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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DON LARRY MODICA, JR., Defendant and Appellant.	D075386 (Super. Ct. No. FVI17000710)

APPEAL from a judgment of the Superior Court of San Bernardino County, Eric M. Nakata, Judge. Affirmed and remanded with directions.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Christine Y. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Don Larry Modica, Jr., shot Miguel R. five times with a shotgun. A jury rejected Modica's claim of self-defense and defense of others and convicted him of first degree

murder (Pen. Code,[1] § 187, subd. (a), count 1) and being a felon in possession of a firearm (§ 29800, subd. (a)(1), count 2). The jury found true the allegations that Modica personally used a firearm (§ 12022.53, subd. (b)) and personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (c), (d)). On count 1, the court sentenced Modica to a term of 25 years to life plus 25 years to life for personal discharge of a firearm causing great bodily injury or death. The court stayed the sentences imposed on the other firearm enhancements. On count 2, the court imposed a consecutive determinate sentence of one year four months.

Modica appeals, contending that the prosecutor misstated the law during rebuttal testimony and the trial court compounded the error by overruling defense counsel's objection. He also asserts that the trial court erred: (1) by overruling his objection under Evidence Code section 352 to the admission of a video of him attacking and kicking another inmate, and (2) in responding to the jury's request for readback of testimony. He claims that the cumulative impact of these errors denied him a fair trial. We reject his assertions and affirm the judgment. Finally, Modica asserts that the matter should be remanded to allow the trial court to exercise its discretion under section 12022.53, subdivision (h), to strike or dismiss his firearm enhancements. On this record, we agree that a remand is warranted.

GENERAL FACTUAL BACKGROUND

Although there were numerous people present at the scene of the shooting, three witnesses provided testimony about what took place: Modica; Sonja S., the girlfriend of

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1 Undesignated statutory references are to the Penal Code.

Modica's nephew, Anthony; and Trayvon M. Because the testimony of these witnesses regarding what occurred immediately before the shooting is remarkably similar, we summarize the facts based on Modica's testimony and then address instances where the witnesses' testimony differed.

Events Before Modica's Involvement

On an evening in June 2015, Miguel twice went to the home where Trayvon lived with his mother, Mariam. During the first visit, Miguel spoke to Mariam's niece, who told him that Trayvon was not there. During the second visit Miguel told Mariam that Trayvon did not owe him money and had not done something wrong to him, but that he wanted to "bless Trayvon with a tattoo." Mariam learned that Miguel was a tattoo artist and "[e]verybody was talking about how good he was."

Mariam found Trayvon at the home of Murray D. Also present were Cody and Veken B., Richard M., and Anthony. Mariam told Trayvon that someone was looking for him to "bless him with a tattoo," but he heard her as saying "blast him with a tattoo" and believed that someone was coming to hurt him. Everyone left Murray's home and went to Trayvon's home. Sonja later arrived at Trayvon's home with Modica.

The Shooting

After speaking with Mariam, Modica determined that Miguel was the man who had been asking about Trayvon. Modica grew up in the same neighborhood as Miguel. Modica was concerned about a possible issue between Trayvon and Miguel because he knew that Miguel was Blood gang member, that he had violent tendencies, and that he was known to carry weapons.

After someone called Miguel, Modica spoke with Miguel to try to find out what issue Miguel had with Trayvon. Modica tried to calm things down and Miguel said he would come over. Trayvon testified that Anthony had called Miguel and asked Miguel to come to Trayvon's home. Trayvon interpreted Anthony's statement as a challenge. Sonja testified that someone contacted Miguel by cell phone. Sonja heard the call over the speaker and interpreted the call as a challenge to fight.

After the phone call, Modica had Sonja take him to his house where he retrieved his gun as a "precautionary measure" thinking that Miguel was "tripping." He then returned to Mariam's home. Sonja testified that after the call she gave Modica a ride to Modica's house, but claimed that Modica did not have a shotgun with him. She later admitted that she had told detectives that Modica had a shotgun and that Modica put the shotgun in the trunk of her car.

Miguel parked his car partially in Mariam's driveway. Miguel and his passenger exited the car. Miguel stated, "I've got Niggas all around the block and I got you surrounded," and started whistling. Trayvon similarly testified that Miguel stated that he had boys around and that Miguel started whistling. Sonja testified that when Miguel arrived he commented that he had Mariam's house surrounded. Sonja saw cars driving up and down the street with their lights off.

Miguel stated that he "was cool with" Trayvon, but said that he had an issue with Veken and Cody. Anthony and Miguel exchanged words and then fought. Anthony ended up on the ground with Miguel kicking or stomping him. Sonja asked Modica to

intercede, but he refused because it was a one-on-one fight. Trayvon and Sonja testified that, in the meantime, Cody knocked Miguel's passenger to the ground with one punch.

Modica decided to retrieve his shotgun after he told Miguel to let Anthony up, but Miguel ignored him and kept "stomping on" Anthony. Modica asked Sonja to "pop" the trunk. When she did not comply, Modica unlocked the trunk. After Miguel finished with Anthony, he told Modica that Modica was dead and then said, "You mother fuckers are all dead." When Miguel started walking back to his car, Modica believed that Miguel was going for a weapon. At that time he opened the trunk and retrieved his shotgun.

Modica held the gun to his side as Miguel got into his car. Miguel looked like he was going to back out, but then "plowed" forward toward Anthony and one of Mariam's relatives. Modica claimed that the car hit Anthony in the legs and that Anthony fell to the ground. Miguel backed his car up, and when it seemed as if Miguel was going to drive forward again, Modica fired his gun because he thought Miguel was going to run over Anthony. Miguel did not know how many shots he fired—he just wanted to stop the car. For the first shot Modica needed to just pull the trigger. For the following four shots he needed to pump the shotgun first and then pull the trigger. Modica admitted that during each of these steps he could have stopped firing, but that he choose not to do so. Miguel's car then rolled backward. Chaos ensued as Modica looked for Anthony. He discovered that Sonja and Anthony were in her car. He also got in the car and they went to Sonja's mother's house.

Sonja's testimony differed in some respects from Modica's account. Sonja testified that Modica asked her several times to open the trunk of her car. Sonja did not

want to open the trunk because she knew that Modica had a shotgun in the trunk. Eventually, Modica got the shotgun out of the trunk after the fight between Miguel and Anthony ended.

Sonja claimed that Miguel tried to back out and then "rush[ed] the car into the driveway where Anthony and Cody were standing." She claimed that Miguel stopped his car as Modica pulled Anthony out of the way. Sonja believed that Miguel was trying to hit Anthony when he drove quickly into the driveway. Sonja believed that someone else was also in the driveway, but she did not know the person. Sonja admitted that Modica got his shotgun before Miguel got into his car and drove it quickly into the driveway.

Sonja then saw Modica walk up to Miguel's car and shoot Miguel. Sonja estimated that Modica was standing about two feet away from Miguel's driver's side window when he fired the shotgun. Sonja turned away after the first shot because she was scared. The shots were consecutive, one after the other. Sonja, Anthony and Modica then got into Sonja's car. They left the scene and went to her mother's home.

Trayvon testified that after the fight, Miguel walked quickly to Miguel's car as Cody started to hit Miguel. It appeared to Trayvon that Miguel was trying to leave. Trayvon claimed that Miguel jerked his car forward toward Trayvon's cousin, Mickey M., who was cursing at Miguel. Trayvon pulled Mickey back when this happened. Trayvon described the car's action as jerking forward a couple of inches as if Miguel were pressing the brake and the accelerator at the same time causing the tires to squeak. Trayvon claimed that Miguel had already braked his car when he pulled Mickey out of

the way. Trayvon stated that Anthony was not in front of Miguel's car during this time. On redirect, Trayvon stated that no one was in danger of being hit by Miguel's car.

Trayvon heard someone say "pop the trunk" and then saw Modica walk up to Miguel's car and start shooting as Miguel backed up to leave. He stated that Modica stood close to Miguel's driver's side door when Modica opened fire. Modica then left with Sonja and Anthony. Trayvon claimed that the entire incident, between the time Miguel's car lunged forward and Modica fired the shotgun, took about five minutes.

Trayvon did not know whether Modica made a threat during the incident. He denied previously telling police that when Miguel returned to his car that he yelled, "I'm going to kill you." A detective testified, however, that Trayvon previously told him that as Miguel got into the car he threatened to kill someone.

The Investigation

Sonja later showed detectives where the shotgun had been hidden behind a dumpster. The shotgun was a pump-action—it had to be pumped to load a new round in the chamber. A search of Modica's home uncovered a duffel bag containing 20-gauge shotgun slugs and other items. Modica had previously asked his fiancée to hide the bag. A criminalist concluded that all five of the expended shells recovered from the crime scene were fired from the shotgun recovered from the dumpster.

Detectives spoke with Modica after the shooting and told him that he should let them know if he acted in self-defense. Modica denied being present during the shooting.

DISCUSSION

I. *ALLEGED PROSECUTORIAL AND INSTRUCTIONAL ERROR*

A. *Additional Background*

During closing argument, defense counsel compared Modica's actions to those of a police officer:

> "Police officers—and I don't bring up police officers because I'm saying Don Modica is one or remotely near one. I bring it up because that's who we see being forced to use deadly force all the time; right?"
>
> "The force that's necessary to stop that danger is a gun. I don't know how else on earth you would do that. What the police do is only what any of us can do."
>
> "But when you make the decision to use deadly force, you better use deadly force or you get killed. A police officer in the same situation, he's going to unload."
>
> "What if somebody had called the police earlier and the police get there and they're standing there trying to assess the situation and they see this car flooring into the driveway to hit people where there's people in danger?"

Defense counsel later argued:

> "[Modica's] not a cop. He's not in charge of keeping the peace, but nothing prevents him from using the firearm in self-defense. What it does do is it convicts him of Count 2, and you should convict him of Count 2. It means that he's a felon in possession of a firearm, but that law does not come into play at all when we're talking about self-defense. He shouldn't have had it, but just as anybody can be a victim, Don Modica can go get that shotgun. He can stand his ground. He can not retreat. He can not call 911, and he can use it in self-defense. It's a choice that he made. He'll suffer the consequences for the crime that he committed, and you should convict him of that. It's Count 2."

During rebuttal argument, the prosecutor responded to defense counsel's police analogy:

> "[PROSECUTOR]: [Defense counsel] articulates that law enforcement has a right to shoot an individual that's driving a car at them. That's law enforcement. That's not a reasonable person. The instructions given to you specifically state that. Consider what a reasonable person in a similar situation with similar knowledge would have believed. It doesn't ask you what a law enforcement officer in a similar situation would do, because obviously we ask more of law enforcement officers who have something to carry, something to protect. [¶] *Nobody asked Don Modica to carry, nobody asked him to protect. But more importantly, he's not even allowed to because he is a felon.*
>
> "[DEFENSE COUNSEL]: I'm going to object to a misstatement of the law. He's not allowed to protect?
>
> "THE COURT: Well, to be honest with you, I didn't hear anything objectionable in that so the objection is overruled." (Italics added.)

B. *Analysis*

Modica contends that the prosecutor misstated the law by suggesting that his prior felony conviction barred him from using a gun in self-defense or defense of others and that this misstatement amounted to prosecutorial error. Modica claims the trial court's comment that it "didn't hear anything objectionable" constituted instructional error.

Modica notes that defense counsel explicitly directed her objection to that portion of the prosecutor's argument concerning the right to "protect" and that the trial court unambiguously overruled the objection. Modica argues that the trial court's comment, in context, clearly endorsed the prosecutor's improper argument that Modica was not allowed under the law to use the gun to "protect" because he is a felon. He claims that

the misstatement of law by the prosecutor and the erroneous instruction by the trial court were prejudicial under any standard.

"Although counsel have 'broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law.' " (*People v. Mendoza* (2007) 42 Cal.4th 686, 702.) "Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights . . . but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action ' "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' " (*People v. Riggs* (2008) 44 Cal.4th 248, 298.)

"For a prosecutor's remarks to constitute misconduct, it must appear reasonably likely in the context of the whole argument and instructions that ' "the jury understood or applied the complained-of comments in an improper or erroneous manner." ' " (*People v. Winbush* (2017) 2 Cal.5th 402, 480.) When the prosecutor's "argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' " (*People v. Osband* (1996) 13 Cal.4th 622, 717.)

To establish prejudice under California law, defendants must show a reasonable probability that they would have received a more favorable outcome had the prosecution not engaged in the alleged misconduct. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071; *People v. Watson* (1956) 46 Cal.2d 818, 837 [the test for prejudice is based on "reasonable probabilities" rather than "mere possibilities"].) To the extent the prosecutor's statement was ambiguous, courts do not "lightly infer" that the jury interpreted the remarks in a way that was most harmful rather than least harmful to the defendant. (*People v. Thomas* (1992) 2 Cal.4th 489, 530.) The defendant has the burden of showing that the jury construed the prosecutor's remarks in an improper or erroneous manner. (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The prosecutor's comments were ambiguous. To the extent his rebuttal argument suggested that Modica had no right to "carry" a firearm because he was a convicted felon, there was no error. However, as the Attorney General impliedly concedes, the prosecutor misstated the law to the extent his rebuttal argument suggested that Modica had no right to "protect" because he was a convicted felon. Even a convicted felon may "defend himself, stand his ground, and use the amount of force reasonable under the circumstances." (*People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1346.) While a prosecutor's misstatement of the law constitutes misconduct (*People v. Boyette* (2002) 29 Cal.4th 381, 435), reversal is only required where a miscarriage of justice occurs (Cal. Const., art. VI, § 13).

Immediately before closing argument the trial court instructed the jury with CALCRIM No. 200, which states that the jurors must follow the law as the court explained it to them, even if they disagreed with it, and that they must follow the court's instruction if they believe that an attorney's comments on the law conflict with the instructions. The court also instructed the jury with CALCRIM No. 505 regarding the elements of self-defense and that the prosecution had the burden of proving beyond a reasonable doubt that Modica did not act in self-defense or in the defense of others. Thereafter, the prosecutor began his argument by informing the jury that "the main contention is whether [Miguel] was killed in self-defense" but that the case was not one of self-defense. The prosecutor later reviewed the law on self-defense and argued that self-defense did not apply because Modica used unreasonable force, the danger had ceased, and Miguel was trying to leave.

Defense counsel then argued that the jury needed to decide whether self-defense applied, she reviewed the law on self-defense and asserted that Modica reasonably used a gun to stop a person driving a car. Defense counsel emphasized that, while Modica was a convicted felon and thus should be convicted of count 2 (being a felon in possession of a firearm), he had a right to self-defense, he could stand his ground, not retreat, not call 911, and use a gun in self-defense. Defense counsel ended her argument by reminding the jurors that the prosecution had the burden of providing this was not a case of self-defense or defense of others.

When the entirety of the prosecutor's rebuttal argument is viewed with the earlier closing arguments it is clear that the prosecutor was responding to defense counsel's

police analogy and, while done ineloquently, correctly argued that Modica had no right to possess a gun because he was a convicted felon. It is unlikely the jury interpreted the prosecutor's isolated rebuttal statement as an assertion that Modica had no right to use a gun in self-defense or defense of others because the prosecutor spent a large portion of closing argument discussing how self-defense did not apply to the evidence. It is more likely that the jury interpreted the prosecutor's argument as a comment on the evidence. To the extent the jury could have misconstrued this fleeting argument, the jury had a copy of the jury instructions, including the self-defense instruction and the admonition that if "the attorneys' comments on the law conflict with my instructions, you must follow my instructions." On this record, the prosecutor's brief and isolated comment, while possibly prosecutorial error, was not prejudicial.

In a related argument, Modica claims that the trial court's act of improperly overruling defense counsel's misstatement of law objection amounted to instructional error. The People assert that the court's ruling was ambiguous regarding whether the court overruled the objection to that portion of the argument suggesting that Modica was not allowed to carry a gun, Modica was not allowed to protect, or both. We reject this argument because defense counsel specifically objected to the suggestion that Modica was not allowed to protect. Based on *Rhodes*, *supra*, 129 Cal.App.4th at page 1346, the trial court necessarily erred in overruling defense counsel's misstatement of law objection to the extent the prosecutor's argument suggested that a convicted felon had no right to use a firearm in self-defense. With this said, it is more likely that the trial court overruled the objection because it construed the prosecutor's argument that Modica had "no right to

protect" as a fair comment on the evidence, rather than an erroneous belief that the law provided that a convicted felon had no right to use a firearm in self-defense. (See *People v. Harris* (2005) 37 Cal.4th 310, 345 ["The prosecution is given wide latitude during closing argument to make fair comment on the evidence, including reasonable inferences or deductions to be drawn from it."].)

To the extent the jury could have construed the court's act of overruling defense counsel's objection as a comment on the law, we reject Modica's suggestion that this act endorsed the prosecutor's argument and elevated the comment to the status of a jury instruction. As a preliminary matter, Modica cited no authority that a court's act of erroneously overruling a misstatement of law objection during closing argument elevates the misstatement to the level of a jury instruction.

Our independent research uncovered *People v. Lloyd* (2015) 236 Cal.App.4th 49 (*Lloyd*), in which the defendant stabbed the victim during an altercation. During closing argument, the prosecutor stated, " 'If you find there is self-defense, you are saying his actions, the defendant's conduct was absolutely acceptable.' " (*Id*. at p. 62.) The trial court overruled defense counsel's objection. (*Ibid.*) During rebuttal argument the prosecutor asserted that if the jurors voted to find the defendant not guilty, they would be saying that they condoned his behavior and that he did not commit a crime. (*Ibid.*) The *Lloyd* court found that both comments constituted "a misstatement of the law" that reduced the burden of proof by "equating a not guilty verdict based on self-defense or defense of others as meaning the defendant must establish the defense to the point the

jury considers his actions 'absolutely acceptable' and by arguing not guilty means the defendant is innocent." (*Id*. at p. 63, italics omitted.)

The *Lloyd* court noted that "[h]ad the court sustained defendant's objection and admonished the jury, we would normally presume the jury followed the court's admonishment and instruction. [Citation.] That presumption, however, is ill suited to the present situation where the prosecutor misstated the law *with the effect of lightening her burden of proof*, defense counsel objected, and the court overruled the objection. The court's action in overruling the defense objection gave the appearance of condoning the prosecutor's interpretation of the reasonable doubt standard and the law on self-defense as it relates to a not guilty verdict. The court's action in overruling the defendant's objection aggravated the situation. [Citation.] In failing to cure the misstatement of law, the court placed its considerable weight behind the misstatement. In such a situation the court gives the jury two conflicting legal interpretations. Under these circumstances, we may not presume the jury followed the court's instruction when the court also signaled to the jury the prosecutor's misstatements of law were correct." (*Lloyd*, *supra*, 236 Cal.App.4th at p. 63, italics added.) The *Lloyd* court noted that the matter "was a close case that turned on the credibility of the civilian witnesses on each side" (*ibid.*) and reversed concluding that a reasonable likelihood existed that the result would have been different had the prosecutor not made the subject statements to the jury. (*Ibid.*)

In the instant case, the prosecutor's isolated statement, even assuming it constituted a misstatement of law, did not lighten the People's burden of proof. The self-defense instruction clearly instructed the jury that the People had the burden of proving

that the killing was not justified in self-defense or defense of others. On this record we cannot conclude that a reasonable likelihood exists that the result would have been different had these purported errors not occurred. As we explained, *infra*, the court instructed on self-defense and counsel argued why the facts either showed, or did not show, self-defense. The instruction and argument would have been rendered meaningless if the law provided that a convicted felon had no right to use a firearm in self-defense or defense of others. Given the instructions and argument, as a whole, it is unlikely that the jury construed the prosecutor's argument and the trial court's ruling as a comment on the law, rather than a comment on the evidence.

II. *ALLEGED EVIDENTIARY ERROR*

A. *Additional Background*

The prosecutor moved in limine to exclude the testimony of law enforcement officers regarding Miguel's prior criminal conduct. The prosecutor also moved to introduce evidence of Modica's character for violence—specifically, video surveillance footage showing Modica and another inmate kicking a third inmate lying on the floor—in the event the defense introduced evidence of Miguel's character for violence. Defense counsel acknowledged that the jail battery may be admissible under Evidence Code section 1103, but argued that the video was extremely prejudicial and should be excluded under Evidence Code section 352.

The trial court viewed the video and found it admissible. The court also ruled that evidence of Miguel's prior violent crimes would be inadmissible, but that defense counsel

could adduce evidence of Miguel's prior convictions and the opinion of law enforcement witnesses about Miguel's character for violence.

During the defense case, a detective testified that Miguel had prior convictions for assault with a deadly weapon and assault with force likely to produce great bodily injury. The detective opined, based on his investigations and contacts with Miguel, that Miguel was a violent gang member. The court later read to the jury a stipulation setting forth Miguel's prior felony convictions, which included a robbery conviction.

Prior to the prosecution rebuttal case, defense counsel renewed her Evidence Code section 352 objection to the jail incident video. The trial court again overruled the objection. Thereafter, a deputy testified that he investigated an incident involving Modica and as a result of the investigation, formed the opinion that Modica was violent on a particular day. The prosecutor then played the video of the jail assault for the jury. The deputy identified the individual in the video with the shaved head as Modica.

B. *Analysis*

Modica contends that the trial court erred by allowing the prosecution to show a "dramatic and shocking video" of a violent incident involving him, while expressly prohibiting the defense from adducing evidence of the details of Miguel's prior violent offenses. He contends that it was manifestly unfair for the prosecution to present evidence designed to inflame the passions of the jurors, while restricting the defense to sterile testimony and a stipulation.

Evidence Code section 1101, subdivision (a) prohibits admission of "evidence of a person's character . . . to prove his or her conduct on a specified occasion." Evidence

Code section 1103 provides an exception to the rule prohibiting character evidence in criminal cases. "In a criminal action, evidence of the character or a trait of character . . . of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by [Evidence Code] Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. [¶] (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1)." (Evid. Code, § 1103, subd. (a).) Additionally, evidence of the defendant's character for violence "is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a)." (Evid. Code, § 1103, subd. (b).)

The trial court, however, has discretion under Evidence Code section 352 to exclude evidence otherwise admissible under Evidence Code section 1103 "if admitting the evidence would have confused the issues at trial, unduly consumed time, or been more prejudicial than probative." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 828.) " 'The "prejudice" referred to in [Evidence Code] section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, "prejudicial" is not synonymous with "damaging." ' " (*People v. Karis* (1988) 46 Cal.3d 612, 638.) " '[E]vidence should be excluded as unduly prejudicial when it is of such

nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' " (*People v. Doolin* (2009) 45 Cal.4th 390, 439.) We review a trial court's rulings regarding admissibility under Evidence Code section 352 for abuse of discretion. (*Id.* at p. 450.)

Here, Modica does not contest that by offering evidence of Miguel's prior violent acts under Evidence Code section 1103, subdivision (a) he opened the door to evidence of his prior violent acts, including the jail assault. (Evid. Code, § 1103, subd. (b).) Rather, he objects to the form of the evidence, a video of him committing an assault, in contrast to the form of the evidence of Miguel's prior violent acts. The People contend that because Modica's assault and battery of the inmate did not result in a felony conviction the prosecutor could refer to the video, thereby allowing the jury to see exactly what occurred during the incident instead of relying on a verbal description by the jail deputy.

While we agree with Modica that evidence of the jail incident could have been presented via a jail deputy, the question before us is whether the trial court abused its discretion by, instead, allowing the jury to view the video. We find no abuse.

Modica does not assert that presentation of the video confused the issues or resulted in the undue consumption of time. Rather, he contends the inflammatory and shocking nature of the video resulted in undue prejudice. The video depicts Modica

following a second inmate into a cell where Modica and the second inmate kick a third inmate who had been crouching in his cell. The third inmate ended up lying on the floor as Modica and the second inmate kicked him. The kicks landed primarily on the third inmate's backside and legs. The entire incident lasted approximately one minute. The third inmate walked out of his cell and showed no apparent injuries. The second inmate is then seen throwing the third inmate's belongings out of the cell. The jail incident was less inflammatory than the charged offense. (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 534, fn. 11 ["Courts are primarily concerned where the past bad act was 'more inflammatory' than the offense for which the defendant is on trial."].)

The prosecutor did not reference the video during closing argument. Defense counsel briefly addressed the video by emphasizing that the attack took place in jail. Defense counsel argued that Modica should not be judged by his conduct in this "alternate universe" because "Jail is not a nice place. Jail is not meant to humanize people. It's meant to dehumani[z]e. It's a violent place. There are criminals in there. There are jail politics. There is conflict every day."

We conclude that the trial court reasonably determined that the probative value of the video was not "substantially outweighed by the probability that its admission [would] (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

Even assuming the trial court erred in admitting the video of the jail incident, the assumed error was not prejudicial. The improper admission of evidence is reviewed for prejudice under the standard applicable to errors of state law. (*People v. Coffman and*

Marlow (2004) 34 Cal.4th 1, 76.) We determine whether there is a reasonable probability that the defendant would have obtained a more favorable result had the error not occurred. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The question of prejudice often turns on the relative strengths and weaknesses of the prosecution and defense cases. "[A]n 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. Breverman* (1998) 19 Cal.4th 142, 177, italics omitted.)

Here, the primary question before the jury was whether Modica shot Miguel in self-defense or defense of others. Although there were some inconsistencies in the testimony of Modica, Sonja and Trayvon, these three witnesses all testified that individuals had been standing in front of Miguel's car before Miguel quickly drove it forward. Modica and Sonja testified that Anthony and another person stood in front of the car. Sonja believed that Miguel was trying to hit Anthony when Miguel drove quickly into the driveway, whereas Modica testified that Miguel's car actually hit Anthony's legs. Accordingly, the jury's decision regarding the application of self-defense likely turned on whether the individuals in front of Modica's car were in imminent danger and the reasonableness of the force used by Modica. It is not reasonably probable that the brief video of the jail incident inflamed the jury and affected the verdict.

III. *ALLEGED ERROR REGARDING TESTIMONY READBACK*

A. *Additional Background*

During deliberations, the jury sent out a note requesting the following:

> "Read back of [Modica's] entire testimony, read back of Sonja's testimony discussing who told her to move the car and why, hearing [Miguel's] threat of 'your [*sic*] all dead' and who called [Miguel] to come over and what was said. Also we would like to request Trayvon's & [Mariam's] read back about who called [Miguel] to come over and what was said."

The court discussed the request with counsel. The court released the jury because of the time of day and the amount of time the readback required. The following morning, the court reporter stated that the threat "[y]ou're all dead" was not in Sonja's testimony. Defense counsel stated that she understood the jury's request to concern the words of the threat as appearing in the testimony of any of the witnesses, not just Sonja's. The following discussion occurred:

> "THE COURT: . . . You are reading way too much into this, and understand this. I read this very conservatively. The statement is, []I'm going to kill you all.' That's the threat we are talking about. We are not talking about every threat that anybody made at that time which seems to be what you are talking about. We don't go there.
>
> "[DEFENSE COUNSEL]: Well, I just don't—certainly don't want to tell the jury there's no testimony regarding a threat of that nature. It's not in [Sonja]'s testimony.
>
> "THE COURT: We are not going to say that neither [*sic*]. They want something that does not exist.
>
> "[DEFENSE COUNSEL]: Right. But I think they are listing the different portions of testimony they want. I think they want [Sonja]'s testimony—

"THE COURT: They can't have something that does not exist. So let's stay with that.

"[DEFENSE COUNSEL]: Well—

THE COURT: The only issue is how do you relay that to a jury?

"[DEFENSE COUNSEL]: Maybe we can say, that is not in [Sonja]'s testimony.

"[PROSECUTOR]: I think it's easily just like that, as the Court put it forward, that [the court reporter] can say, that does not exist in [Sonja]'s testimony.

"THE COURT: Are you okay with that?

"[DEFENSE COUNSEL]: That's fine."

THE COURT: Okay. The mythology in how you want to do it, with her doing it? Do you want me to bring them out here and tell them?

"[PROSECUTOR]: I trust the court reporter in such that I know that she would relay it in the way that the Court addresses it, and I don't have any reason to not allow the court reporter to tell the jury.

"[DEFENSE COUNSEL]: That's fine. And then if they do request testimony from other witnesses regarding threats, I'd obviously like to address that.

"THE COURT: Thank you very much."

After readback of the requested testimony, the jury did not request readback of any other testimony. The jury reached a verdict that afternoon.

B. *Analysis*

Modica contends that the trial court erred by arbitrarily refusing to take any steps to clarify what appeared to be an ambiguous or mistaken request. He claims that the jury's note shows that one or more jurors believed that Sonja had testified about hearing

the threat when, in fact, it had been Trayvon who had made a statement about the threat to a detective, and the detective who had testified about Trayvon's statement to him. Modica asserts that the trial court should have informed the jury that Sonja did not testify regarding Miguel's threats and then inquired if the jury wished to hear the testimony of the detective or, more generically, another witness on the subject. He claims that the court's response, telling the jury what they had requested did not exist, did not assist the jury and may have misled the jury by implying that no such testimony existed at all other than Modica's testimony.

The People disagree, asserting that the trial court properly responded to the precise request made by the jury and had no duty to ask the jury whether it wanted to hear other testimony that was not requested. The People assert that the court correctly interpreted the jury's note as evidenced by the fact the jury, satisfied with the court's response, did not ask for any further readback.

Under section 1138, the jury has a right to rehear testimony on request during its deliberations.[2] (*People v. Ayala* (2000) 23 Cal.4th 225, 288 (*Ayala*).) The primary concern of section 1138 is the jury's right to rehear the evidence. (*Ibid.*) Accordingly, the trial court need not order a readback of any testimony not requested by the jury. (*Ayala*, at p. 289 ["[D]efendant could not have compelled the trial court to order the jury

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[2] Section 1138 provides, "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

to continue to listen to the rereading of testimony once it was satisfied it had heard enough."].) Determining what testimony satisfies the jury's request is a matter within the sound discretion of the court. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 261.) "It is not the party to whom the law gives the right to *select* testimony to be read. And the law does not make the party or his attorney the arbiter to determine the jury's wishes." (*Asplund v. Driskell* (1964) 225 Cal.App.2d 705, 714.)

Here, the jury's request for readback was specific and unambiguous. We reject Modica's speculative contentions regarding what the jury actually wanted to hear. Moreover, Modica waived any claim that the trial court should have asked the jury further questions by failing to raise this issue in the trial court. (Cf. *People v. Saunders* (1993) 5 Cal.4th 580, 589-590 [" ' "An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method." ' "].) If the jurors "wanted further testimony read to them, or other further clarification, they certainly would have so requested. If the testimony actually read to them did not contain the matters they wished to hear, they surely would have said so." (*People v. Gordon* (1963) 222 Cal.App.2d 687, 689.)

IV. *ALLEGED CUMULATIVE ERROR*

Modica asserts that if we conclude that any individual error does not mandate reversal, that the cumulative effect of the above alleged errors requires reversal. We disagree.

Under the cumulative error doctrine, "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.) "In examining a claim of cumulative error, the critical question is whether defendant received due process and a fair trial. [Citation.] A predicate to a claim of cumulative error is a finding of error." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068.)

To the extent we found or assumed the existence of error, we concluded that no prejudice resulted from any such error. Accordingly, the cumulative nature of the errors, if any, does not lead us to conclude that Modica was denied a fair trial.

V. *STRIKE FIREARM ENHANCEMENT*

A. *Additional Background*

Before sentencing, defense counsel filed a motion titled "Invitation for the Court to Exercise Its Discretion to Dismiss PC 12022.53(b)-(d) Enhancements." Defense counsel referenced Senate Bill No. 620, which amended section 12022.53, subdivision (h), as of January 1, 2018, to allow the trial court to strike or dismiss a firearm enhancement "in the interest of justice." The prosecutor opposed the motion, arguing that (1) Senate Bill No. 620 was not yet in effect and would not apply retroactively, and (2) it would not be in the interest of justice to strike the firearm enhancements. The prosecutor also argued that it was unnecessary to continue the sentencing hearing until 2018 "because even today, justice would not be served by dismissing the enhancement." The prosecutor began his argument by stating that defense counsel was not "entitled to that relief at that point." The court responded, "She's not saying that she's entitled. Let's

make that clear. That's why it's an invitation for me to exercise discretion as opposed to this is what the law is. I'm asking you to follow it." After hearing argument from both sides regarding why the firearm enhancement should or should not be stricken, the court stated, "I decline to accept your invitation to do that. I think that you do the crime, you do the time. And he's—that's what he's here for today. Your invitation is denied. I'm declining to follow your invitation."

B. *Analysis*

Sentencing took place on December 8, 2017. Under an amendment to sections 12022.5 and 12022.53, effective January 1, 2018, trial courts may, "in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed . . . ." (§§ 12022.5, subd. (c), 12022.53, subd. (h); *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) The parties agree, and we concur, that the amendment to section 12022.53 applies retroactively. Modica argues that it is unclear what the trial court meant by its statement "you do the crime, you do the time," and the case needs to be remanded to give the court the opportunity to exercise its discretion. The People argue that the court's statement is a clear indication that it would not exercise its discretion and no purpose would be served by remanding the case.

" '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to "sentencing decisions made in the exercise of the

'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' [Citation.] But if ' "the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required." ' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Accordingly, "a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*Ibid.*)

Here, in opposing defense counsel's "invitation" the prosecutor argued that the new law did yet apply, would not apply retroactively, and striking the firearm enhancements would not be in the interest of justice. After the prosecutor argued that defense counsel was not "entitled" to relief, the court indicated that it understood that entitlement to relief was not at issue and that defense counsel was asking the court to exercise its discretion. The court denied defense counsel's invitation stating, "[Y]ou do the crime, you do the time." This statement is subject to different interpretations. It is possible that the trial court assumed that the new law applied, but that it declined to exercise its assumed discretion based on the nature of the crime. Alternatively, as Modica argues, it is possible to interpret the court's statement as an indication that even assuming it had discretion, it would never exercise that discretion in favor of a defendant. This latter interpretation would be arbitrary and amount to an abuse of discretion. (See *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977 [" '[E]xercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' "])

On this record, we are unable to say with the requisite certainty that the trial court would not have exercised its newly vested discretion favorably to Modica. (See generally *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand where trial court had called defendant " 'the kind of individual the law was intended to keep off the street as long as possible' " and "stated that imposing the maximum sentence was appropriate"].) Accordingly, the matter must be remanded to provide the court with the opportunity to exercise its discretion to strike or dismiss the firearm enhancements. We express no opinion about how the court's discretion should be exercised.

DISPOSITION

The matter is remanded to the trial court for the limited purpose of allowing the trial court to exercise its sentencing discretion under Penal Code sections 1385, 12022.5, subdivision (c), and 12022.53, subdivision (h). If appropriate following exercise of that discretion, the trial court is to resentence defendant accordingly, amend the abstract of

judgment and its minute order of the sentencing hearing, and provide a corrected abstract of judgment to the appropriate agencies. The judgment is otherwise affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.