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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.

LATROY DENARD CLINTON, SR.,

Defendant and Appellant.

A140056

(Sonoma County
Super. Ct. No. SCR604001)

Defendant Latroy Denard Clinton appeals from a judgment entered after a jury convicted him of voluntary manslaughter (Pen. Code, § 192, subd. (a)),¹ felon in possession of a firearm (former Pen. Code, § 12021, subd. (a)(1)), and felony evasion of a police officer (Veh. Code § 2800.2, subd. (a)). The jury further found, as to the manslaughter charge, that defendant personally used a firearm (Pen. Code, § 12022.5). Defendant was also found to have served prison terms for three prior felony convictions (§ 667.5, subds. (a)–(b)) and to have suffered two prior “strike” convictions (§ 1170.12). Pursuant to the three strikes law, the trial court sentenced defendant to 50 years to life on the manslaughter conviction, 25-years-to-life sentence on the possession conviction (stayed under § 654), and 25 years to life, to be served consecutively, on the evasion conviction.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

As to his manslaughter conviction, defendant contends the trial court erred in failing to instruct the jury on the lesser offenses of involuntary manslaughter and excusable homicide. As to his felon in possession and evasions convictions, he contends the trial court committed sentencing error, as the crimes are not serious or violent felonies under the Three Strikes Reform Act and he therefore should have been sentenced as a second strike offender.² We conclude the court did not commit instructional error and affirm the manslaughter conviction, but conclude there was sentencing error as to the possession and evasion convictions and remand for resentencing.

BACKGROUND

Defendant was charged with the murder of Oscar Valencia. At trial, the prosecution and defense presented competing narratives as to how Oscar was killed.

Account of the Prosecution's Eyewitnesses

After a night of partying, Oscar Valencia, Jaime Valencia,³ Miguel Ceja, and Keith Quinn were in Ceja's car near the intersection of Homestead and Cumberland in Santa Rosa. Defendant drove up in a white van. He got out and started arguing with Quinn, who was then standing by Ceja's car talking on his cell phone. Oscar went over to defuse the situation, but pushing ensued. Everyone else then intervened. Ceja and Jaime pulled Oscar back. Quinn got defendant to back off. No one had a gun at that time.

Defendant retreated to his nearby house and a few minutes later emerged with a gun. Quinn was heard yelling " 'get . . . out of here' " at Ceja, Oscar, and Jaime, and was

² Defendant raised his claims of sentencing error for the first time in a petition for rehearing. While we ordinarily would not entertain an argument raised for the first time on rehearing, we conclude it is appropriate to resolve his claim of an unauthorized sentence. (See *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6 [an unauthorized sentence may be corrected at any time it comes to the attention of a reviewing court]; *People v. Scott* (1994) 9 Cal.4th 331, 354.)

³ Given that they have the same last name, we refer to Oscar and Jaime by their first names.

seen unsuccessfully trying to block defendant from returning to the parked cars. Defendant moved on towards Oscar, shouting “ ‘I’ll kill you’ ” over and over. Oscar tried to convince defendant there had been a misunderstanding, but defendant shot him. There was no struggle for the gun. Defendant hovered over Oscar’s body for a few seconds, then fled the scene in the van.

Quinn, Jaime, and Ceja all told roughly the same version of the altercation and killing.

A neighborhood resident also saw parts of the fight and saw a man come from across the street, walk up to two individuals and point a gun at one them. He then looked away and heard a gunshot. Another resident heard a voice say “ ‘[d]on’t do it’ ” followed by a pause and a gunshot.

Defendant’s Account

According to defendant, he drove up to his house and saw Quinn. He got out of his car and greeted Quinn with a half hug. Oscar then “jumped up” and asked defendant if he “ ‘[had] a . . . problem with my boy?’ ” Defendant asked Quinn “ ‘what’s your boyfriend’s . . . problem.’ ” Oscar pushed defendant, defendant pushed back. Oscar swung and hit defendant’s head, and defendant punched back. As they continued to fight, Ceja came to Oscar’s aid. Defendant, fearing he was losing the fight, started to run off, but tripped and fell. Oscar then kicked him and the fighting began again. This time, Quinn tried to stop another individual who had joined the fight, Jaime, telling him defendant was “ ‘June Bug’s cousin’ ” and to “ ‘let that shit go.’ ”

But as the struggle continued, Jaime pointed a gun at defendant. “Defending” himself, defendant “grabbed” the gun and “[i]t popped.” “It went off,” and defendant “grabbed [Jaime’s] hand and the barrel . . . and snatched it.” Defendant heard Oscar react and saw Jaime’s face and “knew it was bad.” At that point, defendant had gained control of the gun and, after ensuring that he was out of danger, left the scene in his van with the gun.

A third-party witness testified at the preliminary hearing that Jaime admitted pointing the gun at defendant and the gun went off as defendant reached for it. The jury heard this testimony when the witness refused to retake the stand at trial for fear of self-incrimination. In rebuttal, the prosecution offered evidence defendant had bribed the witness to lie for him and that Jaime had never told the witness anything about the gun.

Jury Instructions and Conviction

After the close of testimony, defense counsel asked for jury instructions on the lesser offenses of voluntary and involuntary manslaughter. The trial court agreed to give an instruction on voluntary manslaughter, but rejected one on involuntary manslaughter. Defense counsel briefly argued, as to involuntary manslaughter, “there was some evidence in regard to a struggle, some evidence in regard to a pushing of the weapon.” The trial court found the evidence insufficient to warrant the instruction.

Defense counsel also requested an instruction on excusable homicide by accident under section 195 and CALCRIM No. 510. Defendant hoped to argue Oscar was accidentally shot when, as per defendant’s testimony, defendant “push[ed] the gun away.” The trial court viewed the instructions on self-defense as adequate and declined to instruct on accident.

The jury convicted defendant of voluntary manslaughter (§ 192, subd. (a)) and found he had personally used a firearm (§ 12022.5). In finding defendant guilty of manslaughter, the jury rejected the greater charges of first degree and second degree murder. The jury also convicted defendant of felon in possession of a firearm (former § 12021, subd. (a)(1)) and felony evasion of a police officer (Veh. Code, § 2800.2, subd. (a)). In a separate court trial, defendant was found to have served prison terms for two prior violent felony convictions (Pen. Code, § 667.5, subd. (a)) and one other felony (§ 667.5, subd. (b)), each qualifying him for enhanced punishment. He was also found to have committed two prior “strike” felonies, subjecting him to three strikes sentencing.

DISCUSSION

Involuntary Manslaughter Instruction

“If supported by substantial evidence, a trial court has the duty to instruct on a lesser included offense. [Citation.] ‘The duty applies whenever there is evidence in the record from which a reasonable jury could conclude the defendant is guilty of the lesser, but not the greater, offense’ [Citation.] Ultimately, ‘[i]t is for the court alone to decide whether the evidence supports instruction on a lesser included offense,’ ” and we independently review that decision. (*People v. Trujeque* (2015) 61 Cal.4th 227, 271, italics omitted.)

“Manslaughter is the unlawful killing of a human being without malice.” (§ 192.) Voluntary manslaughter is such a killing “upon a sudden quarrel or heat of passion.” (§ 192, subd. (a).) Involuntary manslaughter is such a killing “in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. . . .” (§ 192, subd. (b).) Both voluntary and involuntary manslaughter are lesser included offenses of murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813.)

Defendant asserts there was evidence of involuntary manslaughter under the first theory, i.e., the killing occurred during the course of a misdemeanor, namely while he was brandishing a gun at Jaime. As we have recounted, prosecution witnesses testified defendant procured a gun from his house and deliberately shot Oscar. Defendant testified that Jaime produced the gun and Oscar was shot as Jaime and he struggled, and he never brandished the gun until after it discharged and he was trying to get away. Thus, defendant’s involuntary manslaughter theory—that the killing occurred while he was brandishing a gun at Jaime—is grounded on the assertion a jury could have reasonably believed his account of the physical struggle between him and Jaime, but disbelieved his testimony that *Jaime* produced the gun. Or stated another way, defendant’s theory assumes the jury could reasonably have disbelieved all of the prosecution witness’s

testimony about the altercation, except their testimony that defendant retrieved and was holding the gun.

What defendant asserts, in essence, is that the trial court, in deciding what instructions to give the jury, was required to conflate two conflicting versions of events, neither of which, alone, supported defendant's involuntary manslaughter theory, and to divine a hypothetical "third" version of events that could support defendant's killing-while-brandishing-the-gun-at-Jaime theory.

While it may be true, as an abstract principle, that a jury may believe parts of a witness's testimony and reject others (*People v. Wader* (1993) 5 Cal.4th 610, 641), for an instruction on a defense theory to be required, there must still be substantial evidence in the entire record to support it. (*People v. Elize* (1999) 71 Cal.App.4th 605, 615). Speculation is insufficient to require an instruction on a lesser included offense. (*People v. Valdez* (2004) 32 Cal.4th 73, 116; *People v. Mendoza* (2000) 24 Cal.4th 130, 174; *People v. Lewis* (1990) 50 Cal.3d 262, 277; *People v. Yarbrough* (1974) 37 Cal.App.3d 454, 457 [no involuntary manslaughter instruction based on hypotheticals].)

What defendant asked the trial court to do was to speculate. Indeed, a rational jury would not have invented the "third" scenario defendant has posited. (See *People v. Mentch* (2008) 45 Cal.4th 274, 289 & fn. 9 [when the defendant testified to providing marijuana to medical patients and to others, jury could not rationally ignore testimony about provision to others, and it was not error to deny instruction on defense that all provision of marijuana was as "primary caregiver"]; see also *People v. Young* (2005) 34 Cal.4th 1149, 1201 [despite some evidence of a two-person attack, no aiding and abetting instruction required when it would require speculation and selective disbelieving of testimony].) While an infinite number of scenarios could be constructed from selecting bits and pieces of trial testimony, not all would be rational. Here, there was no evidentiary basis for the jury to believe the "true" version of events was a peculiar intermingling of the prosecution and defense versions.

This is not a case where defendant asks us to simply attribute to him a different state of mind (e.g., accidental, intentional, mistaken perception) for the same course of conduct. (See *People v. Breverman* (1998) 19 Cal.4th 142, 162–164 [jury can disregard defendant’s claim of accident and consider voluntary manslaughter or unreasonable self-defense theories]; *People v. Barton* (1995) 12 Cal.4th 186, 202–203 [same]; *People v. Elize* (1999) 71 Cal.App.4th 605, 615 [same]; *People v. Ceja* (1994) 26 Cal.App.4th 78, 86 [when defendant’s testimony that his victim was armed could have been disbelieved (because no gun found at scene), instruction on unreasonable self-defense should be given]; cf. *People v. Mendoza, supra*, 24 Cal.4th at pp. 174–175 [when expert testimony suggested plan to burn house, not just a bed, trial court, in arson case, not required to instruct on lesser offense, setting fire to inhabited dwelling, which did not require an intent to burn house, but only a reckless act].) Rather, defendant asks us to imagine a wholly different course of events in the physical world to which no witness testified, and which, moreover, was wholly inconsistent with the prosecution witnesses’ and defendant’s own version of events.

Under these circumstances, the trial court did not err in refusing to instruct on involuntary manslaughter based on defendant brandishing a weapon at Jaime.

Even if the trial court erred, the error was harmless. “The failure to instruct on a lesser included offense in a noncapital case does not require reversal ‘unless an examination of the entire record establishes a reasonable probability that the error affected the outcome.’ [Citation.] ‘Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.’ ” (*People v. Thomas, supra*, 53 Cal.4th at p. 814, fn. omitted.)

We have already explained why no reasonable jury could have adopted the hybrid version of the killing defendant advocates on appeal. It follows the jury would not have been likely to adopt that highly speculative version had they received an involuntary manslaughter instruction based on defendant's supposed commission of misdemeanor brandishing a weapon at Jaime. (*People v. Thomas, supra*, 53 Cal.4th at p. 814.)

Defense of Excusable Homicide/Accident

In California, raising the “defense” of accident is akin to arguing the prosecution did not meet its burden to prove requisite criminal intent. (*People v. Anderson* (2011) 51 Cal.4th 989, 997.) That an accident is not a crime is “ ‘made clear by the culpability requirements of specific offense definitions’ ” (*Ibid.*) “A trial court’s responsibility to instruct on accident therefore generally extends no further than the obligation to provide, upon request, a pinpoint instruction relating the evidence to the mental element required for the charged crime.” (*Id.* at pp. 997–998, italics omitted; see also *People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1381.)

“When a legally correct instruction is requested, however, it should be given ‘if it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration.’ ” (*People v. Wilkins* (2013) 56 Cal.4th 333, 347.)

Defendant, putting his involuntary manslaughter theory aside, alternatively contends the killing was an accident that occurred when he “push[ed] the gun away” from Jaime and therefore he was entitled to an instruction on excusable homicide. Even if the shooting were an accident in layman’s terms, the legal question is how did defendant act. Defendant testified he grabbed at Jaime’s gun while “defending” himself. Thus, even if he were believed, defendant acted intentionally and volitionally in self defense. He grabbed or pushed intentionally; he did not accidentally fire a gun. (See *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357 [self-defense applies to intentional conduct, not accidental conduct]; cf. *People v. Villanueva* (2008) 169 Cal.App.4th 41, 50 [“an accidental shooting” when defendant aims the gun “is inconsistent with an assertion of

self-defense”], italics omitted.) That defendant’s alleged grab or push resulted in a gunshot does not make the grab or push an accident. Moreover, the jury was fully instructed on a self-defense theory consistent with defendant’s testimony, but rejected it.

Even if the trial court should have given an accident instruction, its failure to do so was harmless. The jury was told they could convict defendant of voluntary manslaughter, or any of the murder offenses, only if they found his conduct was *intentional*. (See generally *People v. Barton*, *supra*, 12 Cal.4th at p. 199 [voluntary manslaughter requires intentional conduct].) Given that the jury convicted defendant, they necessarily found he acted intentionally, and “it is clear, beyond credible argument, that the jury necessarily rejected the evidence adduced at trial that would have supported a finding to the effect that defendant’s ‘accident and misfortune’ defense . . . was valid.” (*People v. Jones* (1991) 234 Cal.App.3d 1303, 1315–1316.)

Any failure to instruct on a theory of accident was therefore not prejudicial. (*People v. Jones*, *supra*, 234 Cal.App.3d at pp. 1315–1316; see also *People v. Anderson*, *supra*, 51 Cal.4th at p. 997 [defense of accident generally incorporated into the instructions setting forth charged offense].) It is not “ ‘reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of’ ” such error. (*People v. Wilkins* (2013) 56 Cal.4th 333, 349 [applying the state-law prejudice test of *People v. Watson* (1956) 46 Cal.2d 818 to failure of trial court to give a pinpoint instruction].)

Unauthorized Sentence

As recounted, defendant was convicted of three crimes—voluntary manslaughter (§ 192, subd. (a)) while personally using a firearm (§ 12022.5) (count 1), felon in possession of a firearm (former § 12021, subd. (a)(1)) (count 2), and felony evasion of an officer while in a motor vehicle (Veh. Code, § 2800.2, subd. (a)) (count 3).

At trial, the evidence showed defendant left the scene of the killing in his van and refused to pull over while police gave chase for 15 miles with sirens and lights on

Highway 101. During the chase, defendant threw a gun from the car. Police set up a spike strip and successfully stopped defendant's van, but defendant ran and was not caught until hours later. After the pursuit, police found a revolver believed to be used in the shooting on the center divide of the highway.

Applying the three strikes law—as defendant had two prior strike-eligible convictions—the trial court sentenced defendant to 50 years to life on the manslaughter conviction (count 1). It sentenced him to 25 years to life on the felon in possession conviction (count 2), but stayed the sentence under section 654. It sentenced him to 25 years to life on the evasion conviction (count 3), to run consecutively to the sentence imposed for the manslaughter conviction.

Prior to trial, the Three Strikes Reform Act (also often referred to as Proposition 36) took effect. “Under the original version of the three strikes law a recidivist with two or more prior strikes who is convicted of any new felony is subject to an indeterminate life sentence. The [Reform] Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender. (§§ 667, 1170.12.)” (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167–168; see also *People v. Thurston* (2016) 244 Cal.App.4th 644, 655 (*Thurston*).)

Only one of defendant's convictions, for manslaughter (count 1), qualifies as a serious or violent felony under the Three Strikes Reform Act, and as to that count, defendant was properly sentenced as a third striker. His other two convictions, however, for felon in possession and evasion (counts 2 and 3), are not serious or violent felonies under the Act. (§ 1170.12, subd. (b).) Accordingly, unless the prosecution “pled and proved” a disqualifying factor as to these crimes, defendant had to be sentenced as a second striker and was not subject to indeterminate life sentences on those counts. (See *People v. Johnson* (2015) 61 Cal.4th 674, 690 [resentencing under Proposition 36 focuses

on individual counts]; Bigelow & Cousins, Cal. Practice Guide: Three Strikes Sentencing, (The Rutter Group 2015) ¶ 7:2, p. 7-8 [count by count approach is “equally applicable to an original sentencing proceeding for crimes committed after the effective date of Proposition 36”].)

The information in this case did not allege, as to counts 2 or 3, any disqualifying factors under the Act. (§ 1170.12, subd. (c)(2)(C).)⁴

The Attorney General maintains the absence of any specifically-pled disqualifying factor is immaterial given that the factual allegations in all three counts, collectively, put defendant on notice the disqualifying factor set forth in section 1170.12(c)(2)(C)(iii) applied—i.e., that “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury”

The Attorney General’s view is at odds, however, with the express pleading and proof requirement in the Act. Subdivision (c) provides in relevant part: “If a defendant has two or more prior serious and/or violent felony convictions . . . that have been pled and proved, and the current offense is not a felony described in paragraph (1) of subdivision (b) of this section, the defendant shall be sentenced pursuant to paragraph (1) of subdivision (c) of this section, *unless the prosecution pleads and proves any of the following*” (§ 1170.12(c)(2)(C); see *Thurston, supra*, 244 Cal.App.4th at p. 656 [“for initial sentencing on a current offense, ‘there is a clear statutory pleading and proof requirement with respect to factors that disqualify a defendant with two or more prior strike convictions from sentencing as a second strike offender’ ”], quoting *People v.*

⁴ That may be understandable, as the information was filed prior to the passage of the Three Strikes Reform Act. However, the charging document could readily have been amended had the People wished to pursue three strikes sentencing pursuant to a new disqualifying factor.

Osuna (2014) 225 Cal.App.4th 1020, 1033; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 802.)

Section 1170.12, subdivision (c)(2)(C) also repeatedly uses the terminology “the current offense,” reinforcing that disqualifying factors must, when applicable, be pleaded as to *each* offense charged. For example, subdivision (c)(2)(C)(iii) identifies as a disqualifying factor, if “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury” (§ 1170.12, subd. (c)(2)(C)(iii).) In short, a disqualifying factor is tied to “the commission of the current offense,” singular, meaning it must be tied to a specifically charged, current offense. This make sense, of course, since, depending on the circumstances, a litany of current offenses can be charged, only some of which may involve disqualifying factors.

In *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), the Supreme Court addressed a similar pleading and proof problem under the “One Strike” law (§ 667.61) which was enacted shortly after the three strikes law and provides an alternative and harsher sentencing scheme for certain sex crimes. (*Mancebo*, at p. 741.) In *Mancebo*, the information alleged the one strike law applied because of two “circumstances”—gun use and kidnapping. The information did not allege the law applied due to a multiple victim circumstance, although it alleged “the facts of the circumstance,” namely that the defendant had raped two victims. (*Id.* at pp. 742–744.) The trial court nevertheless invoked the multiple victim circumstance to impose one strike sentencing and used one of the circumstances that had been pled, gun use, to support an additional enhancement. Had gun use been the basis for one strike sentencing, the court could not have used it for additional enhancement. (*Id.* at p. 744.)

The Supreme Court concluded the factual allegations of the information, alone, did not satisfy the requirement of section 667.61, subdivision (f), that one strike circumstances must be “pled and proved.” (*Mancebo, supra*, 27 Cal.4th at pp. 744–745.)

“[N]o factual allegation in the information or pleading in the statutory language informed defendant that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing under section 667.61, subdivision (a). Thus, the pleading was inadequate because it failed to put defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure indeterminate One Strike terms under section 667.61, subdivision (a) *and* use the circumstance of gun use to secure additional enhancements under [former] section 12022.5(a).” (*Id.* at p. 745.)

The court declined to conduct a harmless error analysis and viewed the People as having waived the enhanced sentencing. (*Mancebo, supra*, 27 Cal.4th at p. 749.) “The pleading and proof requirements of section 667.61, subdivisions (f) and (i), and defendant's due process rights, were violated . . .—not because defendant was never afforded notice that he was being charged with crimes against two victims; he obviously was, and not because defendant was never afforded notice that the One Strike law would apply to his case; again, he was. Sentencing error occurred because defendant was given notice that gun use would be used as one of the . . . circumstances in support of the One Strike terms, whereafter, at sentencing, the trial court used the *unpled* circumstance of multiple victims to support the One Strike terms” (*Id.* at p. 753.)

While the court in *Mancebo* noted it was construing only section 667.61 (*Mancebo, supra*, 27 Cal.4th at p. 745, fn. 5), it was dealing with a variation of the three strikes scheme, the “pled and proved” language of the one strike law is similar to the “pleads and proves” language of the Three Strikes Reform Act, and the reasoning of the court is apropos. *Mancebo* thus makes clear that even when the alleged facts unquestionably support an enhancement, that is not enough to satisfy an explicit pleading and proof requirement. “In many instances, the fair notice afforded by that pleading requirement may be critical to the defendant’s ability to contest the factual bases and truth of the qualifying circumstances invoked by the prosecution in support of One Strike

sentencing.” (*Id.* at p. 752.) “Furthermore, in many instances a defendant’s decision whether to plea bargain or go to trial will turn on the extent of his exposure to a lengthy prison term.” (*Ibid.*; see also *People v. Hopkins* (1974) 39 Cal.App.3d 107, 112–113, cf. *id.* at p. 119 [defendant “entitled to know the true [sentencing] consequences of an adverse finding on the facts before he elected to waive a jury”].)

The Attorney General cites to *People v. Houston* (2012) 54 Cal.4th 1186 (*Houston*). But that case does not address the situation before us, nor does it reject *Mancebo*. There, the defendant challenged a life sentence for each count of attempted murder because the indictment failed to allege the crimes “were willful, deliberate, and premeditated.” (*Houston*, at p. 1225, italics added.) Section 664 provided, at that time, that if an attempted murder was willful, deliberate, and premeditated, the punishment was life imprisonment with the possibility of parole; otherwise, it was a determinate term of five, seven, or nine years. (*Houston*, at p. 1225.) The statute also specified the enhanced term was not to “ ‘be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact.’ ” (*Ibid.*)

The indictment alleged only that the attempt was willful. (*Houston, supra*, 54 Cal.4th at p. 1226.) However, at the end of the first day that the defendant began presenting his case, the trial court provided proposed verdict forms that would require a finding of premeditation and deliberation, and announced it understood the prosecution to be seeking to prove the kind of attempted murder that would result in a life sentence. The court also expressly stated that if its understanding of the case was incorrect, the parties needed to advise the court as soon as possible. The defendant said nothing, the court proceeded to instruct the jury accordingly, and the jury found beyond a reasonable doubt the attempted murders were willful, deliberate, and premeditated. (*Ibid.*)

On that record, the Supreme Court concluded the defendant had forfeited any objection based on the pleading shortcoming in the indictment. (*Houston, supra*,

54 Cal.4th at pp. 1225–1226.) While the court agreed a defendant has a right to notice of the sentencing scheme he is facing, citing *Mancebo*, the defendant received notice at the outset of presenting his case, when he could have asked for additional time to retool his defense had he thought that was necessary. (*Houston*, at pp. 1227–1229.)

Here, there are no similar circumstances that justify forfeiture. Defendant was never notified during the trial court proceedings that the prosecution would seek to invoke the “arming” circumstance to impose three-strikes punishment. Rather, the Attorney General has identified this circumstance for the first time in its response to defendant’s petition for rehearing. Also, unlike in *Houston*, defendant is not seeking to overturn his convictions on a pleading defect, but is seeking a remand for resentencing to correct an unauthorized sentence.

DISPOSITION

Defendant’s conviction of voluntary manslaughter (Pen. Code, § 192, subd. (a)) is affirmed. The sentences imposed for his convictions of felon in possession of a firearm (§ 12021, subd. (a)(1)) and felony evasion of a police officer (Veh. Code, § 2800.2, subd. (a)) are reversed and the matter is remanded for re-sentencing consistent with this opinion.

Banke, J.

We concur:

Humes, P. J.

Dondero, J.