issue is discussed.

The Assaults

The first incident occurred in the early morning on July 1, and involved two young women. According to one of the women, she went to bed around 2:00 a.m. and woke up to find a man standing near a window in her room. She described the man as around six

³ Subsequent references to dates are to dates in the year 2013, unless otherwise stated.

feet tall, and black with hazel brown eyes. He was wearing a ski mask, a dark sweatshirt, and gloves with the fingers cut off. He possessed a black gun.

The man told the woman to look away and cover her eyes; he placed a pillow case over her head and told her he would kill the girl in the other room if she was not quiet. The man removed the woman's bra and told her he was going to rape her. He then put the gun to the woman's head and cocked it.

At this point the woman grabbed for the gun and yelled out. The man responded by hitting the woman in the head several times. The second woman heard the yelling and came toward the room from where she had been sleeping. The man struck her with the gun and slammed her against the wall, telling her to shut up or he would kill her. During this time, the first woman ran from the apartment. The man gave chase. The second woman locked the door and tried to call 911. The first woman ultimately reached her cousin's apartment, where the police were called. Upon returning to the apartment, the first woman noticed her cell phone was missing.

The police determined the man likely entered the apartment through a bedroom window and found the screen had been removed from a window that was found open. They located a single shoe print at the scene. A black and white pair of Nike shoes later recovered from appellant's residence could not be excluded as a match, although there were insufficient distinguishing features to identify them as the shoes that left the print.

The women first called 911 at 3:29 a.m., and the police estimated the crime occurred about 15 minutes before the call. Analysis of appellant's cell phone records showed he was speaking with his girlfriend until 3:00 a.m., stopped using the phone for a while, then resumed texting his girlfriend at 4:00 a.m. His phone was utilizing cell towers that covered both his residence and the scene of the crime. Apparently, no DNA from this crime was obtained and tested.

The second incident occurred on July 18, around 5:00 a.m. The woman attacked in this incident said her husband left for work around 4:45 a.m. She fell back asleep after

he left, only to wake up with a gloved hand over her mouth. Her attacker was a black male slightly taller than 5 feet 11 inches with a deep voice who smelled like cigarettes. He wore a black ski mask, black jean shorts, a sweater, black shoes with white markings, and had a black backpack.

The man instructed the woman to go to the living room and get on her knees. He covered her head with a blanket. He told her not to look at him, not to scream, and to think of her daughter. He used a purse strap to tie her hands. The man then asked for money and began searching the apartment. He told the woman he knew her, called her by name, and said he'd been watching her. He removed her clothing and touched her breasts and body. The man then had intercourse with the woman, using a condom. After he finished, he took the woman to the bathroom and washed her.

The man took the woman back to the living room, her face covered with her shirt, and sat down next to her. He asked her about her relationship and whether she would tell her husband what had happened, and told her not to call the police. He stated he would take her cell phone, but told her he would hide it instead when the woman said there were special pictures of her daughter on the phone. Eventually, the man left through the kitchen window, and around 6:00 a.m., the woman called 911.

The police investigation found a window screen on the ground and that the bathroom window could be opened from the outside, even if locked. The rag used to wash the woman could not be found, but an unknown phone cord, the purse strap used to bind the woman, and the woman's cell phone along with other items were all collected and analyzed. The police also found shoe tracks in the dirt behind the woman's apartment. These prints were consistent in tread to a pair of black Reebok shoes found at appellant's residence.

The review of appellant's cell phone usage showed activity up to about 1:15 a.m. the morning of the attack and then a break until 5:57 a.m., when appellant began calling his girlfriend. The activity around 1:00 a.m. occurred near appellant's residence. The

call at 5:57 a.m., however, utilized the cell tower covering the victim's apartment. In activity after that time, appellant's cell phone travelled back to the cell tower covering his apartment, arriving there by 6:17 a.m. Police reviewed four months of cell phone records and found this was the only time in that period appellant's cell phone connected with the tower covering the woman's apartment.

The police also attempted to conduct DNA analyses on several samples including the purse strap, telephone cord, and cell phone collected, along with a sample taken from the kitchen window. These samples all had multiple contributors and either could not be manually interpreted or could not be matched to a known potential contributor. The police, therefore, utilized a software program called TrueAllele to obtain what are known as match statistics for each sample. These statistics determine the probability that a known DNA profile is a contributor to the mixture when compared to a random person from various ethnic populations. The software is based on known mathematical models based on an algorithmic concept known as the Markov chain Monte Carlo, but the actual analysis it conducts is not publicly known and its source code is not made available for review. Its results have been subjected to peer review analysis and its program validated in certain controlled studies.

Two experts tested the DNA used in appellant's case. The first was Dr. Mark Perlin, the inventor of TrueAllele and a hired expert in the case. The second was Garrett Sugimoto, a criminalist trained to use the TrueAllele software with the Kern Regional Crime Laboratory. Both sets of results were presented at trial.

According to Dr. Perlin, a match between appellant and one of the contributors in the sample was 43 times more probable than coincident for the purse strap, 34,000 times more probable for the telephone cord, 41,000 times more probable for the cellphone, and 10 times more probable for the kitchen window. In comparison, when looking at whether the woman was a contributor on the purse strap, the results were five quintillion times more probable than coincident. Of all the samples from this incident, Dr. Perlin found

three supported appellant as a contributor, nine supported exclusion, and one was inconclusive.

Sugimoto utilized a slightly different methodology. If the match statistic generated was greater than 10,000, he classified the result as "cannot exclude." If the result was between negative 10,000 and positive 10,000, he classified the result as "inconclusive." If the score was less than negative 10,000, he classified it as "an exclusion." According to Sugimoto, appellant could not be excluded as a contributor to the telephone cord and cellphone samples. In these examples, appellant's score was between 39,000 times and 79,000 times more probable than coincident, depending on the ethnic group considered, for the telephone cord, and between 12,000 times and 22,000 times more probable for the cellphone sample. Sugimoto found the purse strap and kitchen window samples inconclusive. Appellant was excluded from the other samples reviewed.

The third incident, involving a woman and her children, occurred on August 1. One early morning prior to the event, the woman's children saw a light shining through the window and someone attempting to open the window. In response, the family put wooden dowels in all the window tracks. Two days before the assault, the woman found all the dowels removed and around \$150 missing. The apartment manager responded by placing screw-type locking devices on the window tracks.

The morning of the attack, the woman got up for work at 4:00 a.m. When she opened the front door to leave, a tall black man smelling of cigarettes pushed her back into the apartment. He was wearing dark blue gloves, a black mask, a black sweater with a hood, red athletic shoes, and had a black backpack.

The man used tape from his backpack to cover her eyes and mouth. He used plastic ties to bind her hands and feet and placed a rag in her mouth. At one point during the assault, the woman told him she was pregnant. The man responded by kicking her in the back before placing a pillow under her head and stomach. After moving her several

times, the man eventually ripped the woman's bra off and rubbed her breasts before removing her pants and engaging in intercourse. He told the woman not to resist or something would happen to her children. After he ejaculated, the man used a wet towel to clean the woman.

The man also attacked the children in the home. Two of the young girls were taken into the room with the woman, having been stripped naked. A third was brought to the room with the woman but remained clothed. The man used plastic ties to bind the children as well, and placed clothing in their mouths. He touched the naked breasts of one of the children. During the time he was assaulting the children, the woman heard the man turn on the shower.

When he finished the assaults, the man placed all four people on a bed, removed their bindings with a knife, and told them not to look at him. He collected and took those bindings with him along with the towel used to clean up. He then covered them with a blanket and said he was sorry for what had happened. He told the woman not to call the police or her children would pay for it, took her cell phone, and left. The woman immediately dressed, ran to a neighbor's apartment, and called the police.

The 911 call was received at 6:03 a.m., and the police estimated the crime occurred about 40 minutes earlier. A review of appellant's phone records showed no activity from 8:30 p.m. on July 31, until 4:27 a.m. on August 1, when appellant received a text message from his girlfriend. Appellant responded at 5:25 a.m., and called her several times until around 7:06 a.m. The cell phone utilized a tower that covered both appellant's residence and the woman's apartment at all times. The next day, appellant began reviewing web pages discussing the recent attacks.

DNA samples were again collected from the crime scene. None of these samples resulted in a manual analysis match to appellant, but three showed potential matches through the TrueAllele program. Dr. Perlin found two stains on the woman's pants that showed appellant was 1.78 million times and 5.44 million times more likely than

coincident to be the contributor. A stain on the woman's shirt resulted in a 740 million times more likely than coincident finding. In comparison, the woman's boyfriend's DNA was also found in these samples at respective probabilities of 25, 263, and 272 quadrillion times more likely than coincident. A further nine results reviewed by Dr. Perlin presented results that excluded appellant as a donor. Sugimoto's analysis of the three samples implicating appellant showed results between 2.3 and 12 million, 426,000 and 2.1 million, and 43 and 100 million times more likely than coincident, respectively.

The fourth incident, involving a woman and her daughter, occurred on August 19. The woman involved went to bed around 11:30 p.m. on August 18, and awoke to a man in a black hooded sweater and a black mask holding a gun. She could not see his skin. She thought from his voice that he was black, and, at one point, he asked what race she thought he was. She testified she responded "Hispanic," to which the man said, "yeah right, like I would be." Her daughter got a better view of the attacker and said he was a black man wearing black gloves, khaki shorts, a puffy snow jacket over an orange shirt, and red shoes with green on them.

The man placed tape over the woman's eyes and around her head. He bound her hands behind her back with zip ties. He later did the same to the woman's daughter. He asked for money and the woman told him about \$5,000 cash in the apartment that the man ultimately took. The man asked about phones in the house and took the woman's cell phone.

The man again sexually assaulted the woman involved. He removed her tank top with a knife. He then removed her pants and made her lay on a towel. He kissed her breasts and touched her genitals. He used a condom when he had intercourse with her. When he was done, he took the woman to the bathroom, put her in a tub of water, and cleaned her.

During this time, the daughter freed herself and found a phone the man had not known about. She called 911. When the man saw her, she threw down the phone and

fled the apartment. The man fled around this time, apparently taking the towel. When he did, the woman called 911 as well. The first call to 911 occurred at 3:43 a.m.

The police obtained several items of evidence from the apartment, including an ice chest, multiple zip ties, duct tape, and shoe prints. They attempted to analyze finger prints found on the cooler but obtained no matches. They ultimately found the cell phone in a field near the apartments. A red pair of Nike shoes obtained from appellant's apartment contained a tread deemed similar to a shoe print found on the kitchen counter in the apartment.

Unlike the other crimes, there was no cell phone data to review because appellant's pre-paid phone had been disconnected for non-payment on August 14. On August 19, at 4:06 p.m., appellant's phone was reconnected after a payment was made. Appellant's internet search history showed he searched for articles about the recent assaults on August 20, 22, 23, 24, and 31, as well as September 1.

The police later determined that appellant's girlfriend bought a used 1994 Chevrolet Caprice at 11:10 a.m. on August 19, and paid \$2,250 in cash. She also posted a message a few days later on Facebook suggesting a participant in the conversation was not a "true criminal like Billy." Appellant responded to this message, saying "yeah, but when da money come in, what you be saying? Can you buy me a new car? Yeah."

DNA evidence was collected from several items. One of these was a zip tie found on the roadway near the apartment. The DNA on this item was sufficient for a manual interpretation and could be utilized in a CODIS search. This search resulted in a CODIS hit for the DNA. A reference sample from appellant was then requested and Sugimoto determined the DNA from this sample was consistent with DNA on the zip tie.

Appellant's own expert also conducted a manual review of the DNA from the zip tie and concluded "that Mr. Johnson was present" as the major contributor to that sample.⁴

Samples were also run through the TrueAllele software. Dr. Perlin found two results included appellant as a contributor, while 10 results excluded appellant. The two inclusive results were from DNA on the bathtub handle, which showed results of 550 times more likely than coincident, and on the zip tie found on the road, with results of 211 quintillion times more likely than coincident. Sugimoto found the bathtub handle DNA inconclusive but the zip-tie DNA inclusive, with a range of 170 quintillion to 15 sextillion times more likely than coincident.

Appellant's Arrest and Subsequent Conduct

On August 28, appellant was found sitting in the driver seat of a running 1994 Chevrolet Caprice. He was arrested for driving on a suspended license, and police found brass knuckles and two condoms when searching the car. Appellant said he had bought the car with cash earlier and the brass knuckles were inside at the time. Appellant said he and his girlfriend were not working but had been able to save for the car. As he was being transported to jail, the arresting officer reported that appellant spontaneously stated, "I told you that this had to do with more than just brass knuckles" and "I have too many girls to be out here raping people." The arresting officer described appellant as 6 feet 1 inch tall, and 190 pounds. He said appellant smelled of stale cigarettes and as if he had not showered in days.

Following his arrest, appellant was placed under police surveillance. On October 13, he was spotted outside at 2:40 a.m. and again around 3:45 a.m., wearing a black hooded sweatshirt with the hood up and dark pants. The police placed high-beam headlights on appellant and he raised his hands and yelled. They then lost sight of him

⁴ Appellant's expert also found she could not exclude appellant as a minor contributor to sperm cell fractions on shirt and pant stains from one of the other attacks.

until he returned home at 6:54 a.m. A later search of appellant's phone recovered several videos from that morning, recorded between about 2:00 a.m. and about 6:00 a.m. These included a video showing someone searching next to a doormat and plant at the apartment of a woman named Teresa, and a video recording a different naked woman taken through her bedroom window.

On October 14, police saw appellant enter the passenger side of a maroon Chevrolet Caprice driven by his girlfriend shortly after and near where officers allege a black male fired several shots in front of an apartment complex. Police tailed the Caprice and saw an object thrown from the passenger side window. The car was stopped, and appellant was arrested. His girlfriend was released. Appellant later called his girlfriend from the jail and gave what police believed was a coded message to go retrieve the gun used in the shooting. Police returned to where they believed the gun had been tossed and found appellant's girlfriend there. They detained her, searched the area, and found a gun that was later determined to be involved in the shooting.

Subsequent searches of appellant's residence separately located a black ski mask and a black hooded pullover sweatshirt kept in a plastic trash bag in appellant's backyard, along with several items of clothing similar to those described by the victims, and a group of white zip ties in appellant's residence. Police also learned that appellant was conversing with a 14-year-old girl on Facebook in April and September. In those conversations he told the girl he found her "hella sexy" and wondered why "[e]veryone trips on age" when she did not want to speak with him because he was a grown man. In October appellant also attempted to friend a 15-year-old girl.

Appellant was arrested and eventually charged with committing the above assaults.

Jury Selection

Two issues relevant to this appeal arose during the jury selection process. First, appellant's counsel noticed that the prosecutor had utilized six of their first seven

peremptory challenges on female prospective jurors. When the sixth prospective female juror, K.G., was struck, appellant's counsel made a *Batson/Wheeler*⁵ objection. The trial court overruled this objection quickly, noting objective reasons why the prospective juror could be excluded, including her age and lack of sleep. The prosecutor agreed and further pointed to her unique hair color and multiple piercings.

The prosecutor's next challenge was also to a female prospective juror, L.W. Appellant's counsel objected, renewing its *Batson/Wheeler* objection based on the fact seven of nine objections were to women. The court determined a prima facie showing had been made and asked the prosecutor for an explanation. The prosecutor recounted a prior conversation with the prospective juror where she claimed her neighbor had called the police on her after peeking through her windows and seeing her dog going to the bathroom on the rug. The prosecutor also found it odd the prospective juror was more upset about this incident than the death of her son and had apparently gone to law school for a year because she had become interested in the law while serving as president of a teacher's association. The prosecutor thought this prospective juror might have mental deficiencies.

Appellant's counsel requested explanations for all other female prospective jurors dismissed as well, claiming the objection made was to all of them. The prosecutor argued such an explanation was not required. The court noted its prima facie finding related only to the most recent dismissal and found the prosecutor's explanation as to that prospective juror sufficient to show she was not dismissed for being a woman. It therefore did not require the prosecutor to provide any further explanations. The court also noted at the time that four men and seven women were in the jury box.

⁵ A *Batson/Wheeler* motion takes its name from two cases, *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Wheeler*).

Jury selection continued, and 12 jurors were selected. The court swore in those jurors, then took a break for the day before continuing on to select alternates. During this break, one of the jurors learned his wife had been diagnosed with cancer and would undergo surgery in two days. The next morning, the court inquired into the juror's discovery and ultimately determined that the juror should be excused for cause. During these proceedings, the parties debated on how to proceed.

The prosecutor argued the court should wait to dismiss the juror until after the alternates were sworn, then replace the juror with an alternate. The defense stated it was willing to stipulate to reopening voir dire, but only if the court provided the defense with its full 20 peremptory challenges, rather than the two it had not previously exercised. An alternative, the defense argued, was granting a mistrial and beginning jury selection again. The court, instead, dismissed the juror, denied a defense motion for a mistrial, and proceeded to the selection of alternates. When this was complete, the court placed one of those alternates on the jury and proceeded to trial.

Appellant's Trial and Conviction

One of appellant's goals for trial was to challenge the TrueAllele DNA results. As part of his attempt to do so, appellant made a pretrial request, and renewed that request at trial, for the source code to the TrueAllele program. The People opposed this request, arguing the code was subject to the trade secret privilege contained in Evidence Code section 1060, and appellant had not made a proper showing for production. They submitted a declaration from Dr. Perlin supporting this claim.

The trial court held an in limine hearing on the request. Appellant's counsel argued the source code was the only means to determine whether the programmed mathematical formulas were working properly and noted there were discrepancies between the results obtained when Dr. Perlin utilized the software and when Sugimoto ran the same tests. Appellant's counsel further agreed to sign a protective order to view

the code. Counsel did not, though, submit a declaration from their expert supporting a need for the requested evidence.

The trial court ultimately ruled there was “no declaration or showing, with any precision or particularity, how a review of the TrueAllele source code would enable the defense to determine what assumptions were made or how reviewing the highly technical code would help defense counsel in cross-examining Dr. Perlin” The court summarized its position by saying it did not “see a specific logical connection between the source code to be examined and some consequential fact” before recounting the various ways the TrueAllele software has been validated previously, used in prior cases, and peer reviewed.

During trial, appellant raised his request again when objecting to testimony by Dr. Perlin that the TrueAllele software objectively inferred genotypes. The trial court again found no particularized showing warranting disclosure and denied the request.

Appellant also sought to attack the TrueAllele results through expert testimony and called Suzanna Ryan to testify regarding her review of the DNA analysis. The People objected to portions of Ryan’s testimony concerning how TrueAllele works. They argued she lacked foundation to provide such testimony, given that she had neither used nor been trained on the software. The trial court agreed, explaining it would only allow Ryan to testify regarding “the methodology that she has employed in the past . . . within the confines of what tests she’s actually run” and not how TrueAllele results could be different based on changed settings. The court sustained several prosecutorial objections to questions posed to Ryan on these or similar grounds.

Following trial, appellant was ultimately convicted of virtually all of the charges brought against him, with the exceptions of one special circumstance allegation regarding whether he was armed during some of the criminal conduct and certain gang charges that were dismissed. Appellant was ultimately sentenced to multiple life, or life-equivalent,

terms. Included in the final calculation were several firearm enhancements. This appeal timely followed.

DISCUSSION

On appeal, appellant raised several arguments that, as noted, break down into evidentiary-based and procedurally-based claims. We begin by considering appellant's evidentiary-based assertions of error and then turn to his procedurally-based complaints.

Denial of Appellant's Source Code Requests

Both prior to and during trial, appellant moved for or requested discovery related to the DNA analyses using software developed by TrueAllele supporting the case against him. Specifically, appellant requested access to the source code utilized to run the software. The trial court rejected these requests on the ground the source code was a trade secret under Evidence Code section 1060, and that appellant had not made a prima facie showing the code was relevant or necessary to his defense. On appeal, appellant contends these rulings violated his Fifth, Sixth, and Fourteenth Amendment rights. The People respond through several arguments including that appellant was not entitled to pretrial production and that he failed to meet his burden for obtaining the evidence at trial. The People further contend appellant had no Sixth Amendment pretrial right to obtain the evidence, and that the routine application of evidentiary laws does not implicate appellant's constitutional rights. Finally, the People argue any error was harmless.

Standard of Review and Applicable Law

“Evidence Code section 1060 provides that an owner of a trade secret has a privilege to refuse to disclose the secret. Evidence Code section 1061, subdivision (b)(1) requires that a party in a criminal action seeking a protective order submit an affidavit based on personal knowledge listing the affiant's qualifications to give an opinion, identifying the alleged trade secret, identifying the documents disclosing the trade secret, and presenting evidence that the secret qualifies as a trade secret.” (*Stadish v. Superior*

Court (1999) 71 Cal.App.4th 1130, 1144–1145, italics omitted.) The statutory scheme has been interpreted such that “the party claiming the privilege has the burden of establishing its existence. [Citations.] Thereafter, the party seeking discovery must make a prima facie, particularized showing that the information sought is relevant and necessary to the proof of, or defense against, a material element of one or more causes of action presented in the case, and that it is reasonable to conclude that the information sought is essential to a fair resolution of the lawsuit. It is then up to the holder of the privilege to demonstrate any claimed disadvantages of a protective order. Either party may propose or oppose less intrusive alternatives to disclosure of the trade secret, but the burden is upon the trade secret claimant to demonstrate that an alternative to disclosure will not be unduly burdensome to the opposing side and that it will maintain the same fair balance in the litigation that would have been achieved by disclosure.”

(*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1393.)

“The court’s ruling on a discovery motion is subject to review for abuse of discretion.” (*People v. Jenkins* (2000) 22 Cal.4th 900, 953.) “A trial court has abused its discretion in determining the applicability of a privilege when it utilizes the wrong legal standards to resolve the particular issue presented.” (*Seahaus La Jolla Owners Assn. v. Superior Court* (2014) 224 Cal.App.4th 754, 766.)

Errors of both statutory and constitutional magnitude are generally subject to a harmless error analysis. Constitutional errors are generally subject to the federal harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24, asking “ “whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error.” ’ ” (*People v. Capistrano* (2014) 59 Cal.4th 830, 873, overruled on other grounds by *People v. Hardy* (2018) 5 Cal.5th 56, 104.) Where the right to effective cross-examination is at issue the analysis is “based on factors such as: ‘the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or

contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.' ” (*People v. Sully* (1991) 53 Cal.3d 1195, 1220.) Statutory errors, including the denial of a defendant's motion to compel discovery, are generally subject to the state harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, asking whether “it is reasonably probable that the error affected the trial result.” (*People v. Elder* (2017) 11 Cal.App.5th 123, 133.)

Any Error was Harmless Beyond a Reasonable Doubt

The briefs in this case argue the issues surrounding the trial court's decision not to grant appellant access to the TrueAllele source code from contrasting positions. Appellant and the amicus briefs focus heavily on the constitutional protections they contend require production of source code for machine derived testimony that utilizes human-programed mathematical operations that cannot be independently verified exclusive of the programming. They rightly express serious concern that convictions utilizing such results without production of the source code could result in convictions based on “black box” judgments and point out that appellant made a particularized showing that running the same evidence through the software two times, in two different locations, yielded different results, some of which were helpful to the defense. They argue this was a satisfactory showing to warrant production given the high probability the source code contained errors. The People argue that this case turns on the mere application of evidentiary law and that such routine rulings do not even implicate constitutional protections. Further, the People argue the record supports the trial court's finding that the predicate showings for the production of trade secret protected evidence were not met. The People conclude by arguing any error was harmless.

We recognize that appellant made a strong showing that the software produced arguably inconsistent results and acknowledge that in such situations the software is the most likely source of clarification for such issues. However, we do not reach whether the

trial court erred in rejecting either of appellant's requests for production because we readily conclude the evidence overwhelmingly confirms appellant's guilt and, thus, any error was harmless, even under the elevated federal analysis.

In this case, the prosecution built a strong circumstantial case that the four incidents involving break-ins, robberies, assault, or rapes were committed by the same individual. The attacker was consistently described as a black male with a deep voice and hazel eyes. In three of the four incidents, the attacker was described as smelling dirty or of cigarettes. The attacker consistently wore a black hooded sweatshirt and ski mask. In several incidents, the attacker carried a black backpack.

A similar modus operandi, including increasing efforts to avoid detection, was also shown across the attacks. Each occurred in the early morning hours and appeared to be committed by someone that preferred to enter through windows. In the first, second, and fourth incidents, the women awoke to a man in their room and, in two instances, awoke to him covering their mouths. In the first and fourth incidents, the attacker possessed a gun. In the second and fourth incidents, the attacker obtained a knife and used that knife to remove the victims' clothing or bindings. In all four incidents, the attacker covered the victims' head or eyes. The attacker used available items in the home, or duct tape and zip ties brought for the attack, to bind the victims. The attacker engaged in touching and fondling activities before sexual activity and utilized a condom or towels to reduce or eliminate evidence. The attacker regularly cleaned the victims after engaging in sexual contact and collected the items used to bind the victims when leaving. The attacker spoke with several of the victims in conversational ways about his sexual desire, need for money, or actions. In all four incidents, the attacker took or hid the victims' cellular phone after the attack.

The prosecution further built a strong circumstantial case, exclusive of DNA evidence, that appellant was the attacker in one or more of the incidents. In the first incident, a shoe print could not be ruled out as coming from a shoe belonging to appellant

and his cellular phone records suggested he was near the attack when it occurred. In the second incident, appellant was described as wearing black shoes and the tread from black Reebok shoes found at appellant's residence appeared to match tread marks found at the crime scene. Moreover, appellant's cell phone accessed the cellular tower covering the area of the crime scene only once in the four months of phone records reviewed, a time roughly one hour after the attack. For the third incident, appellant's cell phone was in the area of the attack, although the tower also covered appellant's home. In the fourth incident, the attacker was described as wearing red shoes and the tread from red Nike shoes recovered at appellant's residence appeared similar to tread marks found at the crime scene. In that incident, \$5,000 in cash was stolen. Shortly after the theft, appellant's girlfriend bought a \$2,250 car with cash and appellant posted a response to a social media comment about his status as a criminal that said, "yeah, but when da money come in, what you be saying? Can you buy me a new car? Yeah."

While the case made by the People was circumstantial, it was not, as appellant argues, so weak that "it is doubtful that the prosecution had legally sufficient evidence to support its case against appellant" without the TrueAllele evidence. The prosecution presented a confluence of circumstances, each unique if not particularly strong but compelling in combination, showing both that the crimes were committed by one person and that appellant committed one or more of the crimes. Thus, where there were three different shoe prints at three different crime scenes, and witnesses had described the shoes in two of those incidents, appellant was found to have multiple pairs of shoes that both matched the description provided by the witnesses and/or could not be ruled out as causing the print for each incident. Similarly, in three of the four incidents, appellant was using his phone before and after, but not during the attack, in locations that utilized cell towers covering the crime scenes and, in one situation, this was the only time appellant's phone was in that area over a several month period. Added to these circumstances were appellant's access to cash immediately after one of the robberies, his statements to police

suggesting guilt, his search history for information on the attacks, his admissions to other robberies, his possession of clothing and tools such as the zip ties similar to those used in the attacks, and his cell phone videos demonstrating sexually driven prowling behaviors. Simply put, if this case had been tried prior to the advent of DNA evidence, or without the DNA component, we see little if any basis for an appeal on the state of the evidence. The circumstantial evidence of guilt was simply overwhelming.⁶

Appellant was also permitted to challenge the DNA evidence against him in several ways, including through his own expert and cross-examination of the prosecution's experts. He was able to highlight the fact that many of the DNA samples tested excluded him as a donor and that there were inconsistent conclusions between the two uses of the TrueAllele software. To the extent his right to cross-examination was limited, it was not heavily limited with respect to the DNA evidence and not limited at all with respect to the most important witnesses in the case, the victims and the police criminologists gathering non-DNA evidence. Accordingly, we conclude any error in failing to require production of the TrueAllele source code was harmless beyond a reasonable doubt.

Exclusion of Appellant's Expert Testimony

In a partially-related argument, appellant objects to the trial court's exclusion of certain expert evidence he proffered regarding the way certain assumptions entered into the TrueAllele software affect the results generated. Specifically, appellant contends the trial court incorrectly concluded that appellant's expert, Suzanna Ryan, was not qualified to testify about how assumptions made when setting up the TrueAllele software affected

⁶ We note, too, that the manual interpretation of DNA found on the roadway zip tie was sufficient to provide a CODIS hit with appellant's known sample and clear enough that appellant's own DNA expert admitted appellant's DNA was on the item. These DNA findings are not related to the disputes raised with respect to the TrueAllele program's probabilistic analysis of multi-source low-level DNA and further buttresses the prosecution's otherwise convincing circumstantial case.

the mathematical formula and, subsequently, the results of the tests because Ryan had not been formally trained on the software, or previously used it. Appellant contends these facts go to the weight, and not the admissibility of Ryan's testimony, that she was otherwise qualified, and that excluding her testimony was an abuse of discretion. He further contends that the DNA evidence was essential to this case and, thus, the error requires reversal.

Standard of Review and Applicable Law

“The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion.” (*People v. McDowell* (2012) 54 Cal.4th 395, 426.) Generally, any error excluding portions of a defense is one of state law where we apply the *Watson* standard and ask whether it was reasonably probable that a defendant would have obtained a more favorable result, although certain constitutional errors—such as the complete exclusion of a defense—may be reviewed under the *Chapman* standard, asking whether any error was harmless beyond a reasonable doubt. (See *People v. Jones* (2012) 54 Cal.4th 1, 68.)

Any Error Was Harmless

Appellant's arguments focus on the trial court's decision to exclude a portion of his defense, in the form of testimony regarding the effect of certain choices upon the results generated by the TrueAllele software. While appellant claims that this exclusion prevented him from presenting any defense about the reliability of the DNA results generated by the TrueAllele software program, we need not resolve whether his assertions reach the level of constitutional error warranting *Chapman* review. This is so because any alleged error is harmless beyond a reasonable doubt. As discussed in the previous section, the People presented a strong case derived from numerous pieces of circumstantial evidence that did not require the use of DNA evidence, where the evidence of guilt was simply overwhelming. Although the People worked to buttress their case

with DNA results, those results were not as strong as the circumstantial evidence and not necessary for conviction. Indeed, the results of tests from the two labs involved conflicted in several instances, one lab found evidence inconclusive or exclusionary while the other found it inculpatory. These differences were admitted at trial and used as a part of the defense. In this context, the court's decision to limit appellant's expert testimony based on the expert's failure to have previously used or been trained on the TrueAllele program was not significant to the case. Appellant had already placed the DNA results in question and, more importantly, the overwhelming circumstantial evidence presented regarding his participation in these attacks rendered exclusion of any additional attacks on that DNA evidence harmless beyond a reasonable doubt.

The Court's Decision Not to Declare a Mistrial During the Jury Selection Process

We next turn to the procedurally-based objections. Appellant first contends the court incorrectly failed to order a mistrial when it dismissed one of the original 12 sworn jurors before alternates were selected. We find any error harmless.

Standard of Review and Applicable Law

Code of Civil Procedure section 233 governs the discharge of jurors unable to perform their duties and applies to the situation in this case. It provides detailed instructions when a jury is dismissed, as follows:

“If, before the jury has returned its verdict to the court, a juror . . . , upon other good cause shown to the court, is found to be unable to perform his or her duty, the court may order the juror to be discharged. If any alternate jurors have been selected as provided by law, one of them shall then be designated by the court to take the place of the juror so discharged. If after all alternate jurors have been made regular jurors or if there is no alternate juror, a juror becomes . . . unable to perform the juror's duty and has been discharged by the court as provided in this section, the jury shall be discharged and a new jury then or afterwards impaneled, and the cause may again be tried. Alternatively, with the consent of all parties, the trial may proceed with only the remaining jurors, or another juror may be sworn and the trial begin anew.”

The parties dispute how we should review any error arising under this law.

Harmless Error Analysis Applies and Any Error Was Harmless

Appellant argues that the specific language of Code of Civil Procedure section 233 demonstrates that the court erroneously failed to grant a mistrial upon removing one of the 12 sworn jurors prior to selecting alternates to replace him. Appellant claims such an error is structural in nature and, therefore, reversible per se. The People concede that, under “the plain language of Code of Civil Procedure section 233, the trial court should have discharged the jury after it dismissed the sworn juror, because there was no alternate juror and the defense did not consent to proceed with 11 jurors for the remainder of jury selection,” but argue we should interpret the statute to avoid such an absurdity and that any error was harmless.

We take no position on whether the statute’s plain language requires restarting jury selection if a sworn juror is dismissed in the period between swearing in the original 12 jurors and selecting and swearing in the alternates. We do not agree, however, that any error in this instance is structural and reversible per se. Rather, if any error occurred, it was a violation of state law jury selection statutes.

As the People note, appellant’s right to proceed with a particular jury attaches once the jury is sworn and double jeopardy attaches. (See *People v. Whitaker* (2013) 213 Cal.App.4th 999, 1011.) However, double jeopardy does not attach until after the alternate jurors are selected and sworn in. (See *People v. Griffin* (2004) 33 Cal.4th 536, 565–566, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.) The trial court’s decision to select alternate jurors after dismissing one of the sworn jurors thus did not impair appellant’s fundamental right to a jury trial or otherwise permit him to be convicted by a jury of less than 12 of his peers. Accordingly, any error is subject to state law harmless error analysis. (See *People v. Watson, supra*, 46 Cal.2d at p. 836; see also *People v. Rambaud* (1926) 78 Cal.App. 685, 692 [“The order of selecting a juror is a matter of procedure and . . . the state constitution specifies that no

error as to any matter of procedure shall be held sufficient to set aside a verdict or order a new trial, unless it appears from the record that the error complained of has caused a miscarriage of justice.”].)

Under this standard, we conclude the error was harmless. Procedurally, appellant was aware that alternate jurors would be selected for his trial. And appellant eventually selected alternate jurors knowing that one of them would be placed on his jury panel due to the dismissal. While appellant raises a concern that his ability to select a jury based on his understanding of how all 12 jurors will interact was impaired, we do not see this as prejudicial error under the circumstances. Indeed, appellant was required to select alternate jurors even if no prior juror had been dismissed and, if the dismissal issue had not arisen until after swearing in the alternates, appellant would have been in at least the same, if not a worse, position given that one of the alternates would have been properly placed on the jury upon dismissal of the original juror and appellant would not have been able to screen the alternates based on the knowledge one would definitively be included in the deliberations. Ultimately, appellant proceeded to trial with 12 jurors and the remaining alternates, and with knowledge that any selected alternate could be added to the original jury panel. Other than the knowledge that one alternate would definitively be added to the jury, this process was no different than intended under the law. We further see the error as harmless substantively. For all the reasons previously discussed, we see no possibility that this change in the jury’s makeup affected the outcome of this case. Accordingly, any error was harmless.

The Court’s Batson/Wheeler Decision

Appellant’s second procedurally-based concern arises from how the trial court managed his *Batson/Wheeler* objections during the jury selection process.

Standard of Review and Applicable Law

The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates both the California and United States Constitutions. (*Batson*,

supra, 476 U.S. at p. 89 [right to equal protection]; see *Wheeler, supra*, 22 Cal.3d at pp. 276–277 [right to trial by jury drawn from representative cross-section of the community]; see also *People v. Burgener* (2003) 29 Cal.4th 833, 863.) “A party who suspects improper use of peremptory challenges must raise a timely objection and make a prima facie showing that one or more jurors [have] been excluded on the basis of group or racial identity.” (*People v. Jenkins, supra*, 22 Cal.4th at p. 993.) “Once a prima facie showing has been made, the prosecutor then must carry the burden of showing that he or she had genuine nondiscriminatory reasons for the challenges at issue.” (*Ibid.*) At that point, the trial court must decide whether the opponent of the challenge has proved purposeful discrimination. (*People v. McDermott* (2002) 28 Cal.4th 946, 971.)

This next part of the *Batson/Wheeler* analysis “focuses on the subjective genuineness of the reason, not the objective reasonableness.” (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez*)). It is, in essence, a credibility determination in which “the court may consider, ‘among other factors, the prosecutor’s demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy.’” (*Ibid.*) “To satisfy herself that an explanation is genuine, the presiding judge must make ‘a sincere and reasoned attempt’ to evaluate the prosecutor’s justification, with consideration of the circumstances of the case known at that time, her knowledge of trial techniques, and her observations of the prosecutor’s examination of panelists and exercise of for-cause and peremptory challenges.” (*Id.* at p. 1159.)

In carrying out this obligation, the trial court is not required to make specific or detailed comments for the record to justify every instance where it finds a prosecutor’s nondiscriminatory reason for exercising a peremptory challenge as genuine. This is particularly true where the prosecutor bases his or her nondiscriminatory reason for exercising a peremptory challenge on the prospective juror’s demeanor, or similar intangible factors, while in the courtroom. (*People v. Reynoso* (2003) 31 Cal.4th 903,

919.) In contrast, “ ‘when the prosecutor’s stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.’ ” (*Gutierrez, supra*, 2 Cal.5th at p. 1171.) Ultimately, while the “movant must show it was ‘ ‘more likely than not that the challenge was improperly motivated’ ’ ” (*id.* at p. 1158), “the ultimate responsibility of safeguarding the integrity of jury selection and our justice system rests with courts” (*id.* at p. 1175).

We generally review the trial court’s ruling on this issue for substantial evidence and with great restraint. (*People v. McDermott, supra*, 28 Cal.4th at p. 971.) “We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court’s ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.” (*People v. Burgener, supra*, 29 Cal.4th at p. 864.) However, when assessing “the viability of neutral reasons advanced to justify a peremptory challenge by a prosecutor, both a trial court and reviewing court must examine only those reasons actually expressed.” (*Gutierrez, supra*, 2 Cal.5th at p. 1167.) “What courts should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual.” (*Id.* at p. 1159.)

“Excluding by peremptory challenge even ‘a single juror on the basis of race or ethnicity is an error of constitutional magnitude’ ” that “requires reversal of [appellant’s] resulting convictions.” (*Gutierrez, supra*, 2 Cal.5th at p. 1172.)

The Court Did Not Err By Failing to Obtain Explanations for All Prior Strikes
Appellant raises a narrow issue with respect to how the trial court handled his *Batson/Wheeler* motions. Specifically, appellant contends the trial court should have made the prosecutor provide a gender-neutral explanation for each woman dismissed

from the venire. Appellant argues this was required because his objection covered all women dismissed and the trial court found a prima facie case with respect to L.W.

Appellant's argument rests on his interpretation of *People v. Avila* (2006) 38 Cal.4th 491. In *Avila*, our Supreme Court held that a *Batson/Wheeler* motion made to a specific prospective juror does not trigger an obligation on the trial court to review all similar previously struck prospective jurors, even if a prima facie case is made as to the current objection that utilizes past strikes for support. (*Avila*, 38 Cal.4th at p. 552.) The court further noted that although the trial court had no specific duty to review prior strikes, "upon request it may appropriately do so when the prosecutor's subsequent challenge to a juror of a protected class casts the prosecutor's earlier challenges of the jurors of that same protected class in a new light, such that it gives rise to a prima facie showing of group bias as to those earlier jurors." (*Ibid.*) Appellant contends his renewed objection as to all previous women struck triggered an obligation for the trial court to conduct a holistic review. The People oppose this contention, arguing appellant's renewed objection did not place the People's prior actions in a new light and, thus, the trial court was correct not to go any further than the current objection to L.W.

We agree with the People in this instance. *Avila* does not mandate that the trial court review all prior strikes upon a probable cause finding with respect to one prospective juror, even if an objection is made as to all strikes after probable cause is found as to one. Rather, *Avila* leaves such an inquiry within the trial court's discretion for those times it deems appropriate because the later objection places all prior objections in a new light.

In this instance, the court found a prima facie case based on the number of challenges made to women and its "recollection of the earlier and current responses by [L.W]." The People then explained its gender-neutral reasons for excluding L.W., including concerns about her mental state supported by answers and behaviors observed in court, and explained that the high number of objections to women was, in part, because

there were many more women in the venire than men. The court concluded the People's arguments were sufficient and denied the motion with respect to L.W. At that point, it had heard a previous gender-neutral explanation for K.G., a gender-neutral explanation for L.W., and a viable explanation for why more women had been subject to objections. It also had a panel where several women were still serving such that, at the conclusion of the selection process, there were seven women on the jury.

Based on these facts, we see no error in the trial court's decision not to review all prior strikes to women. Resolution of the latest objection uncovered no gender-based concerns, and the panel was not being deprived of women based on the objections made. The court could properly conclude the prima facie case found with respect to L.W. was not sufficient to place all prior objections in a new light.

Independent Pitchess Review

During the course of discovery, appellant requested and was granted review of confidential personnel files relating to the one of the officers involved in his arrest. One confidential complaint was produced to the defense. Appellant requests we independently review the *Pitchess* hearing conducted by the trial court.

Standard of Review and Applicable Law

Pitchess motions are the well-settled mechanism by which defendants can screen law enforcement personnel files for evidence that may be relevant to their defense without compromising the officer's reasonable expectation of privacy in those records. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225 (*Mooc*)). Subject to various restrictions not relevant here, a trial court must conduct an in camera review of potentially relevant personnel files if the defendant makes a showing of good cause for the discovery. (*Id.* at p. 1226.)

This process is effectuated by having a custodian of records collect all potentially relevant documents from identified personnel files and present them to the trial court. The custodian "should be prepared to state in chambers and for the record what other

documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion." (*Mooc, supra*, 26 Cal.4th at pp. 1228–1229.)

The trial court must then make a record of what documents it has examined to permit future appellate review. (*Mooc, supra*, 26 Cal.4th at p. 1229.) "If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined." (*Ibid.*) These proceedings are then sealed. (*Ibid.*)

Upon appeal, we independently examine the record made by the trial court "to determine whether the trial court abused its discretion in denying a defendant's motion for disclosure of police personnel records." (*People v. Prince* (2007) 40 Cal.4th 1179, 1285.)

The Trial Court Did Not Abuse its Discretion

We have reviewed the full set of transcripts, files, and statements relevant to this issue. The trial court complied with the required *Pitchess* procedures. A custodian of records was present and placed under oath. The custodian identified and presented for review nine complaints made against the relevant officer. The custodian also provided the court with the officer's personnel file. The court independently reviewed the relevant files and ordered production of one of the nine complaints. The court created an accounting of what complaints were reviewed and its determination on what to produce. These proceedings were stenographically recorded. (*Mooc, supra*, 26 Cal.4th at p. 1229.) Our independent review finds the trial court did not abuse its discretion in producing only one of the complaints. The documents withheld by the trial court are not responsive to appellant's requests for documents showing dishonesty, false arrests, false statements,

false claims of probable cause, fabrication of charges or evidence, misstating or withholding evidence, false testimony, or planting evidence by the relevant officer.

The Court's Sentencing for Firearm Enhancements

Finally, appellant argues that this matter should be remanded for resentencing based on the recent enactment of Senate Bill No. 620. The People acknowledge the legislation is retroactive, but argue remand is not appropriate in this case because the trial court would not strike appellant's firearm enhancements.


Senate Bill No. 620 (2017–2018 Reg. Sess.), approved by the Governor on October 11, 2017, and effective January 1, 2018, added the following language to the firearm enhancement provisions in Penal Code sections 12022.5 and 12022.53: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section.” (Pen. Code, §§ 12022.5, subd. (c), 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, §§ 1, 2.) The legislation thus granted trial courts new discretion to strike firearm enhancements arising under Penal Code sections 12022.5 and 12022.53.

In this case, firearm enhancements under either Penal Code sections 12022.5 or 12022.53 were imposed on several of the counts appellant was convicted of committing. The enhancements added decades to what were already multiple life sentences. While the People correctly note that the trial court imposed the upper term in all available instances, ran appellant's sentences consecutively, and made clear that appellant's conduct made him an “unsuitable candidate[for probation], by any stretch of the imagination,” none of the court's actions or statements exposed what it would have chosen to do had it been aware that it had the discretion to strike or dismiss the firearm enhancements. Moreover, given the multiple convictions and certainty of multiple life sentences, there is at least a remote possibility the trial court could have seen the enhancements as unnecessary to ensuring a proper punishment. Accordingly, we will remand for the trial court to exercise its discretion as to whether to resentence appellant

on the firearm enhancements. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 [remanding where the record “[does] not clearly indicate that [the trial court] would have imposed the same sentence had [it] been aware of the full scope of [its] discretion”].) In all other respects, however, we affirm the conviction.

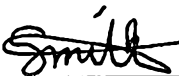
DISPOSITION

We remand for the trial court to exercise its discretion to consider striking any firearm enhancements imposed pursuant to Penal Code sections 12022.5, subdivision (c) or 12022.53, subdivision (h), as amended by Senate Bill No. 620 (Stats. 2017, ch. 682, §§ 1, 2, eff. Jan. 1, 2018). In all other respects, we affirm.



HILL, P.J.

WE CONCUR:



SMITH, J.



MEEHAN, J.