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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD TREMAYNE BRITTON,

Defendant and Appellant.

A139191

(Alameda County
Super. Ct. No. 170574)

INTRODUCTION

A jury convicted defendant Donald Britton of first degree murder in the shooting death of Leo Dunson, a man who defendant's sister complained was stalking her. On appeal, defendant argues his trial attorney rendered ineffective assistance of counsel, the trial court acted arbitrarily and with judicial bias, and the prosecutor committed misconduct. We find no prejudicial trial error. The parties agree, and we concur, the trial court erroneously imposed a five-year enhancement. Therefore, we will strike the enhancement. As modified, the judgment is affirmed.

STATEMENT OF THE CASE

Defendant was charged by information with first degree murder (count 1) and possession of a firearm by a felon (count 2). (Pen. Code, §§ 187, subd. (a), 29800, subd. (a)(1).)¹ In connection with the murder charge, the information also alleged defendant personally inflicted great bodily injury on another person and personally and intentionally

¹ All further unspecified statutory references are to the Penal Code.

used and discharged a firearm, causing great bodily injury or death. In addition, the information alleged three prior convictions. (§§ 12022.5, subd. (a), 12022.7, subd. (a), 12022.53, subds. (b)-(d), (g), 667, subd. (a), 667.5, subd. (c).) Defendant was found guilty of the substantive charges and the conduct-based enhancement allegations were found true after jury trial. Defendant waived jury findings as to the prior conviction allegations and the trial court found those true. Defendant was sentenced to 91 years to life in state prison.

STATEMENT OF FACTS

I. Prosecution Case

At 10:30 a.m. on June 4, 2011, Leo Dunson called his niece Marilyn Ooten to report the tires of his car had been slashed. He went to her house in East Oakland to get some money to replace the tires. Leo left his niece's house around 1:25 p.m. Not long after, Ms. Ooten's daughter called her with news that Leo had been shot.

He was shot in front of 2906 High Street in Oakland, near the intersection of High Street and Fleming Avenue, and a block away from the Express Gas Mart at the corner of High Street and Penniman Avenue. He died from a gunshot wound that entered the head behind his left ear and lodged in his brain. There were no abrasions, cuts, or bruises on his hands and no trauma to his body except a small abrasion with bruising above his right eyebrow. Police at the scene received information the shooting may have been preceded by an argument or disturbance of the peace, but no witnesses were found to confirm that information.

At 2:10 p.m. on June 4, Carla Thompson was walking from her apartment on High Street to catch a bus when she noticed an African-American man wearing dreadlocks, sunglasses, dark clothes, and a baseball cap pacing back and forth in front of the bus stop. She did not speak to him, and after a few minutes he crossed the street.

A truck passed between Thompson and the man momentarily blocking her view of him, but she heard a popping sound. After the truck passed, Thompson heard two more

pops and saw the man with dreadlocks shoot another man, who dropped to the ground. Before the shooting, Thompson did not hear or see an argument or behavior indicating the men were fighting. After the shooting, the man with dreadlocks calmly sauntered away. Thompson crossed the street to help the person who had been shot, but she saw he had a head wound and called 911.

Later that same day, Thompson identified the shooter in a surveillance video from a gas station on High Street. Defendant's sister, Chantell, and cousin, Starkeisha (Star), identified defendant as the man with sunglasses and a hat in a photo from the gas station's surveillance video. However, months later, Thompson was unable to identify defendant in a photo lineup without dreadlocks, a hat, or sunglasses and picked someone else.

On the afternoon of the shooting, Wallace Campbell was filling up his car at the gas station on High Street. He saw an African-American man walk from the gas station to an apartment building across the street. Campbell had seen the same man inside the gas station's store earlier; he had selected a green lighter, threw it on the counter, and then left without paying. The man wore black clothing, glasses, and a scarf or cap over braided hair. As Campbell worked on his car, he heard three gunshots. Campbell saw the same man come from behind some cars with smoke coming from his jacket. Months later, Campbell selected two men from a photo spread but was uncertain if either man was the person he saw.

Phillip Chun, an AAA tow truck driver, was on duty that day. He was stopped in traffic on High Street when he saw one man push another man. He then saw the pusher pull a gun from his waist area and fire three times from a distance of one foot at the head of the man pushed. The pusher-shooter then walked away through traffic and put the gun back in his waistband. Later that night, Chun identified the pusher-shooter in a still photo from a gas station's surveillance video. Later, he was shown the surveillance video from the gas station's store. Chun identified the shooter as the man who was grabbing a green

lighter from the counter in the video footage. He saw no fight or argument before the push and the shots.

In February 2012, Chun picked defendant's photograph—number five in the photo spread—from a group of six photographs. Chun could not identify the shooter at the preliminary hearing or at the trial.

Chantell Britton is defendant's sister. She testified at trial under a grant of immunity. Defendant is 10 years older than Chantell. On June 4, 2011, Chantell lived in a green house at 2900 High Street on the corner of High Street and Fleming Avenue in Oakland. Chantell met a man named Leo in March 2010, when Leo went to her home seeking to use jumper cables for his car. Leo told Chantell he lied about the need for cables; he just wanted to get on her porch. Chantell told him to get off her porch. Chantell realized that Leo lived in the apartment complex next door when she saw him later that same month.

One day, Leo returned to her porch and indicated he wanted to get to know her. Chantell told him she was not interested. Yet, Leo returned that day to the porch and simply stood there. He began frequenting her porch and would gaze into her home when the window blinds were open. One night, Chantell left home and Leo followed her. Chantell became afraid of Leo; she asked her boyfriend Prince to talk to Leo, but he just laughed. Chantell called the police on Leo several times, but they told her there was nothing they could do unless Leo touched her.

On June 3, Leo again followed Chantell. Chantell decided to go to her cousin Star's house instead of her own for safety reasons. Chantell and Star ended up spending the night at the home of another cousin, Niece.

Chantell returned to her home the next day, June 4, with her nine-year-old daughter, Star, Star's boyfriend Andre (Dre), and Star's four-year-old daughter. Chantell called Prince about Leo; he advised her to use a taser gun on him. She also called defendant, who was staying at his mother's house in Pittsburg, California. She told defendant Leo

had been following her and she was scared of him. She asked defendant to talk to Leo. She did not ask defendant to harm Leo or to bring a gun. She also did not ask Dre to slash the tires of Leo's car on June 4. In fact, Dre had already slashed Leo's tires on June 4. He told her about it afterwards.

That day, Prince drove Chantell's car to Pittsburg to pick up defendant. When defendant arrived at Chantell's house, he told her "it was going to be okay" and said he was going to the gas station. Appellant was wearing a gray sweater. When he returned from the gas station 30 minutes later, he was wearing the gloves, jacket, hat, and sunglasses depicted in the pictures from the gas station's surveillance system.

When defendant returned from the gas station, Chantell pointed out Leo to him. The two men stood face to face, but they did not have a physical confrontation. No one was pushed. Chantell walked back into her home, closed the door, and, within 10 seconds, heard two gunshots. Chantell left immediately after the shooting for Star's house in North Oakland. Chantell saw defendant later in the day at Star's house and asked him, "What did you do?" Defendant was wearing the gray sweater. Defendant advised her she should not have to be afraid. While he was in Star's house, he cut his dreadlocks.

Chantell was arrested for the homicide on August 2, 2012. She implicated defendant in the crime and was released pending further investigation.

Star was also inside Chantell's home at the time of the shooting. She heard three to four shots and dropped to the floor. She recalled that she, Chantell, and Chantell's daughter left together for Star's house within the next 15 or 20 minutes. About an hour and a half after the shooting, defendant came to Star's house. He had dreadlocks and was wearing his typical outfit of black clothing. Defendant asked for scissors and then began cutting his dreadlocks. His hair was an "afro" hairstyle after he cut off the dreadlocks.

At the preliminary hearing, the defense counsel asked Star several questions concerning the appearance of her boyfriend, Dre. He never wore dreadlocks; his hair was cut in a "fade" style.

II. Defense Case

Defendant testified on his own behalf. He received a call from Chantell around 10:00 a.m. on June 4. She told him she was having issues with a man who was stalking her. Chantell said she was afraid of the man, and asked defendant to talk to him. When he arrived at Chantell's home, he was wearing dark clothing, which is customary for him.

Defendant went to the gas station to purchase alcohol; however, the gas station's store did not sell it. He grabbed a lighter, lit a cigarette, and left. He admitted he was the person in the surveillance photo. When he returned to Chantell's home, she pointed out Leo, who was standing by his car.

Defendant walked over to Leo and indicated he wished to speak with him about his sister. Leo stated, "So you the motherfucker who slashed my tires." He grabbed defendant and started hitting him. Leo told defendant, "I'm going to kill you." Since defendant did not know what Leo was talking about, he became afraid of Leo. Leo continued punching defendant and also grabbed defendant's neck, causing him to have trouble breathing. Defendant was scared for his life. Defendant reached into his pocket and withdrew his pistol. He fired the first shot at Leo's leg but that did not stop the assault. Eventually, defendant fired two more shots in Leo's general direction, and Leo fell. Defendant realized he had killed a man, panicked, and left the scene. He did not call 911 to report the shooting because he did not think the police would believe him, and he did not want Chantell to face retaliation because of the shooting.

On August 2, 2012, defendant was arrested at his home in Carson City, Nevada. In phone calls he made from jail, he denied involvement in the shooting to protect his sister. Defendant admitted cutting his dreadlocks to change his appearance. He tossed the gun into the Delta.

III. Rebuttal

On June 4, Grant Minix lived on High Street. He was inside his home when he heard the first shot. He looked out the front window and saw an African-American man

wearing a baseball hat with dreadlocks sticking out, a hoodie, big sunglasses, and jeans holding a gun and pointing it down. The man fired two more shots. Minix did not see a second man, or a struggle or fight between two men. He did see the shooter hop a short fence and proceed up Fleming Avenue. Seconds later, a red or maroon car sped down Fleming and turned onto High Street, almost hitting another car. Two African-American men were in the front seats, and third man who looked like the shooter was in the back seat. They were all laughing.

DISCUSSION

I. Ineffective Assistance of Counsel Claims

Defendant contends his trial attorney rendered ineffective assistance of counsel by failing to object to a question posed to Chantell by the prosecutor about her immunity agreement. Chantell testified that after she was arrested, she was appointed an attorney, and together they decided if the prosecutor asked her questions about the events of June 4, 2011, she would invoke the Fifth Amendment. She said she felt the shooting was her fault because she asked defendant to talk to Leo. Questioned about her understanding of the immunity agreement, Chantell responded, “[B]asically my testimony can’t be used against me.” The prosecutor then asked Chantell if she understood “it’s the judge who will decide if you’re testifying truthfully,” to which defense counsel made no objection. She answered, “Yes.” The prosecutor continued: “Do you understand that the immunity agreement doesn’t protect you from prosecution for perjury if you don’t tell the truth?” She again answered, “Yes.” The questioning then turned to the events of June 4.

Defendant also contends his attorney should have interposed a hearsay objection when Chantell testified on direct examination that a little while before Prince went to pick defendant up in Pittsburg, Dre “came to the door and said that he had slashed the tires.” The question which prompted the response was: “When did you learn that [Leo’s tires] had been slashed?” Chantell had previously testified she believed the tires had been slashed that morning. She did not ask Dre to slash them; she did not know if anyone else

asked Dre to slash them; she did not know how it came to be that Dre slashed the tires; and she did not know when the tires were slashed.

On cross-examination, defense counsel asked Chantell many questions about Dre's involvement in the slashing of Leo's tires. Asked if there was any doubt in her mind that Dre slashed the tires, Chantell reiterated: "That's what he said to me. I didn't see him do it"

A. Principles Governing Ineffective Assistance of Counsel Claims

Under state law, "[t]o prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 (*Strickland*).) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Hart* (1999) 20 Cal.4th 546, 624 (*Hart*).)

The rule is the same under federal law. "To establish ineffective assistance of counsel 'a defendant must show both deficient performance by counsel and prejudice.'" (*Premo v. Moore* (2011) 562 U.S. ___ [131 S.Ct. 733, 739] citing *Knowles v. Mirzayance* (2009) 556 U.S. 111, 122 (*Knowles*).)

"Judicial scrutiny of counsel's performance must be highly deferential Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (*Strickland, supra*, 466 U.S. 668, 689.) For that reason, " '[t]actical errors are generally not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the

record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation” [Citation.]’ ” (*Hart, supra*, 20 Cal.4th 546, 623-624.)

Deciding whether to object is inherently tactical, and failure to object is rarely ineffective assistance. (*People v. Chatman* (2006) 38 Cal.4th 344, 384.) “[N]o Supreme Court precedent establish[es] a ‘nothing to lose’ standard for ineffective-assistance-of-counsel claims.” (*Knowles, supra*, 556 U.S. 111, 122.)

With these principles in mind, we now turn to defendant’s specific claims of ineffectiveness.

B. Questions About Chantell’s Immunity Agreement

Defendant contends that trial counsel was ineffective because she failed to object to the prosecutor’s question whether Chantell understood the judge would decide if she was testifying truthfully. Citing Ninth Circuit precedent, he further argues that *Strickland* calls for automatic reversal when counsel’s deficient performance results in “structural error.” (*United States v. Withers* (9th Cir. 2011) 638 F.3d 1055, 1067-1068; *Styers v. Schriro* (9th Cir. 2008) 547 F.3d 1026, 1030, fn. 5.) He asserts “the trial judge’s failure to correct the prosecutor’s erroneous suggestion that the judge would be the guarantor of her key witness’s veracity amounted to structural error.” We disagree.

“[T]he existence of a plea agreement is relevant impeachment evidence that must be disclosed to the defense because it bears on the witness’s credibility. [Citation.] . . . ‘[W]hen an accomplice testifies for the prosecution, full disclosure of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting the witness’s credibility.’ ” (*People v. Fauber* (1992) 2 Cal.4th 792, 821 (*Fauber*); *People v. Bonilla* (2007) 41 Cal.4th 313, 337.)

In *Fauber*, the prosecutor twice read to the jury the text of a key witness’s plea agreement, once at the outset of his immunized testimony and again in closing argument.

(2 Cal.4th 792, 820.) The agreement provided, inter alia, that the witness would testify truthfully against the defendant in any hearings in the prosecution of his case and, “ ‘[i]n the event of a dispute, the truthfulness of [the witness’s] testimony will be determined by the trial judges who preside over these hearings.’ ” (*Id.* at p. 820, fn. 4.) On appeal, Fauber argued that language should have been excised from the reading of the agreement because it “plac[ed] on the trial court rather than the jury the responsibility to determine whether [the witness] was telling the truth.” (*Id.* at p. 822.) The *Fauber* court agreed that portion of the plea agreement was “irrelevant to the [jury’s] credibility determination or potentially misleading to the jury [and] should, on timely and specific request, be excluded. Here, it was crucial that the jury learn what would happen to [the witness] in the event he failed to testify truthfully in defendant’s trial. But the precise mechanism whereby his truthfulness would be determined was not a matter for its concern. The provision detailing the judge’s determination of [the witness’s] credibility in the event of any dispute arguably carried some slight potential for jury confusion, in that it did not *explicitly* state what is implicit within it: that the need for such a determination would arise, if at all, in connection with Buckley’s sentencing, not in the process of trying defendant’s guilt or innocence. For these reasons, had defendant objected to its admission, the trial court would have acted correctly in excluding it on a relevancy objection.” (*Id.* at p. 823, italics in original.)

Nevertheless, the court found the inclusion of that language in the recitation of the agreement non-prejudicial. The court concluded: “The jury could not reasonably have understood [the witness’s] plea agreement to relieve it of the duty to decide, in the course of reaching its verdict, whether [the witness’s] testimony was truthful. Nor could the jury have been misled by prosecutorial argument. The prosecutor argued that [the witness] had nothing to gain by lying because the trial court would make a determination of his credibility in the event of a dispute. The context of the remarks made it clear that determination would occur if the prosecutor sought to repudiate its agreement with [the

witness] after trial in defendant’s case. [¶] Our conclusion is reinforced by the fact that the trial court instructed the jury, before the start of the prosecution’s case and after closing argument, that ‘[e]very person who testifies under oath is a witness. [Citation.] You are the sole judges of the believability of a witness and the weight to be given to his testimony’ (CALJIC No. 2.20.) We presume, in the absence of any contrary indication in the record, that the jury understood and followed this instruction. [Citation.] The prosecutor, in his opening statement, likewise emphasized the jurors’ role as sole judges of credibility. In sum, the reading of [the witness]’s plea agreement did not constitute reversible error.” (*Fauber, supra*, 2 Cal.4th at pp. 823-824, fns. omitted.)

In this case, prior to trial, defense counsel objected to the grant of immunity because the information she had about the immunity agreement did not spell out “who’s determining whether she’s testifying truthfully or not” Counsel’s concern was that the prosecutor—rather than the court—would make the determination of truthfulness. The prosecutor assured counsel and the trial court Chantell understood “it’s your Honor who will determine whether or not she is telling the truth. There has been no stated agreement that she is to testify in line or consistent with her prior statement. She’s simply under the impression that she needs to tell the truth today and she could still be subject to prosecution of perjury if she does not.”

Prior to opening statements, the trial court instructed the jury: “You must base the decisions you make on the facts and the law. First you must determine the facts from the evidence received in the trial and not from any other source. . . . [¶] Second, you must apply the law that I state to you to the facts as you determine them and in this way arrive at your verdict [¶] . . . [¶] Statements made by the attorneys during the trial are not evidence. . . . [¶] . . . A question is not evidence and may be considered only as it helps you to understand the answer.” The court continued: “CALJIC 2.20. Believability of a witness. [¶] Every person who testifies under oath or affirmation is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony

of each witness. In determining the believability of a witness, you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness including but not limited to any of the following: [¶] . . . [¶] Whether the witness is testifying under a grant of immunity.”

During her opening statement, the prosecutor informed the jury Chantell gave a statement to the police on August 2, 2012. She also informed the jury she had “no idea what [Chantell’s] going to tell you on this witness stand today.” She further stated, “[Chantell will] be testifying today with a grant of immunity. And all that means is what she says here in court today cannot be used against her in any future prosecution. The judge is the person who will determine whether or not she’s telling the truth. And the immunity agreement that she has entered into does not protect her from any prosecution for perjury if she does not tell the truth. I’ll leave it to you and we’ll see how it goes. If she comes in and lies, then I have a feeling you’ll be watching her on video from August 2nd, of 2012, but we’ll see that shortly.”²

During closing argument, the prosecutor again mentioned the immunity agreement: “Chantell told you what the immunity agreement meant. That immunity agreement did not mean that she would not ever be prosecuted for murder. That immunity agreement meant anything she said in court would not be used against her if there were ever a future prosecution. She also told you it’s her understanding it’s the judge who decides whether she told the truth or not, and not me and not whether she stuck to her original story.”

After arguments were over, the court instructed the jury: “You have two duties to perform. First, you must determine what facts have been proved from the evidence received and not from any other source. . . . [¶] Second, you must apply the law that I state to you to the facts as you determine them, and in this way arrive at your

² The CD of Chantell’s interview was not admitted at trial.

verdict” Additionally, the court instructed: “Statements made by the attorneys during the trial are not evidence”; “A question is not evidence”; and, “You must decide all questions of fact in this case from the evidence received in this trial and not from any other source.” Finally, the court re-instructed with CALJIC No. 2.20 in the identical terms it used before opening statements.

On this record, as in *Fauber*, had counsel made an objection to the prosecutor’s statements, the trial court would have been correct to sustain it. The comments were irrelevant, and the point made was, at best, obscure. However, we are not prepared to find that counsel’s failure to object fell below objective standards of competence when the record reflects counsel was aware of the law governing immunity agreements, was more concerned that the prosecutor not be perceived by the jury as the arbiter of truth, and was not asked why she did not object. As a result, the record is opaque as to her reasons.

More importantly, defendant has not met the second prong of *Strickland*’s test for ineffective assistance of counsel. There is no basis for finding the probability of a different outcome if counsel had objected. In context, it was clear that the court’s truth-determining function would come into play, if at all, in connection with a potential prosecution of Chantell for perjury – not during defendant’s trial. Here, as in *Fauber*, the jury could not have reasonably understood from the prosecutor’s comment that it was relieved of the duty to decide for itself whether Chantell’s testimony was truthful. (*Fauber, supra*, 2 Cal.4th at p. 823.) And the court’s instructions made it crystal clear that, for the purpose of reaching a verdict in the trial, the jury was the sole arbiter of truth. We presume the jury understood and followed the instructions. (*Id.* at p. 823.) In addition, the error was also non-prejudicial given the abundant other evidence of defendant’s guilt. Ineffective assistance of counsel has not been shown.

Finally, we reject defendant’s argument that structural error occurred here. Structural error is rare. (*Washington v. Recuenco* (2006) 548 U.S. 212, 218.) “ [I]f the

defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.’ ” (*Neder v. United States* (1999) 527 U.S. 1, 8, quoting *Rose v. Clark* (1986) 478 U.S. 570, 579.) The error here was classic trial error that is amenable to the type of prejudice analysis *Strickland* compels. Therefore, we need not determine whether the *Strickland* test dispenses with a showing of prejudice when counsel’s incompetence leads to true structural error. No ineffectiveness of counsel has been demonstrated here. (See *People v. Davis* (1995) 10 Cal.4th 463, 505 [rejecting ineffective assistance of counsel claim involving *Fauber* error].)

C. Hearsay Testimony About Who Slashed Leo’s Tires

On direct and cross-examination, Chantell testified Dre told her about slashing the tires after he had already done it.

Defendant argues defense counsel should have interposed a hearsay objection. He acknowledges Dre’s remark constitutes a statement against Dre’s penal interest (Evid. Code, § 1230), but argues it was inadmissible because the prosecution did not show Dre was unavailable or the statement was reliable. He further argues, since counsel could have made the objection outside the presence of the jury, there would have been “no ‘down side’ to an objection” We disagree.

As noted earlier, “no Supreme Court precedent establish[es] a ‘nothing to lose’ standard for ineffective-assistance-of-counsel claims.” (*Knowles, supra*, 556 U.S. 111, 122.) Moreover, deciding whether to object is inherently tactical (*People v. Chatman, supra*, 38 Cal.4th 344, 384); tactical decisions are entitled to deferential review. “ ‘[T]he relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable.’ ” (*Babbitt v. Calderon* (9th Cir. 1998) 151 F.3d 1170, 1173.)

Here, counsel’s tactical reasons for failing to object to Chantell’s statement on direct examination, and for asking many more questions about the slashed tires on cross-

examination, are transparent. Chantell's testimony suggested Dre may have slashed the tires even before defendant arrived at her house, thus supporting defendant's testimony he knew nothing about the slashed tires on June 4. It was important for defendant to distance himself from the tire-slashing to counter the prosecutor's theory that he—alone or in concert with others—slashed Leo's tires to ensure he would be there when defendant confronted him. It was also of paramount importance to defendant's self-defense claim to show that Leo had good reason to fight defendant: his ire over the slashing of his tires. Simply put, defense counsel did not object to Chantell's testimony as hearsay because she wanted the jury to hear about the circumstances surrounding the tire-slashing and the fact Leo's tires were slashed by someone other than defendant. Defense counsel's tactical decision was reasonable under the circumstances and no ineffective assistance of counsel appears.

II. Judicial Bias

Defendant argues reversal is required without any showing of prejudice because the trial court demonstrated judicial bias by asking defendant argumentative questions designed to “discredit [him] and make his defense ‘contemptible and ridiculous in the eyes of the jury.’” (*United States v. Salazar* (2d Cir. 1961) 293 F.2d 442, 444.) Defendant acknowledges he did not object to the court's questions but argues to do so would have been futile and caused more damage before the jury. He does not argue counsel's failure to object amounted to ineffective assistance of counsel.

At the outset, we note defendant's failure to object to the court's questions forfeits the issue on appeal. (*People v. Harris* (2005) 37 Cal.4th 310, 350.) Defendant's pleas of futility and damage before the jury are not persuasive. Defendant could have objected outside the jury's presence and moved to strike the offending questions and answers, as was done in *People v. Hawkins* (1995) 10 Cal.4th 920, 947-948, disapproved on another point in *People v. Blakeley* (2000) 23 Cal.4th 82, 89. In any event, we reject defendant's claim on the merits.

In this case, after defense counsel and the prosecutor finished questioning defendant, the court asked defendant a series of questions about the connection between defendant's efforts to prevent Chantell and Star from testifying and a fair trial.³ The court then asked another series of questions probing defendant's stated reasons for failing to contact the police after the shooting.⁴

³ [Q]: Okay. Mr. Britton by falsifying documents, trying to persuade witnesses not to testify, how could that make your trial fair?

[A]: Did I say that would make my trial fair or did I say I would not receive a fair trial?

[Q]: Well, you said that you were trying to persuade Chantell and [Star] not to show up and testify. You admitted trying to get them to falsify documents because you couldn't receive a fair trial. So how would those things help you receive a fair trial?

[A]: Actually, I was not trying to make those things get me a fair trial. What I was trying to do is avoid a trial by them not coming.

[Q]: But you testified that by doing these things the reason why you did them is because you couldn't receive a fair trial.

[A]: The reason why I felt that I had to do those things because I didn't feel like – I felt like I wouldn't receive a fair trial.

[Q]: So falsifying documents, telling witnesses not to come up and testify, you would receive a fair trial that way?

[A]: No. I thought that would negate the trial actually. I thought that it would – that there would not be a trial.

[Q]: So what you wanted to do by doing these things is to not go to trial?

[A]: Yes, Sir.

⁴ [Q]: Okay. And then in terms of – your counsel asked you about you didn't report it to the police or call the police because you didn't want to get back – you didn't want to jeopardize or threaten Chantell or the family and so you never reported it, correct?

[A]: I never reported it because. . .

[Q]: You didn't want it to come back on her?

[A]: That's another reason, yes.

[Q]: Okay. And then two months after you heard that she was being threatened?

[A]: Right.

[Q]: Why wouldn't you report it then?

[A]: I didn't want to confirm anything.

[Q]: What do you mean confirm?

[A]: I felt like if I had reported it, that would have been definitely confirming that I had involvement and I didn't want confirmation – if somebody thought that she had something to do with it is one thing. To know that she had something to do with it is another.

[Q]: You testified that they threatened to kill her?

[A]: That's what she told me.

[Q]: You believed that?

[A]: Right.

[Q]: That wasn't enough for you to report it at that point?

[A]: I just told her to come stay with me; she could come stay with me if she like.

[Q]: Okay. Counsel, anything further? ~RT 963-964~

We view the court's questions in the context of defendant's entire testimony on those points.

On direct examination, defendant said he left the scene after the shooting and did not call 911 because, "[f]or one, I really don't have too much faith in the system and I don't think they would believe me anyway. Number two, even if they did believe me, they would have arrested me. It would have been published that I did what I did, or that I was involved, and retaliation could have fell back on my sister. So I really just 86'd the idea." A few months later, Chantell told him Leo's family had threatened to kill her. Asked by defense counsel what effect that information had on him "with regard to wanting to report [the shooting] to the police," defendant responded, "I didn't never tell her to call the police I told her you're welcome to come stay with me." At that point, the court asked defendant if he understood the question, to which defendant replied, "Maybe not." The court asked a few question to focus defendant on how *he* felt about reporting or not reporting. Defendant responded that he never thought to report it because he did not want retaliation and he did not think the police would believe him.

In phone calls defendant made from the jail, defendant denied being at the scene of the shooting on June 4, 2011 because, "[i]f it had gotten out that I was involved, then that could cause a backlash on my sister or any other of my family members as well" He also testified he never directly told Chantell or Star "not to show up," but he indirectly encouraged them not to do so, even though he did nothing wrong, because "[l]ike I said, I don't really believe in the system, and I didn't think I would get a fair trial."

Defendant was cross-examined extensively about the false alibi statement he admitted he had Chantell and Star write, sign, and get notarized. He said he wanted the documents to be introduced somehow into the case because he was desperate to go home and, "like I said, I wanted to give myself a fair chance. I didn't think I would get a fair trial." He understood both relatives were potential witnesses against him. He reiterated:

“[L]ike I said, I don’t believe anybody would believe my side of the story, so I just tried to avoid the whole situation.”

Defendant admitted: “[i]f things went according to how I planned, my little deception, yeah, I probably would be home by now. [¶] . . . [¶] I wouldn’t say I was trying to game the system. I was trying to help myself. I didn’t feel like I would be getting a fair trial here. I didn’t feel you guys would believe someone like me coming from the other side of the tracks. You see us on the news all the time. Most people have a negative outlook on us. I come from a subculture. I feel like hey, I give myself a chance.” Defendant “tried to make sure that [his] sister was tucked away and not available for court” and “encouraged [Chantell and Star] to write documents stating other . . . than the truth.” He thought because no one identified him at the preliminary hearing, “my little scheme was appearing to bear fruit” Asked by defense counsel why he made all the false statements, he responded: “Because I just don’t believe too much in the system and I really don’t believe that I was going to get a fair trial here.” He said he was trying to avoid trial.

A trial court has the right and the duty “to see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved insofar as possible.” (*People v. Carlucci* (1979) 23 Cal.3d 249, 255.) “ ‘[I]f a judge desires to be further informed on certain points mentioned in the testimony it is entirely proper for him to ask proper questions for the purpose of developing all the facts in regard to them. Considerable latitude is allowed the judge in this respect as long as a fair trial is indicated both to the accused and to the People. Courts are established to discover where lies the truth when issues are contested, and the final responsibility to see that justice is done rests with the judge.’ ” (*Ibid.*)

Even so, the defendant in a criminal trial has a due process right to “ ‘ “a fair trial in a fair tribunal” [citation] before a judge with no actual bias against the defendant or interest in the outcome of his particular case.’ ” (*People v. Harris, supra*, 37 Cal.4th 310,

346.) A violation of that right is structural defect that requires automatic reversal. (*Washington v. Recuenco, supra*, 548 U.S. at pp. 218-219 & fn. 2.) Thus, “ [t]he trial judge’s interrogation “must be . . . temperate, nonargumentative, and scrupulously fair. The trial court may not . . . withdraw material evidence from the jury’s consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury’s ultimate factfinding power.” ’ ’ (*People v. Harris, supra*, 37 Cal.4th at p. 350.)

However, when judicial bias is raised as an issue on appeal, “[t]he role of a reviewing court ‘is not to determine whether the trial judge’s conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, [the reviewing court] must determine whether the judge’s behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.’ ” (*People v. Harris, supra*, 37 Cal.4th at p. 347.)

We see no evidence of judicial bias. Defendant’s oft-stated belief he could not receive a fair trial left unanswered questions about how his efforts to manufacture and suppress evidence figured in a fair trial. The court’s questions clarified that defendant did not want a fair trial; he wanted no trial at all. This clarification was relevant to defendant’s credibility and the questions were, on the whole, neutral and nonargumentative. Similarly, the court’s questions probing the logic of defendant’s stated reasons for failing to report the shooting to police clarified ambiguities in defendant’s testimony and were relevant to his credibility. In our view, even if some of the questions about defendant’s failure to call police after Chantell reported being threatened could be interpreted as expressing mild skepticism, “[t]he expression of this opinion [was] nothing more than a ‘comment on the evidence and the testimony and credibility of [a] witness’ designed to assist the proper determination of the cause, as permitted by article VI, section 10 of the California Constitution. Therefore, whether the trial court’s questioning . . . is viewed as the interrogation of a witness, or a comment on the evidence, or a combination of both, it was part of the trial court’s legitimate role of clarifying witness

testimony and assisting the jury's understanding of the evidence, and was not error.” (*People v. Hawkins, supra*, 10 Cal.4th 920, 948, 995.) The court's questions do not leave this “reviewing court with an abiding impression that the judge's . . . questioning of witnesses projected to the jury an appearance of advocacy or partiality.” (*Shad v. Dean Witter Reynolds, Inc.* (9th Cir. 1986) 799 F.2d 525, 531; *United States v. Scott* (9th Cir. 2011) 642 F.3d 791, 799-800.) The brief exchange did not deprive defendant of a fair trial.

III. Ordering Defendant To Face Forward

Defendant argues the trial court deprived him of a fair trial by ordering him not to look at the jurors when they walked by. Defense counsel asked the court to lift the order at trial, arguing the jury might draw negative inferences “from the fact that Mr. Britton looks like he's sort of being punished a little bit being singled out as somebody that can't make eye contact with them.” The court explained it made the order “because during jury selection when the first panel came in on March 18th of 2013, as we were doing hardships both for Panel A in the morning and Panel B in the afternoon, Mr. Britton clearly made some staring facial gestures at people who were in the audience, potential jurors in this case. I thought that that would compromise the fairness of the trial. So in order to protect him, I ordered that he face forward.”

On appeal, defendant argues that ordering him to look forward is comparable to ordering the defendant to wear prison garb, inhibiting a defendant's access to his lawyer during trial, and requiring the defendant to sit in a dock. Defendant suggests the error should be evaluated under the federal harmless-beyond-a-reasonable-doubt standard, as when visible shackles, stun belts, or other affronts to human dignity are imposed on a defendant in the absence of a demonstrated manifest necessity for the measures. (*People v. Hernandez* (2011) 51 Cal.4th 733, 742.)

We find no error. The court did not order defendant to wear prison garb, inhibit his access to his counsel, or make him sit in a dock. The court did not encumber him with

shackling, a stun belt, or other visible sign of restraint. The court ordered him to look forward so that he could not stare or glare at the jurors while they passed. The court did not make the order arbitrarily; it made the order only after defendant engaged in the offensive behavior during voir dire.

“The trial court has inherent and statutory discretion to control the proceedings to ensure the effective administration of justice The court also has the ‘duty to see that both sides receive a fair trial and that justice is done.’ [Citation.]” (*People v. Williams* (2009) 170 Cal.App.4th 587, 615.) “[I]n keeping with a trial judge’s duty to insure that a defendant will receive a fair trial the judge may, in order to prevent even the probability of unfairness, make such orders as are reasonably designed to avert improper prejudice to . . . [a] defendant[.]” (*Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 226.) The court made such an order here to prevent defendant from prejudicing himself by staring down the jurors.

IV. Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct by improperly impeaching defendant with the underlying facts of his prior conviction for assault with a firearm in 1994, after the court ruled in limine the underlying facts of the assault were inadmissible. We agree the prosecutor should not have asked the question, but the error is harmless.

The prosecutor filed a pretrial motion to admit for impeachment purposes defendant’s prior conviction for assault with a firearm (§ 245, subd. (a)(2)), which the defense opposed. Prior to trial, the court ruled defendant could be impeached with his prior assault conviction. On defense counsel’s request, the court specifically limited the impeachment to “the date, felony conviction for a 245(a)(2), the county and assault with a firearm. That’s what a 245(a)(2) is. The county in which he was convicted, date of the conviction.” The court declined to sanitize the conviction by omitting “firearm” from the description of the offense. The prosecutor did not ask the court to rule that the assault

conviction was admissible under Evidence Code section 1101 as a prior similar bad act, or to impeach untruthful testimony.

During direct examination, defendant testified he went to Chantell's house on June 4 with a .38-caliber revolver. He described how the barrel of a revolver was different from the barrel of a regular pistol. He said he had been carrying a gun in the Bay Area for protection for five years since being stabbed at a flea market in Berkeley, but he did not keep one in Carson City because it was so safe there. Defense counsel asked if on February 3, 1994 he suffered a felony conviction in Contra Costa County for an assault with a firearm. Defendant said, "Yes."

On cross-examination, defendant testified he bought the murder weapon "batteries included" from a stranger on the street. He twice used the slang term "batteries" to refer to bullets, and the prosecutor asked him to stop. The gun used to kill Leo was not the first gun he had ever owned; he first fired a gun at age 19, and it was also a .38-caliber revolver. The incident back in 1994 that occurred in Pittsburg also involved a revolver. Defendant had never practiced shooting a gun or cleaned one. He testified he never test-fired, loaded, or unloaded the gun he used to kill Leo; he had never used the gun before shooting Leo with it.

After questioning defendant on other topics, the last questions asked by the prosecutor were: "Now, your attorney already asked you, but you were convicted of assault with a firearm, right? [¶] . . . [¶] And assault with a firearm is shooting somebody, right?" Defendant answered, "Yes" to both questions.

Outside the jury's presence, defendant objected that the prosecutor had violated the court's pretrial ruling by bringing out the facts of the prior conduct and requested that the court admonish the jury to disregard defendant's answer or declare a mistrial. The prosecutor justified her conduct: "I didn't go into the facts of the prior. I do believe there were repeated statements from the defendant that would have opened up the facts of the prior. We did discuss that and you told me to be careful. I believe I was being very

careful. I did not go into the facts of that prior conviction. But I think the jury is entitled to know that assault with a firearm is not just a brandishing.” Defendant’s request for ameliorative action was denied.

A prosecutor’s conduct that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) “ ‘[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’ [Citation.]” (*People v. Smithey* (1999) 20 Cal.4th 936, 960 (*Smithey*)). “In conducting this inquiry, we ‘do not lightly infer’ that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]” (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The Attorney General acknowledges: “ ‘[t]he deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct’ ” (*People v. Bell* (1989) 49 Cal.3d 502, 532), but argues the prosecutor’s question asked merely what defendant was “convicted of” and therefore did not violate the court’s pretrial ruling. “Also, neither the question nor the answer revealed any facts about appellant’s particular prior crime.” We cannot agree.

The court’s pretrial ruling was that the defendant could be impeached with what he was “convicted of” – assault with a firearm. A conviction for assault with a firearm may, but does not necessarily, involve a shooting. (*People v. Valdez* (1985) 175 Cal.App.3d 103, 108; cf. *People v. Sylva* (1904) 143 Cal. 62, 64-66 [pointing an *unloaded* gun at another is not an assault].) Particularly when combined with the other information brought out by the prosecutor—that defendant first fired a gun at age 19, and that the 1994 incident involved a revolver—there is a reasonable likelihood the jury

understood the prosecutor's question to suggest that defendant had been convicted of "shooting somebody."

Nevertheless, even assuming the prosecutor should not have asked the questions, in our view any error was harmless. The two questions comprised an isolated incident. Defendant was properly impeached with the fact of his prior conviction for assault with a firearm. Finally, the evidence of premeditation and deliberation, if not "impregnable," was strong. None of the eyewitnesses supported defendant's self-defense claim, and there was uncontroverted evidence he arrived at the scene with a loaded gun and shot Leo in the head behind the ear. Other circumstantial evidence supported the prosecution's theory that defendant was complicit in the slashing of Leo's tires and was waiting around for Leo to appear. Under these circumstances, we conclude there is no reasonable probability of a different result. (*People v. Carter* (2003) 30 Cal.4th 1166, 1209; *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1236.)

V. Cumulative Error

Defendant argues the errors committed were cumulatively prejudicial and deprived him of a fair trial. "A [criminal] defendant is entitled to a fair trial, not a perfect one." (*People v. Mincey* (1992) 2 Cal.4th 408, 454.) Nevertheless, "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844-845.) In this case, there is no series of errors to cumulate. We found no ineffective assistance of counsel and no judicial bias. Assuming the prosecutor's cross-examination of defendant on one point amounts to misconduct, we have found it was not prejudicial. There was no cumulative error or prejudice.

VI. Sentencing Error

Defendant correctly contends, and the People concede, the trial court erroneously imposed a five-year enhancement pursuant to section 667, subdivision (a) on count 2,

possession of a firearm by a felon, a violation of section 29800, subdivision (a)(1). We agree.

Section 667, subdivision (a)(1), provides for imposition of a five-year enhancement for “any person convicted of a serious felony who previously has been convicted of a serious felony” (See also *People v. Thomas* (1999) 21 Cal.4th 1122, 1129.) Serious felony means one of the enumerated offenses listed in subdivision (c) of section 1192.7. (§ 667, subd. (a)(4).) However, possession of a firearm by a felon is not listed in subdivision (c) of section 1192.7. “For purposes of the Three Strikes law as amended by the Reform Act, [possession of a firearm by a felon] is not a violent felony within the meaning of section 667.5, subdivision (c), or a serious felony within the meaning of section 1192.7, subdivision (c).” (*People v. White* (2014) 223 Cal.App.4th 512, 518.) Tellingly, the information did not allege count two was “a serious felony within the meaning of Penal Code section 1192.7(c)” as it did with count 1, murder. We will therefore strike the five-year enhancement.

DISPOSITION

The five-year enhancement attached to count 2, possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)) is stricken. As modified, the judgment is affirmed.

Dondero, J.

We concur:

Humes, P.J.

Margulies, J.