NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JULIO ANGEL TORREZ, JR., Defendant and Appellant.	F082878 (Super. Ct. No. BF176040A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

David W. Beaudreau, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Kari Mueller, Lewis A. Martinez and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Julio Angel Torrez, Jr., appeals from the judgment of his conviction of attempted voluntary manslaughter and related crimes and enhancements arising from an incident where he stabbed his girlfriend, Natalie A., in the chest. He was sentenced to an aggregate prison term of 22 years.

and appeared to be unconscious. Another neighbor called 911; the call was played for the jury, and Natalie's son could be heard on the call saying that "Julio" stabbed his mother. Natalie had endured stab wounds to the center portion of her chest, under her right breast, and her arm.

Law enforcement searched Natalie's apartment. There, they observed the mounting hardware for the window curtains had been pulled down and blood on the hallway wall. They found documents and a California Identification Card with appellant's name. They also found a fixed blade knife located in the kitchen.

The next morning, law enforcement made contact with appellant at the Department of Motor Vehicles. They asked appellant for his identification and name, and appellant displayed aggressive behavior and refused to follow instructions. Officers needed to use force to detain and subdue him. Eventually, appellant provided a false name and date of birth. Appellant was arrested. Photos taken of appellant at the time of his arrest depict cuts on his hands.

Appellant made several[3] telephone calls to Natalie from jail, and recordings of 10 calls were played for the jury. Over the course of the calls, appellant and Natalie discussed the incident. The first mention of the incident was in the first call played for the jury, when appellant asked Natalie why he was brought to jail, to which Natalie responded, "I don't know [appellant]. You don't know what you did or what?" In this call, Natalie went on to make several statements accusing appellant of "almost kill[ing her]," almost "t[aking her] kids' only parent," and "going for the kill." Appellant told Natalie she knew "what happened," but that he did not want to talk about "all of that." Natalie replied that she knew "what happened," that appellant "almost killed" her but that she was not planning on pressing charges or cooperating with the prosecution.

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[3] A jail call log was admitted into evidence but was not transmitted to this court as part of the record on appeal; however, the prosecutor stated in his closing argument that the call log indicated appellant made over 80 calls to Natalie while in jail.

A major thread throughout all calls that were played involved appellant pleading with Natalie not to speak with the district attorney and instead to let her family kill him when he got out of custody, at multiple points telling her he "deserve[d]" it. Throughout the calls, Natalie maintained she would not cooperate with the prosecution but also expressed anger at appellant for almost killing her. At one point after Natalie expressed anger towards appellant, appellant responded, "I stopped. Right?"

At several points throughout the calls, appellant expressed that he did what he did because he had feared for his life. At one point after expressing he had been fearful, the following exchange occurred:

"NATALIE []: But fear from what?

"[APPELLANT]: By your brother bein' there.

"NATALIE []: He had to (unintelligible)…

"[APPELLANT]: By all them – by them people bein' outside, you know?

"NATALIE []: What people – what people?

"[APPELLANT]: But – but I don't – I don't want to talk about this, you know what I mean?"

Appellant went on to tell Natalie he would forgive her and hoped she would forgive him as well. Natalie responded by telling appellant she did not do anything to him and was nothing but good to him.

At another point in the calls, appellant told Natalie he did not want her to hate him for "what happened" and again that he would forgive her.

"NATALIE []: You forgive me for what?

"[APPELLANT]: I forgive you for…

"NATALIE []: Yeah that made no sense.

"[APPELLANT]: I felt like my life was in jeopardy and...

"NATALIE []: How? How?

"[APPELLANT]: I don't want to talk about it.

"NATALIE []: You were on drugs.

"[APPELLANT]: Because, you know...

"NATALIE []: You were on drugs. You were laced the f[***] up.

"[APPELLANT]: Hey.

"NATALIE []: Like, how can you say your life was in danger when you were cheating on me with Brandy or whatever the f[***]."

"[APPELLANT]: Hey."

The parties stipulated to the admission of Natalie's medical records related to her treatment for the injuries she sustained. The parties further stipulated that appellant had been convicted of a domestic violence misdemeanor in 2015 that did not involve Natalie.

Defense Case

The defense played an additional recording of one of appellant's jail calls to Natalie. On that call, appellant told Natalie he was going to take his case "all the way" and that he wanted to be with her when he got out. Natalie assured appellant she would not do anything "against" appellant. Appellant said he was "angry that I can't explain myself and – and direct you how to." Natalie and appellant discussed him cheating on her. Appellant told Natalie "they're gonna try to make me guilty as – as – as – as they can." They then had the following exchange:

"NATALIE []: But you know you're not guilty.

"[APPELLANT]: No matter what...

"NATALIE []: You know you're not guilty.

"[APPELLANT]:	...hey, no matter...
"NATALIE []:	You know...
"[APPELLANT]:	...what I tell 'em...
"NATALIE []:	You know that...
"[APPELLANT]:	No matter what the truth is.
"NATALIE []:	You know you're not guilty. You know that – that...
"[APPELLANT]:	No matter what the truth is.
"NATALIE []:	...that wasn't you – you – you – that wasn't you, like, you know, like – I don't...
"[APPELLANT]:	All I gotta say is I defended myself. You know what I mean?
"NATALIE []:	Okay then. Then that – that – that's – you defended yourself.
"[APPELLANT]:	And – and – and – you know what I mean? You have your brother there.
"NATALIE []:	Okay. You defended yourself. You know, like...
"[APPELLANT]:	You know what I mean?
"NATALIE []:	Yep."

Appellant asked Natalie if she wanted him to stop talking to her, and she said she did not think she would be able to be around him comfortably anymore, so if he wanted to stop calling her, he should. Appellant asked Natalie if she wanted him to go to prison, to which she responded she did not, not because of him but because of his mom and that he was someone's son. She stated she did not wish his mother to suffer. Appellant then said he was angry and that he wanted "to explain to you what happened. If you don't believe me, you don't believe me." Appellant made Natalie promise she would talk to his mother. The following exchange occurred:

well, as – You know what I mean?"; and "I can't tell you how I feel about all that because I – I – they can use it...."

Also relevant to appellant's claims on appeal is that law enforcement gave him *Miranda* warnings before attempting to question him with regard to this incident. Appellant's statement was ultimately excluded because the trial court found he had invoked his right to an attorney early in the questioning.

Appellant moved in limine to exclude the recordings of the jail calls in their entirety "based on multiple grounds, including: hearsay, Evidence Code Section 352; Evidence Code 1054, et.seq.; lack of foundation improper character evidence (Evid. Code §1101(a)); and that it would violate the defendants right to confrontation," citing *Crawford v. Washington* (2004) 541 U.S. 36. In his written motion, appellant alleged generally that the statements were not admissible as adoptive admissions.

In open court, during a discussion on the jail calls, the court indicated its position that many of the statements made in the jail calls were admissible as adoptive admissions, in that appellant did not respond or responded in a remorseful manner to Natalie's statements. Defense counsel noted there were some instances in the calls where Natalie made statements to which appellant did not respond, and in some instances, responded by saying, "I can't talk about it or I can't say anything on the phone or I'm not going to talk about this.". Defense counsel contended those instances could not be considered adoptive admissions as it "is more of a following of an advice of attorney, advice of myself as well as advice of other attorneys that have come into contact with [appellant], which is you are not to talk about your case over the phone since they are recorded."

The prosecutor asserted the proffered jail calls were admissible either as admissions by a party opponent under Evidence Code section 1220 or admissions that have been adopted under Evidence Code section 1221. The prosecutor further contended the jail calls were relevant because appellant talked about facts of the case as to why he

did what he did and was relevant as consciousness of guilt because of appellant's attempts to dissuade Natalie from testifying.

The court ruled the jail calls were admissible, noting it was "not ruling on each specific item that's proffered by the People. But I think as a general proposition I have as I indicated on the record reviewed these, listened to them, read the transcripts. I think that the adoptive admissions are admissible as adoptive admissions with the appropriate instruction to the jury. It's for the jury to determine that question and the statements of the defendant that are evidence of dissuasion is admissible under the concept of consciousness of guilt." The court stated it had considered the issue raised by appellant's counsel, which it summarized as the "limitation of the People's use of an adoptive admission is if the admission by silence or adoption is under circumstances which indicate that the defendant is invoking a Fifth Amendment right not to speak. It's also limited if the defendant is acting upon the advice of counsel in remaining silent." The court stated those limitations did not apply because appellant clearly initiated the calls; thus, it was a voluntary act by him rather than a pretextual call or an action by the police or prosecution to trick appellant.

The calls were played for the jury as described *infra*.

B. *Appellant's Contentions*

On appeal, appellant makes several claims with regard to the portions of the calls which could be considered tacit adoptive admissions; that is, moments where Natalie made statements to which appellant did not directly respond. He asserts that none of the purported tacit adoptive admissions were admissible but draws our attention to two specific moments in the calls, that appellant contends were particularly damaging to his self-defense claim.

The first is the following exchange:

appellant he was "not guilty," she further explained her statement by saying "that wasn't you," which, in context, appears more like an expression that appellant was not in his right mind or was not the type of person who would do what he did, not that he was not the perpetrator or acting in reasonable self-defense.[10] Though the transcript of the call indicates Natalie told appellant, "Okay then. Then that – that – that's – you defended yourself" and "Okay. You defended yourself," the recordings add more meaning than is indicated by the cold transcript of the call, as Natalie says these statements in an exasperated tone seemingly made to placate appellant after she had been arguing with him for nearly 10 minutes trying to convince him that she would not testify against him. Finally, Natalie's comment that she was drunk and did not remember if she did anything to make appellant mad or "trigger" him does not support an inference she attacked him with a knife, especially when viewed with the rest of the evidence. Rather, it suggests she did something to provoke appellant without knowing, supporting an inference that appellant acted unreasonably by using force.

In sum, the potential prejudicial effect of the purported tacit adoptive admissions was low in light of appellant's express statements related to his self-defense claim, the evidence supporting the jury's attempted voluntary manslaughter conviction was overwhelming, and the evidence supporting that appellant acted in perfect self-defense was weak. For the reasons stated, any error in admitting the purported tacit adoptive admissions from the jail calls was harmless beyond a reasonable doubt.

II. Denial of Appellant's Proposed Pinpoint Instruction

A. *Relevant Background*

The pattern instruction for adoptive admissions, CALCRIM No. 357, provides:

"If you conclude that someone made a statement outside of court that (accused the defendant of the crime/[or] tended to connect the defendant

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[10] Natalie's statement echoes a statement made by appellant in a prior call where he said in relation to the case, "Please, know that – that that person wasn't me."

with the commission of the crime) and the defendant did not deny it, you must decide whether each of the following is true:

"1. The statement was made to the defendant or made in (his/her) presence;

"2. The defendant heard and understood the statement;

"3. The defendant would, under all circumstances, naturally have denied the statement if (he/she) thought it was not true;

"AND

"4. The defendant could have denied it but did not.

"If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true.

"If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose." (CALCRIM No. 357.)

Appellant requested the court instruct the jury with one of two proposed additions to the pattern instruction. First, appellant requested the following italicized portion be added to the penultimate paragraph as follows: "If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true, *unless you believe that defendant failure to respond was in reliance on his right of silence guaranteed by the Fifth Amendment of the United States Constitution.*" The second alternate appellant proposed was to replace the penultimate paragraph of the instruction with the following: "*You may consider Julio Torrez belief and reliance on his right of silence by the Fifth Amendment of the United States Constitution in deciding if under the circumstances he naturally couldn't explain or deny the accusation.*"

The court denied appellant's request, reasoning that appellant's counsel could argue he was relying on his right to remain silent based on the state of the evidence and that the court had already instructed the jury on appellant's Fifth Amendment right with regard to his testimony. The court further noted that it had addressed the legal issue

credited appellant's arguments, "the jury would have (a) received *some* inadmissible tacit admissions and (b) applied an incomplete instruction to the admissible tacit admissions" and the errors "altered the jury's assessment of the evidence and [appellant's] self-defense claim." Because we conclude the admission of any inadmissible tacit adoptive admissions was harmless beyond a reasonable doubt and the court did not err by declining to give appellant's pinpoint instruction, we reject appellant's cumulative error claim.

IV. Resentencing in Light of Recent Legislation

Appellant contends the matter must be remanded for resentencing based on the recent enactment of Assembly Bill 518 and Senate Bill 567. We conclude remand for resentencing is appropriate.

A. *Assembly Bill 518*

At the time of appellant's sentencing, former section 654, subdivision (a) required that a defendant who committed an act punishable by two or more provisions of law be punished under the provision that provided for the longest possible term. Assembly Bill 518 amended section 654, subdivision (a) to permit an act or omission punishable under two or more provisions of law to "be punished under either of such provisions." (Stats. 2021, ch. 441, § 1, eff. Jan. 1, 2022.) "[S]ection 654 now provides the trial court with discretion to impose and execute the sentence of either term, which could result in the trial court imposing and executing the shorter sentence rather than the longer sentence." (*People v. Mani* (2022) 74 Cal.App.5th 343, 379.)

The parties agree, as do we, appellant is entitled to the benefit of Assembly Bill 518. (See *People v. Sek* (2022) 74 Cal.App.5th 657, 673 ["Assembly Bill No. 518 ... applies retroactively to defendants ... whose convictions were not yet final when the law became effective January 1, 2022."].) They disagree, however, as to whether remand is appropriate. We contend it is.

" 'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

We cannot say the record clearly indicates the trial court would have reached the same conclusion. Respondent contends it would have based on the fact it found no circumstances in mitigation and imposed the maximum sentence, relying on several circumstances in aggravation: "The defendant's prior convictions as an adult and sustained [petitions] in juvenile delinquency proceedings are numerous. The defendant has served prior California Youth Authority commitments and two State prison terms. The defendant committed violation of Penal Code Section 273.5 in the presence of a minor. The defendant was on felony probation and State parole when the crime was committed. The defendant's prior performance on probation and parole is unsatisfactory."

However, while the trial court did not impose the middle term, it did not have the opportunity to consider, and appellant had no opportunity to argue for, a stay of the 11-year base term in favor of the 8- or 10-year base term for the assault or domestic violence convictions, respectively, resulting in a slightly shorter aggregate sentence.

B. *Senate Bill 567*[11]

Effective January 1, 2022, Senate Bill 567 amended section 1170, restricting a trial court's sentencing discretion, including its ability to impose the upper term for a conviction. (Stats. 2021, ch. 731, § 1.3.) Pursuant to Senate Bill 567, section 1170 now precludes a trial court from imposing a sentence exceeding the middle term for any offense with a sentencing triad, unless "there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term, and the facts underlying those circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial." (§ 1170, subd. (b)(1) & (2).) In other words, Senate Bill 567 provides for a presumptive middle term absent the presence of circumstances in aggravation, the facts underlying which have either been stipulated to by the defendant or proven beyond a reasonable doubt at trial. (§ 1170, subd. (b)(1) & (2); *People v. Lopez* (2022) 78 Cal.App.5th 459, 464.)

The parties agree, as do we, the amended version of section 1170, subdivision (b) applies retroactively in this case as an ameliorative change in the law applicable to all nonfinal convictions on appeal. (See *People v. Flores* (2022) 73 Cal.App.5th 1032, 1039.)

While respondent argues remand is not necessary under Senate Bill 567, because we are already remanding for resentencing in light of Assembly Bill 518, we decline to address this issue, as it is moot. We rest assured the sentencing court will consider all

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11 On December 27, 2021, appellant filed a request for judicial notice of a record of legislative history for Senate Bill 567. On January 14, 2022, this court deferred ruling on appellant's request and granted respondent 15 days' leave to file a response, noting failure to file one may be deemed agreement appellant's request be granted. Respondent did not file a response. As respondent makes no objection and the record appears to be appropriate for judicial notice, we grant appellant's request.

sentencing provisions applicable at the time of resentencing, including section 1170 as amended by Senate Bill 567.[12]

V. Prior Serious Felony Enhancements

Appellant contends, and respondent agrees, that two of the three five-year section 667, subdivision (a) prior serious felony enhancements must be stricken under *Sasser*, *supra*, 61 Cal.4th 1. We agree with the parties.

Our high court in *Sasser* held that determinate second-strike sentences were subject to section 1170.1, which draws a distinction between offense-based enhancements, which apply to every relevant count, and status-based enhancements, which apply only once. (*Sasser*, *supra*, 61 Cal.4th at pp. 15, 17.) Because the five-year prior serious felony enhancement is a status-based enhancement, it may only be added to the aggregate sentence rather than each individual count. (*Id.* at p. 16.) Therefore, upon remand for resentencing, the trial court may only impose one five-year prior serious felony enhancement.

DISPOSITION

Appellant's convictions are affirmed. The matter is remanded for resentencing in compliance with all applicable laws. The trial court is instructed to impose the prior serious felony enhancement under section 667, subdivision (a) in compliance with *Sasser*.

De Santos

DE SANTOS, J.

WE CONCUR:

Meehan

MEEHAN, Acting P. J.

Snauffer

SNAUFFER, J.

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12 We express no opinion on how the trial court should exercise any of its sentencing discretion upon remand.

Proof of Service

I, David W. Beaudreau, declare as follows. I am a member of the State Bar of California, over 18 years old, not a party to this action, and my business address is 748 S. Meadows Parkway, Suite A9-182, Reno, NV 89521. I am familiar with the business practice for collection and processing of correspondence for mailing with the U.S. Postal Service. Today, I served the within **Appellant's Petition for Review** by:

1. Submitting an electronic original to the California Supreme Court through Truefiling.

2. Transmitting an electronic copy via Truefiling to:
   - The Court of Appeal (per Supreme Court Truefiling policy)
   - Office of the Attorney General, SacAWTTrueFiling@doj.ca.gov
   - CCAP, eservice@capcentral.org

3. Depositing true copies, in sealed envelopes with postage fully paid, in a mailbox regularly maintained by the U.S. Postal Service, addressed as follows:

Kern County Superior Court
Attn: Hon. David Lampe
1415 Truxtun Avenue
Bakersfield, CA 93301

Kern County District Attorney
Attn: Dep. Bradley King
1215 Truxtun Avenue
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Kern County Public Defender
Attn: Dep. John Mattaeo
1315 Truxtun Avenue
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(Trial counsel)

Julio Angel Torrez, BP3851
CSP – Los Angeles County
P.O. Box 4610
Lancaster, CA 93539

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed February 17, 2023, at Reno, NV.

s/ David W. Beaudreau

David W. Beaudreau

Court of Appeal, Fifth Appellate District - No. F082878

S278677

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JULIO ANGEL TORREZ, JR., Defendant and Appellant.

The petition for review is denied.

GUERRERO

Chief Justice

IN THE

Court of Appeal of the State of California

IN AND FOR THE

Fifth Appellate District

THE PEOPLE,
Plaintiff and Respondent,
v.
JULIO ANGEL TORREZ, JR.,
Defendant and Appellant.

F082878
Kern County Super. Ct. No. BF176040A

TO THE SUPERIOR COURT:

*** * * REMITTITUR * * ***

This remittitur is issued in the above entitled cause. Also enclosed is a file-stamped copy of the opinion/order.

Costs are not awarded in this proceeding.

Date: April 3, 2023

BRIAN COTTA, Clerk/Executive Officer

Alicia Gonzalez

By: Alicia Gonzalez
Deputy Clerk