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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN LOPEZ,

Defendant and Appellant.

A139857

(Alameda County  
Super. Ct. No. C171235)

Appellant Adrian Lopez was sentenced to prison after he was convicted of committing felony offenses against his father on one occasion and against his aunt and uncle on another. He argues the judgment must be reversed because the trial court (1) admitted evidence of photographs and text messages that were the product of an unlawful warrantless search of his cell phone, and (2) admitted evidence concerning his possession of firearms not used in the charged offenses. We reject these claims but order the judgment and abstract of judgment modified to correct an unauthorized sentence.

I. FACTS AND PROCEDURAL HISTORY

The Alameda County District Attorney filed an information charging appellant with second degree robbery with firearm use allegations (Pen. Code, §§ 211, 12022.5, subd. (a), 12022.53, subd. (b)),<sup>1</sup> attempted second degree robbery with firearm use allegations (§§ 211, 664, 12022.5, subd. (a), 12022.53, subd. (b)), assault with a semiautomatic firearm with a firearm use allegation (§§ 245, subd. (b), 12022.5,

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

subd. (a)), and two counts of possession of a firearm by a felon (§ 29800). The information further alleged that appellant had suffered a prior conviction for first degree residential burglary for purposes of the serious felony enhancement and the “Three Strikes” law. (§§ 667, subd. (a), 1170.12.) An additional count charging appellant with making a criminal threat under section 422 was dismissed.

The case proceeded to a jury trial, at which the following evidence was adduced:

Appellant, who was 22 years old at the time of the events in this case and had been convicted of a felony, lived part of the time with his father, Adrian Sr.<sup>2</sup> Adrian Sr. told appellant to move out of his home in the autumn of 2012 because he was tired of appellant taking his things, slacking off, staying out late, and expecting his father to cook and clean up after him. Appellant approached his father near Christmastime, telling him he had nowhere to stay, which led to an exchange of words in which Adrian Sr. told appellant he was a disappointment and appellant brandished a pipe. On New Year’s Eve, Adrian Sr. saw appellant at a bar and pushed him aside to scuffle with appellant’s friends, who laughed at him.

The home of Adrian Sr.’s brother Ricardo was burglarized over the holidays, while Ricardo was out of the country with his wife Diana. Adrian Sr., Ricardo and Diana suspected that appellant had committed that burglary, as well as the burglary of another family member’s home. Ricardo let it be known in the neighborhood that he was looking for appellant.

On January 17, 2013, at about 9:00 p.m., Ricardo and Diana were unloading groceries in front of their house when appellant appeared. He told Ricardo, “I heard you were looking for me,” and held a semiautomatic handgun to Ricardo’s chest. Ricardo raised his hands in the air and told appellant to “be cool,” that they were family. Appellant told Ricardo to shut up and checked his pockets; Ricardo gave appellant \$40 from his wallet. Appellant kept pointing the gun at Ricardo while he patted Diana’s

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<sup>2</sup> For clarity, we use the victims’ first names due to the surname they share with appellant.

pockets, but she was only carrying keys, her identification and her ATM card, so appellant took nothing from her. As he was leaving, appellant warned them he would be back if they called “5-0.” Ricardo called 911 and reported that appellant had robbed him at gunpoint and taken about \$45.

At about 9:45 a.m. on February 1, 2013, Adrian Sr. was on his way to his job at an auto body shop when he saw appellant sitting in the front of the shop talking to two or three men who worked there. Adrian Sr. went home to avoid contact with appellant, but returned after he was unable to reach his boss on the telephone. When he arrived at the shop, Adrian Sr. angrily told appellant he had to leave, and appellant said he was there first. Adrian Sr. went next door and explained the issue to the building’s owner, who came out to tell appellant to leave.

Appellant walked across the street to his car, and Adrian Sr. walked into the shop angrily yelling, “[D]on’t need no more shit here.” Appellant left his car and walked up to Adrian Sr., saying, “What is your fucking problem. You’re tripping too much.” Adrian Sr. told him to leave and saw that appellant had a black handgun that appeared to be a nine millimeter. Appellant said, “I will kill you, bitch ass mother fucker.” Adrian Sr. screamed, “[A]re you really going to shoot me?” and “[G]o ahead.” Appellant left, and as he was driving away, Adrian Sr. hit the windshield of the car with a screwdriver he had been carrying, cutting his own hand.

Adrian Sr. had the building owner dial 911, and told the dispatcher appellant had pulled a loaded gun and said he was going to kill him. He described the gun as “an automatic, nine millimeter or a 40.” During an interview with police officers at the body shop that same morning, Adrian Sr. appeared shocked and upset and reported that appellant had pointed a handgun at his head. In a handwritten statement given to police, Adrian Sr. recounted that appellant “took a black, semiautomatic pistol out of his waistband of his basketball shorts and put the pistol to my head.” A reluctant witness at trial, Adrian Sr. testified that appellant had not held the gun to his head, but had just held it up. He explained that he had wanted appellant to be picked up by police to teach him a lesson.

Two weeks after the confrontation at the body shop, appellant sent Adrian Sr. a text message that read, “I never meant to pull the thang out [it] is just you be on dat 2 faced shit an i hate people like that i opalogize for doing that but wats done is done. I never.” According to Inspector Craig Chew of the district attorney’s office, who testified as the prosecution’s firearm expert, the term “thang” often refers to a gun.

On March 8, 2013, Ricardo called 911 asking that the police arrest appellant. He told the dispatcher appellant was hanging around in front of a tattoo shop smoking weed and that he always carried an eight- or nine-millimeter Glock. Officer Porter Weston of the Oakland Police Department contacted appellant at the tattoo shop and searched him for a weapon, but did not find one. Appellant asked Weston to retrieve his cell phone from where he had been sitting and Weston examined it “incident to arrest.” Weston found two photographs of handguns (People’s Exhibits Nos. 1-1 and 1-3) and met Ricardo nearby to see whether one of the guns had been used in the January 17 robbery. Ricardo indicated the larger of the two guns looked similar to the one appellant had pointed at him, but he could not be sure.

Weston put the cell phone in airplane mode and booked it into evidence. Later, the district attorney obtained a search warrant for the phone and an expert in cell phone data extraction from that office used Cellebrite technology to extract data from the phone, including text messages and photographs.

Inspector Chew was shown four photographs of firearms extracted from appellant’s cell phone and was asked to identify the type of weapon depicted. One photograph (People’s Exhibit No. 1-1) showed two guns, the larger of which was identified by Chew as a Beretta .40 caliber or nine millimeter, either one of which would be semiautomatic unless they had been modified to be fully automatic. Chew identified the second, smaller gun in the photograph as a “Beretta model 21 Bobcat which is a .22 or .25 caliber pistol” and described it as “a semi-automatic pistol originally from the manufacturer.” A gun depicted in three photographs (People’s Exhibits Nos. 1-3, 1-5 and 1-7) was identified by Chew as a “Browning model 71, .380 caliber, semi-automatic pistol.” Several text messages on appellant’s phone concerned his offers to sell various

guns between December 9, 2012, and March 4, 2013, including a Browning .380 caliber, a .40-caliber Smith & Wesson semiautomatic pistol and a Glock .40-caliber semiautomatic pistol.

The jury convicted appellant of the charged offenses and found the firearm enhancement allegations to be true. The court found the prior conviction allegation to be true in a bifurcated proceeding and sentenced appellant to prison for an aggregate term of 29 years, calculated as follows: the three-year middle term on the robbery count, doubled to six years under the Three Strikes law, plus a consecutive 10-year term for the firearm enhancement under section 12022.53, subdivision (b); eight months (one-third the middle term) for the felon with a firearm count involving the incident with Ricardo and Diana, doubled to 16 months under the Three Strikes law; two years for the assault with a firearm count (one-third the middle term), doubled to four years under the Three Strikes law, plus an additional 16 months (one-third the middle term) for the firearm enhancement under section 12022.5, subdivision (a); and eight months (one-third the middle term) for the felon with a firearm count involving Adrian Sr., doubled to 16 months under the Three Strikes law. A five-year serious felony enhancement under section 667, subdivision (a) was added to the entire sentence, and the attempted robbery count involving Diana was ordered to run concurrently.

## II. DISCUSSION

### A. *Warrantless Search of Cell Phone*

Appellant argues that under the recent United States Supreme Court decision in *Riley v. California* (2014) \_\_\_ U.S. \_\_\_ [134 S.Ct. 2473] (*Riley*), the warrantless examination of his cell phone by Officer Weston at the time of his arrest violated his federal constitutional right to be free of unreasonable searches and seizures. (U.S. Const., 4th & 14th Amends.) The People do not dispute that *Riley* renders the initial search of the cell phone illegal, but they contend reversal is not required because (1) appellant forfeited the claim by failing to raise it in the trial court; (2) the good-faith exception to the exclusionary rule renders the fruits of the search admissible under *United States v. Leon* (1984) 468 U.S. 897 (*Leon*) and *Davis v. United States* (2011) \_\_\_ U.S. \_\_\_

[131 S.Ct. 2419, 2423-2424] (*Davis*); (3) the extraction of the information from the cell phone pursuant to a warrant was attenuated from the original warrantless search; and (4) any error in admitting information extracted from the cell phone was harmless.

1. Forfeiture

We initially consider the issue of forfeiture. Appellant did not file a motion to suppress evidence under section 1538.5 or otherwise object to the warrantless search of his cell phone in the trial court, but he argues his failure to raise the issue is excusable because the decision in *Riley* did not issue until after his trial and the California Supreme Court had previously held such searches permissible when they were incident to a lawful arrest. We agree.

In January 2011, the California Supreme Court issued its decision in *People v. Diaz* (2011) 51 Cal.4th 84, 88 (*Diaz*), holding that police may conduct a warrantless search of a cell phone seized from a defendant's person at the time of arrest without violating the Fourth Amendment. The United States Supreme Court denied certiorari later that same year. (*Diaz v. California* (2011) \_\_\_ U.S. \_\_\_ [132 S.Ct. 94].) Appellant was arrested, brought to trial and sentenced in 2013. Absent a contrary ruling by the United States Supreme Court, the trial court was bound to follow the rule set forth in *Diaz*, which rendered futile any Fourth Amendment challenge to the search of his cell phone incident to his arrest. (*Montano v. Wet Seal Retail, Inc.* (2015) 232 Cal.App.4th 1214, 1224, fn. 5; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) It was not until January 2014 that the United States Supreme Court granted certiorari in *Riley* and a companion case, and the decision in *Riley* was not filed until June 2014. (*People v. Riley* (Feb. 8, 2013, D059840) [nonpub. opn.], cert. granted Jan. 17, 2014, \_\_\_ U.S. \_\_\_ [134 S.Ct. 999]; *United States v. Wurie* (1st Cir. 2013) 728 F.3d 1, cert. granted Jan. 17, 2014, \_\_\_ U.S. \_\_\_ [134 S.Ct. 999].)

Fourth Amendment issues must usually be raised in the trial court (*People v. Hart* (1999) 74 Cal.App.4th 479, 485 (*Hart*)), but a failure to do so may be excused when requiring an objection “ ‘would place an unreasonable burden . . . to anticipate

unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal.’ ” (*People v. De Santiago* (1969) 71 Cal.2d 18, 23-28 [defendant excused from challenging entry based on failure to comply with “knock-and-notice” requirement of section 844 when reasonable defense counsel would have construed the case law at the time of trial to excuse police compliance with that section].) The rule of *Diaz* was binding at the time of appellant’s arrest and trial, and appellant’s failure to challenge the warrantless cell phone search was excusable.

## 2. Good-Faith Exception

Because appellant’s conviction was not yet final on direct review when the United States Supreme Court announced its decision in *Riley*, that decision applies retroactively to appellant’s case. (*Davis, supra*, 131 S.Ct at p. 2431.) The parties do not dispute that the initial warrantless cell phone search was unlawful under *Riley*, but the fact appellant was subject to such a search does not mean he is automatically entitled to the remedy of excluding the cell phone data seized. (*Ibid.*) “Whether the exclusionary sanction is appropriately imposed in a particular case . . . is ‘an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.’ ” (*Leon, supra*, 468 U.S. at p. 906.)

The exclusionary rule is not a personal constitutional right, nor is it designed to redress the injury caused by an unconstitutional search; rather, it is a judicially created remedy whose sole purpose is to deter future Fourth Amendment violations. (*Davis, supra*, 131 S.Ct. at pp. 2426-2427.) The deterrence benefits of exclusion “ ‘var[y] with the culpability of the law enforcement conduct’ at issue. [Citation.] When the police exhibit ‘deliberate,’ ‘reckless,’ or ‘grossly negligent’ disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. [Citation.] But when the police act with an objectively ‘reasonable good-faith belief’ that their conduct is lawful, [citation], or when their conduct involves only simple, ‘isolated’

negligence, [citation], the ‘ “deterrence rationale loses much of its force,” ’ and exclusion cannot ‘pay its way.’ ” (*Id.* at pp. 2427-2428.)

Decisions beginning with *Leon, supra*, 468 U.S. 897, have carved out a so-called good-faith exception allowing the introduction of evidence that would otherwise be subject to exclusion based on a Fourth Amendment violation. This good-faith exception has been applied in a number of situations: when officers acted in objectively reasonable reliance on a subsequently invalidated warrant (*id.* at p. 922); when police have taken action subject to a statute that is subsequently invalidated (*Illinois v. Krull* (1987) 480 U.S. 340 (*Krull*)); when an unlawful arrest was attributable to incorrect information in a judicially maintained computer database system of outstanding warrants (*Arizona v. Evans* (1995) 514 U.S. 1); when an unlawful arrest was attributable to incorrect information in a police-maintained database of outstanding warrants (*Herring v. United States* (2009) 555 U.S. 135 (*Herring*)); and, as relevant here, when a search is lawful under binding judicial precedent that is in effect at the time of the search, but that precedent is later overruled (*Davis, supra*, 131 S.Ct. at pp. 2428-2429). As to this last variant of the good-faith exception: “An officer who conducts a search in reliance on binding appellate precedent does no more than ‘ac[t] as a reasonable officer would and should act.’ ” (*Id.* at p. 2429.)

In *Davis*, the weight of the case law had interpreted United States Supreme Court precedent to allow police to search an automobile incident to an arrest of recent occupants, regardless of whether the arrestee was within reaching distance of the vehicle at the time of the search. (*Davis, supra*, 131 S.Ct. at p. 2424.) The Eleventh Circuit, where the *Davis* case arose, followed this bright-line approach. (*Id.* at p. 2425.) Then, in *Arizona v. Gant* (2009) 556 U.S. 332 (*Gant*), a plurality of the United States Supreme Court created a new, two-part rule allowing such a search only when (1) the arrestee was within reaching distance of the vehicle during the search, or (2) the police had reason to believe the vehicle contained evidence relevant to the crime for which the person was arrested. The Supreme Court in *Davis* concluded the good-faith exception applied to an automobile search that would have been invalid under *Gant*, but had been conducted

before that decision issued. (*Davis*, at p. 2425.) “[W]hen binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities.” (*Id.* at p. 2429.)

The California Supreme Court’s decision in *Diaz* specifically authorized officers to conduct a warrantless search of a cell phone found on a defendant’s person when that search was incident to a lawful arrest. (*Diaz, supra*, 51 Cal.4th at p. 88.) Although appellant criticizes *Diaz* as an unwarranted extension of United States Supreme Court precedent regarding searches incident to arrest, he offers no cogent argument that it was objectively unreasonable for a police officer in the field to rely on that decision. (Cf. *Krull, supra*, 480 U.S. at p. 355 [officer cannot reasonably rely on statute when “legislature wholly abandoned its responsibility to enact constitutional laws” or if provisions of the law were “such that a reasonable officer should have known that the statute was unconstitutional”].)

Appellant suggests a remand is required to determine whether the police in this case actually relied on *Diaz* when conducting the warrantless search of the cell phone, but such an inquiry would be misplaced. Though the term “good faith” suggests an examination of the officer’s actual state of mind, the test for the good-faith exception is an objective one: “The pertinent analysis of deterrence and culpability is objective, not an ‘inquiry into the subjective awareness of the arresting officers [citation].’ ” (*Herring, supra*, 555 U.S. at p. 145; see *People v. Willis* (2002) 28 Cal.4th 22, 34-35.)

At oral argument, counsel for appellant suggested that if we were to remand the case to the trial court for a suppression hearing, appellant might be able to establish that the good-faith exception did not apply because the cell phone was not taken from appellant’s person at the time of his arrest and its search was not lawful even under *Diaz*. This argument, unlike the claim that *Riley* renders the search unlawful, is predicated on the law in existence at the time of the search in this case. Appellant’s failure to raise the issue in the trial court has forfeited this aspect of his argument on appeal. (See *Hart, supra*, 74 Cal.App.4th at pp. 485-486.)

We therefore conclude the good-faith exception to the exclusionary rule applies, and suppression of the evidence obtained during the warrantless search of appellant's cell phone was not required.<sup>3</sup> We need not resolve the People's additional claim that because the information on appellant's cell phone was ultimately extracted pursuant to a search warrant issued at the district attorney's behest some months after the phone was taken into custody, the evidence was attenuated from any illegality in the initial warrantless search by Officer Weston. (See generally *People v. Brendlin* (2008) 45 Cal.4th 262, 269; *People v. Weiss* (1999) 20 Cal.4th 1073, 1077 [independent source doctrine].) Nor do we determine whether the introduction of evidence seized from appellant's cell phone, if unlawfully seized, was harmless under the standard for federal constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Boyer* (1989) 48 Cal.3d 247, 280, fn. 23, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

*B. Cell Phone Photos of Pistols Not Used in Charged Offenses*

Appellant argues that regardless of the legality of the cell phone search, the trial court erred in allowing the prosecution to present the photographs of guns and the text messages referring to gun sales that were recovered from the phone. He contends this evidence was improperly used to prove criminal propensity in violation of Evidence Code section 1101, subdivision (a), and violated his federal constitutional rights to due process and a fair trial under *McKinney v. Rees* (1991) 993 F.2d 1378 (*McKinney*). Appellant notes that while Ricardo had identified a photograph of one of the guns as similar to that used by appellant during the robbery on January 17, the other weapons had not been tied to the charged crimes.

Preliminarily, we reject the People's contention that appellant forfeited this argument by failing to lodge a specific objection under Evidence Code section 1101.

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<sup>3</sup> The California Supreme Court has granted review to determine whether *Riley* should apply to warrantless cell phone searches incident to arrests made at a time when *Diaz* was the controlling authority. (*People v. Macabeo*, review granted Nov. 25, 2014, S221852.)

During the hearing on the People’s motion in limine on the issue, defense counsel objected that the photos and texts, which were clearly evidence of illegal conduct by appellant, were not in any way relevant to the case. “When . . . the People have already made it clear that the evidence will show the commission of an uncharged crime, and the defendant objects on grounds that the People have not shown that the evidence is relevant to any issue in the case, the objection is sufficient to alert the court that admissibility must be determined under the criteria of Evidence Code section[] 1101 . . . .” (*People v. Williams* (1988) 44 Cal.3d 883, 907; compare *People v. Clark* (1992) 3 Cal.4th 41, 126-127, abrogated on other grounds by *Crawford v. Washington* (2004) 541 U.S. 36.)

Turning to the merits, Evidence Code section 1101, subdivision (a) generally prohibits the use of character evidence, including evidence of specific acts on another occasion, to establish the charged offense. Subdivision (b) of that section permits such evidence when relevant to prove a material fact at issue other than criminal propensity or disposition to commit such an act. A ruling admitting evidence of other crimes is reviewed for abuse of discretion. (*People v. Harris* (2013) 57 Cal.4th 804, 841.)

The photographs of the firearms were admissible because they tended to show appellant possessed semiautomatic handguns near the time of the offenses charged in this case. This corroborated the testimony of the victims that appellant had used a firearm in the commission of the offenses, and, in particular, Ricardo’s testimony that the gun used was a semiautomatic. The photographs were clearly relevant to the elements of both the charged offenses and the firearm use enhancements. (See *People v. Champion* (1995) 9 Cal.4th 879, 924, overruled on other grounds in *People v. Combs* (2004) 34 Cal.4th 821, 860 (*Champion*) [photographs of defendants holding the type of gun used in killing one of the victims were “obviously relevant”]; *People v. Price* (1991) 1 Cal.4th 324, 434 [photographs of guns that could have been used to commit the charged offenses were relevant]; *People v. Rinegold* (1970) 13 Cal.App.3d 711, 720 [“an implement by means of which it is likely that a crime was committed is admissible in evidence if it has been connected with the defendant”].)

As the trial court noted when ruling on the prosecution's motion in limine to admit the cell phone evidence, Ricardo had been shown two photographs of guns found on the cell phone and had identified one of them (described by Chew as the .40-caliber or nine-millimeter Beretta) as similar to the weapon appellant used in the robbery. But Ricardo was not certain the gun in the photograph was the gun that was actually used, and his statement to police did not eliminate the possibility that the smaller Beretta or the Browning might have been used in one or more of the charged crimes. "When the specific type of weapon used . . . is not known, it may be permissible to admit into evidence weapons found in defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in the defendant's possession was the . . . weapon." (*People v. Riser* (1956) 47 Cal.2d 566, 577, disapproved on other grounds in *People v. Chapman* (1959) 52 Cal.2d 95, 98 and *People v. Morse* (1964) 60 Cal.2d 631, 648-649.) "Although the witnesses did not establish the gun necessarily was the . . . weapon, it might have been." (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1052.)

As for the text messages concerning appellant's offer to sell a Glock, a Smith & Wesson and a .380 Browning, this evidence also tended to circumstantially show that appellant was in possession of weapons that could have been used in the charged offenses. The messages suggested the guns used were semiautomatic weapons as charged, not some other less lethal type of firearm or replicas. They also explained why no weapons had been recovered from appellant in this case—he might well have completed the sales he was negotiating in his texts.

Even if we assume the court should have excluded the photographs and text messages under section 1101, subdivision (a), the error is one of state law that requires reversal only if it is reasonably probable appellant would have obtained a more favorable result if the evidence had been excluded. (*People v. Welch* (1999) 20 Cal.4th 701, 749-750, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) The admission of the challenged evidence was not prejudicial under this standard.

There was no issue of identification in this case because the victims were three close family members of appellant's. Appellant's father, Adrian Sr., was obviously reluctant to testify against his son, but he nonetheless described an altercation in which appellant had confronted him and threatened him with a nine-millimeter or .40-caliber handgun. Appellant's uncle Ricardo and his aunt Diana both testified that appellant approached them outside their home as they were unloading groceries, held a handgun to Ricardo's chest, took money from Ricardo's pocket and then patted Diana's pockets to see if she had anything of value. Ricardo described the gun used as a semiautomatic without reference to the photographs, and Diana confirmed it was not a revolver. Excluding evidence that appellant had possessed and tried to sell other weapons was not reasonably likely to have changed the result of the trial.

Nor are we persuaded that the introduction of the photographs and texts rendered appellant's trial fundamentally unfair and thereby violated his federal constitutional right to due process. Appellant relies primarily on *McKinney, supra*, 993 F.2d 1378, 1381, a case in which the victim's throat was slit with a knife that was never identified. At issue was the prosecution's introduction of extensive, emotionally charged testimony concerning the defendant's fascination with knives, his collection of knives, and his use of a knife to carve "Death is His" on his closet door. (*Id.* at p. 1382.) The court concluded this evidence was not relevant to any issue except character and disposition and, because the case against the defendant was circumstantial and weak, admitting that evidence rendered the trial fundamentally unfair. (*Id.* at pp. 1381-1386.)

*McKinney* is inapposite because it involved the introduction of highly prejudicial evidence from which " 'no permissible inference[]' " could be drawn by the jury. (*McKinney, supra*, 993 F.2d at p. 1384.) Here, by contrast, the photographs and text messages regarding semiautomatic weapons were relevant. (Cf. *People v. Steele* (2002) 27 Cal.4th 1230, 1246.) Moreover, if we assume the photos and text messages should have been excluded, their admission did not deny appellant a fair trial. Even without the evidence, the jury would have learned that appellant had confronted his family members with handguns. " 'The . . . issue is not whether introduction of [the evidence] violated

state law evidentiary principles, but whether the trial court committed an error which rendered the trial so arbitrary and fundamentally unfair that it violated federal due process.’ ” (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.)

### C. Sentencing Issues

The People note the abstract of judgment reflects a concurrent sentence for the attempted robbery count involving Diana, but omits the length of the term imposed. In its oral pronouncement of judgment, the trial court indicated it was imposing a concurrent term of eight months (one-third the middle term) for the attempted robbery count, doubled to 16 months under the Three Strikes law, plus three years four months (one-third the middle term) for the firearm enhancement under section 12022.53, subdivision (b). This was an unauthorized sentence, because the one-third-the-middle-term limitation under section 1170.1, subdivision (a) applies only to consecutive terms. (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1156, fn. 3.) We have the inherent power to correct an unauthorized sentence on appeal, even when the issue was not raised in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

A remand for resentencing is unnecessary because the trial court indicated it was choosing the middle term “for subsequent offenses after the princi[pal] term” and denied appellant’s motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to dismiss the prior “strike.” (See *People v. Alford* (2010) 180 Cal.App.4th 1463, 1473-1474 [modification rather than remand appropriate].) Contrary to the suggestion of appellant’s counsel at oral argument, section 654 is not potentially applicable because the attempted robbery involved a separate victim. (See *Champion, supra*, 9 Cal.4th at p. 935.) The middle term for attempted second degree robbery is two years. (§§ 18, subd. (a), 213, subd. (b).) We will order the sentence for the attempted robbery in count 2 modified to reflect imposition of the two-year middle term, doubled to four years under the Three Strikes law, plus a 10-year firearm enhancement pursuant to section 12022.53, subdivision (b), that term to run concurrently with the rest of appellant’s sentence.

Based on the California Supreme Court’s recent decision in *People v. Sasser* (2015) 61 Cal.4th 1, the People have withdrawn their claim that an additional five-year enhancement should have been imposed under the Three Strikes law. We consider that issue no further.

### III. DISPOSITION

The sentence for the attempted robbery in count 2 is modified to reflect a two-year middle term, doubled to four years under the Three Strikes law, plus an additional 10 years for the firearm enhancement under section 12022.53, subdivision (b), that 14-year term to run concurrently with the remainder of appellant’s sentence. The abstract of judgment shall be amended to reflect this modification and a copy of the amended abstract shall be forwarded to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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NEEDHAM, J.

We concur.

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JONES, P.J.

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SIMONS, J.