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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. KEVIN JERMAINE JONES, Defendant and Appellant.	B233204 (Los Angeles County Super. Ct. No. YA079266)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cary H. Nishimoto, Judge. Affirmed in part, reversed in part, and remanded.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Joseph P. Lee and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of Discussion Part II and Discussion Part III.

INTRODUCTION

On appeal, defendant Kevin Jermaine Jones, who was convicted of making a criminal threat (Pen. Code, § 422[1]), grand theft from a person (§ 487), and simple assault (§ 240), contends, inter alia, that the trial court erred in admitting hearsay statements under the forfeiture by wrongdoing doctrine. In the published portion of this opinion, we hold that under the forfeiture by wrongdoing doctrine, the trial court properly admitted a statement by a witness who was dissuaded from appearing at trial by defendant. In the unpublished portion of this opinion, we order sentence enhancements stricken. We otherwise affirm the judgment.

BACKGROUND

In June of 2009, Los Angeles Police Department Officer Pedro Cabunoc and his partner responded to a 911 call from Dominique Durden, defendant's then girlfriend. Durden told the officers that she was watering her lawn when defendant placed her in a bear hug from behind. Durden screamed and attempted to break free. Defendant placed his hand over Durden's mouth to stop her screaming. Defendant ultimately let go of Durden, and she willingly accompanied him into her apartment where they discussed ending their relationship. During the discussion, defendant grabbed Durden with his hand, placing it around her neck in a choking manner. Defendant forcibly and violently put Durden on the floor. Durden feared for her life. Eventually, defendant released Durden, took Durden's car keys, and left. Defendant was not charged in the incident.

Carl Smith, defendant's brother, was the father of Bri-Ana Breland's children. In June of 2010, Breland drove Smith, and two children to Smith's mother's house in Inglewood. When they arrived, Smith's mother and defendant were outside. Smith, his mother, and Smith's older son left to pay Smith's phone bill. Breland and her six-month-old son waited in the car for Smith to return.

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1 All statutory citations are to the Penal Code unless otherwise noted.

As Breland, who was pregnant, waited in the car, defendant approached yelling foul language. Defendant told Breland that that she was "going to learn to keep [her] mouth closed." According to Breland, defendant expressed anger that Breland had allegedly told one of defendant's two girlfriends about the other. One of the girlfriends was Durden, a friend of Breland. Breland denied telling Durden or anyone else that defendant was seeing more than one woman.

Defendant threatened Breland. He opened the passenger door, kneeled in the car, and choked her. He held her with one hand around the middle of her neck and squeezed hard, hurting Breland "very badly." Breland felt as though she was going to die. She tried to remove defendant's hand from her, but defendant would not let go. Breland started to give up. She had trouble breathing and was light-headed and dizzy. Defendant said, "Now, bitch, I bet you won't open your mouth no more, and I bet you'll keep my name out your mouth." Defendant appeared to be getting more upset with Breland and told her that he was going to kill her. Breland believed that her life was in danger.

At some point, defendant released the pressure on Breland's neck, and Breland reached for her cell phone to call 911. Defendant grabbed the phone and threw it in the street in an attempt to break it. Defendant then grabbed a bottle of baby lotion and threw the lotion all over the inside of the car and on Breland. As he threw the lotion, defendant said, "Now what?" As defendant continued to threaten Breland, she drove away.

Although she did not know its location, Breland intended to drive to the police station. As she was driving to the police station, Breland saw Smith and his mother driving in the opposite direction. Smith's mother stopped, and Smith and his son got out of Smith's mother's car and into Breland's car. Breland did not tell Smith what had happened; he already knew. Breland asked Smith for the location of the police station. Smith said he did not want to get involved, and he and his son got out of the car. Breland drove to the police station where she told an officer what had happened. When she returned home that night, Breland was still in fear for her safety because defendant knew where she lived.

Breland spoke with Smith the night before her testimony. Smith told Breland not to go to court. Breland was afraid when she testified.

In October of 2010, during an interview of Durden by Detective Marya Parente, Durden said that she had dated defendant for about five years and ended the relationship because of physical violence between them. Durden stated that she and Breland were friends and that defendant called her on the date of the incident using Breland's phone. Durden said that defendant told her, "I just choked your homegirl out and I have her phone." Durden added that she was afraid of defendant due to the prior acts of violence between them. Detective Parente testified that Durden was not cooperative and that Durden did not seem as though she wanted to get involved

On March 23, 2011, Detective Parente spoke to Durden after Durden had been served with a subpoena to appear in court. Durden acknowledged service of the subpoena. When Durden failed to appear in court on March 25, 2011, a body attachment for her was issued in the amount of $75,000. Thereafter, Detective Parente and other officers attempted, unsuccessfully, to contact Durden.

On March 28, 2011, Detective Parente made a request for records from the inmate telephone monitoring system—a system that records all inmate telephone calls from county jail—concerning calls placed by defendant. Defendant placed 12 phone calls to Durden that consisted of about 10 hours of conversation. Detective Parente prepared a recording and transcript of portions of the conversations. The recording was played for the jurors, and the transcript was provided to the jurors. Those recordings included what the trial court suggested were threats by defendant to dissuade Durden from testifying in his case.

DISCUSSION

I. The Trial Court Properly Admitted Durden's Statement Pursuant To The Doctrine Of Forfeiture By Wrongdoing

Defendant challenges the admission of two statements Durden made to Detective Parente. In the first statement, Durden said that she ended her relationship with

defendant because of physical violence between them. In the second statement, Durden said that defendant called her on the date of the incident using Breland's phone and told her, "I just choked your homegirl out and I have her phone." Defendant contends that his Sixth Amendment right to confrontation was violated when the trial court admitted Durden's out of court statements pursuant to the doctrine of forfeiture by wrongdoing. The trial court improperly admitted the challenged statements pursuant to the doctrine of forfeiture by wrongdoing, defendant argues, because that doctrine applies to statements by victim witnesses who were murdered to prevent their testimony and not to statements by corroborating witnesses whose testimony was prevented by means other than murder.[2] The trial court did not err.

A. Background

During a hearing concerning the admissibility of evidence that defendant choked Durden in 2009, the prosecutor stated that Durden was afraid of defendant and was being "quite uncooperative." The prosecutor stated that Durden had been "served" earlier in the week, but had not appeared that morning. A body attachment was issued for Durden's arrest with bail in the amount of $75,000.

During voir dire, the prosecutor told the trial court that significant efforts had been made to locate Durden and bring her to court. The prosecutor learned that during the prior week defendant had contacted Durden from jail by phone. The prosecutor stated that during the taped phone calls, defendant attempted to dissuade Durden from appearing in court. The prosecutor asserted that Durden's hearsay statements were

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[2] Respondent contends that defendant forfeited this issue because he did not raise in his objection in the trial court the specific claim he raises on appeal. The issue that defendant raises on appeal—whether the doctrine of forfeiture by wrongdoing applies only to murdered victim witnesses—is purely a question of law that may be raised for the first time on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 406, p. 464.)

admissible at trial pursuant to the forfeiture by wrongdoing doctrine as set forth in Evidence Code section 1390[3] and *Giles v. California* (2008) 554 U.S. 353.

The following morning, the prosecutor filed a motion to admit Durden's hearsay statements under the forfeiture by wrongdoing doctrine. At the hearing on the motion, the prosecutor argued that defendant's communications with Durden caused her to be unavailable. Detective Parente testified at the hearing that in investigating the case against defendant, Durden told the detective that she had dated defendant for five years and was afraid of defendant due to past acts of violence. In June of 2010, defendant called Durden using Breland's phone and remarked, as quoted above, "I just choked your homegirl out and I have her phone."

Detective Parente testified that Durden was served with a subpoena requiring her to appear on the date of a hearing. After Durden failed to appear on that date, and a body attachment was issued, Detective Parente and various other laws enforcement officer attempted, unsuccessfully, to locate Durden.

Thereafter, Detective Parente obtained recordings of defendant's phone calls to Durden from jail. During the period surrounding the date Durden was subpoenaed to appear, defendant made 12 calls to her. The calls lasted for about 10 hours. Excerpts from the recordings were played for the trial court. After listening to the tapes, the trial court stated, "Well, I think it is clear from the information that the court has and reviewing the transcript that the witness was concerned that the defendant thinks that she told the police what he did, and she went to great lengths to try to assure him that she was—that she had his back. And the implication from the discussion that they had is that he has friends on the outside who can assist him in doing whatever is necessary." The trial court granted the motion.

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[3] Evidence Code section 1390, subdivision (a) provides, "Evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party that has engaged, or aided and abetted, in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

B. Application of Relevant Principles

The Sixth Amendment's Confrontation Clause provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington* (2004) 541 U.S. 36, 53-54, the United States Supreme Court held that the confrontation clause "bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" (*Davis v. Washington* (2006) 547 U.S. 813, 821.) In *Davis v. Washington*, the United States Supreme Court clarified the distinction between nontestimonial and testimonial statements. The Supreme Court held, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[4] (*Id.* at p. 822.) Detective Parente interviewed Durden four months after the incident. The primary purpose of the interview was not to meet an ongoing emergency, but to gather evidence of a crime. Durden's statements during that interview were therefore testimonial.

The doctrine of forfeiture by wrongdoing is an exception to the bar against the admission of unconfronted testimonial statements. The United States Supreme Court explained the doctrine as follows, "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system." (*Davis v. Washington*, *supra*, 547 U.S. at p. 833.) Thus, "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." (*Ibid*; see also *Crawford v. Washington, supra,*

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[4] Respondent does not contend that the statements at issue here were nontestimonial.

541 U.S. at p. 62 ["the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds"].) The doctrine of forfeiture by wrongdoing has been accepted in many jurisdictions. (See *Giles v. California, supra,* 554 U.S. at p. 367, fn. 2 [12 states recognize wrongdoing as a basis for forfeiting objection to out-of-court statements]; McAllister, *Down But Not Out: Why Still Standing* (2009) 59 Case Western Reserve L. Rev. 393.)

Defendant contends that the doctrine of forfeiture by wrongdoing applies only to statements by victim witnesses who were murdered to prevent their testimony and not to statements by corroborating witnesses whose testimony was prevented by means other than murder. No California case applies the rule, defendant argues, other than in the context of a murdered victim witness.[5]

Defendant's argument fails. Defendant cites no case—from California or any other jurisdiction—that holds that the doctrine of forfeiture by wrongdoing applies only when the defendant has murdered the victim of a crime to prevent that victim from testifying about that crime. The rationale behind the doctrine does not support such a limitation.[6] In *Giles v. California, supra,* 554 U.S. 353, the court stated, "The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them—in other words, it is grounded in 'the ability of courts to protect the integrity of their proceedings.'" (*Id.* at p. 374, citing *Davis v. Washington, supra,* 547 U.S. at p. 834.) "One who obtains the absence of a witness by wrongdoing," whatever the nature of the wrongdoing, "forfeits

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5 But see *People v. Pearson* (2008) 165 Cal.App.4th 740 (forfeiture by wrongdoing by concealing witness, as estoppel to invoke double jeopardy).

6 The common law origins of the forfeiture by wrongdoing doctrine did not specify that the unavailable witness be a murdered victim. (See *Giles v. California, supra,* 554 U.S. at pp. 359-365; Donaldson, "Combating Victims/Witness Intimidation in the Family Violence Cases: A Response of Critics of the 'Forfeiture By Wrongdoing' Confrontation Exception Resurrected by the Supreme Court in *Crawford* and *Davis* (2008) 44 Idaho L. Rev. 643, 648-654.)

the constitutional right to confront[]" that witness. (See *Davis v. Washington, supra,* 547 U.S. at p. 833.) That "wrongdoing" has not been limited to the killing of a victim or even of a nonvictim witness.[7] Accordingly, the trial court did not err in admitting Durden's statements to Detective Parente.

II. The Admission Of Uncharged Crime Evidence And Of Defendant's Phone Calls To Durden From Jail

Defendant contends that the trial court abused its discretion under Evidence Code section 352 when it admitted evidence that defendant choked Durden in June 2009, an uncharged crime, and when it admitted the contents of defendant's phone conversations with Durden from jail. Any error in the admission of evidence that defendant choked Durden in June 2009 was harmless, and the trial court acted within its discretion when it admitted the contents of defendant's phone conversations with Durden.

A. Standard of Review

We review for abuse of discretion a trial court's ruling on the admissibility of evidence under Evidence Code section 352. (*People v. Kelly* (2007) 42 Cal.4th 763, 783; *People v. Brown* (2003) 31 Cal.4th 518, 550-551.) A trial court's erroneous admission of evidence pursuant to Evidence Code section 352 is reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836—i.e., whether there is a reasonable probability that the defendant would have received a more favorable result in the absence of the trial court's error. (*People v. Gonzales* (2011) 51 Cal.4th 894, 924; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

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[7] See *People v. Giles* (2007) 40 Cal.4th 833, 854, overruled on another ground in *Giles v. California, supra,* 554 U.S. 353, (rule applies when witness is "genuinely unavailable to testify" and "the unavailability is caused by the defendant's intentional criminal act"). There are forfeiture by wrongdoing cases cited in *People v. Giles, supra,* 40 Cal.4th at pp. 842-847 that do not involve the killing of a victim or witness. (See also *Reynolds v. United States* (1878) 98 U.S. 145.)

B. Background

1. Evidence of Durden's June 2009 choking

Prior to trial, the prosecutor moved to admit evidence that defendant choked Durden in June 2009. The District Attorney's Office declined to file a case with respect to that incident. The prosecutor argued that the evidence was admissible under Evidence Code section 1101, subdivision (b) as a similar course of conduct to Breland's choking in June 2010. Alternatively, the prosecutor argued that defendant admitted to Durden that he choked Breland, Durden was being uncooperative, and Durden told a detective that she was afraid of defendant based on "prior incidents of conduct between the two of them." If Durden recanted or refused to cooperate at trial, the prosecutor argued, the evidence would be relevant to explain Durden's demeanor. Defense counsel argued that if Durden was brought to court on the body attachment, the evidence of the prior choking incident would be more prejudicial than probative. The trial court found the evidence admissible because the evidence related directly and indirectly to the incident in this case. Because the evidence related to this case, the trial court found, it was not prejudicial.

2. Evidence of defendant's phone calls to Durden from jail

Citing CALCRIM No. 371, the prosecutor moved during voir dire to admit the contents of defendant's phone conversations with Durden from jail as evidence of defendant's consciousness of guilt. CALCRIM No. 371 provides, in relevant part, "If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance." Defense counsel argued that the evidence was cumulative and more prejudicial than probative. The trial court found the evidence admissible as evidence of a consciousness of guilt and found that its probative value outweighed any prejudice.

C. Application of Relevant Principles

"Evidence Code section 1101, subdivision (a), generally prohibits 'evidence of a person's character or a trait of his or her character' when it is 'offered to prove his or her conduct on a specified occasion.' Subdivision (b) of section 1101, however, provides: 'Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.'" (*People v. Kelly, supra,* 42 Cal.4th at pp. 782-783.)

The California Supreme Court has explained that, in general, "'[t]he admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.' (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379 [63 Cal.Rptr.2d 1, 935 P.2d 708].) The main policy that may require exclusion of the evidence is the familiar one stated in Evidence Code section 352: Evidence may be excluded if its prejudicial effect substantially outweighs its probative value. Because substantial prejudice is inherent in the case of uncharged offenses, such evidence is admissible only if it has substantial probative value. ([*People v.*] *Ewoldt* [(1994)] 7 Cal.4th [380,] 404.)" (*People v. Kelly, supra,* 42 Cal.4th at p. 783.)

"The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." 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 section 352,

"prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

1. Evidence of Durden's June 2009 choking

Even assuming that the trial court erred in admitting evidence that defendant choked Durden in June 2009, any such error was not prejudicial. The prosecution's case rested primarily on Breland's testimony. No evidence was presented that Breland had a motive to falsely claim that defendant choked her in order to get defendant in trouble. Rather, because defendant's brother was the father of Breland's son, Breland had a motive to keep defendant out of trouble. The jury apparently found Breland's testimony credible as it convicted defendant of two charges—making a criminal threat and simple assault—to which the 2009 choking incident had no relevance. Accordingly, it is not reasonably probable that defendant would have received a more favorable result if the evidence that defendant choked Durden in June 2009 had not been admitted. (*People v. Gonzales*, *supra*, 51 Cal.4th at p. 924; *People v. Cudjo*, *supra*, 6 Cal.4th at p. 611.)

2. Evidence of defendant's phone calls to Durden from jail

Defendant contends that the evidence of defendant's phone calls to Durden from jail should have been limited to the trial court's determination of whether defendant dissuaded Durden from going to court. The phone calls evidence, defendant argues, was prejudicial, collateral, involved an undue consumption of time, and created a danger of confusing the jury. The trial court properly admitted the evidence of defendant's phone calls to Durden because they demonstrated defendant's consciousness of guilt.

Defendant does not contend that the recorded conversations did not show that defendant attempted to dissuade Durden from going to court and thus failed to demonstrate a consciousness of guilt. Instead, defendant contends that the phone calls evidence was "not necessary to show 'consciousness of guilt' because there was plenty of evidence presented by the prosecution regarding the charged crimes. Thus, the effect of the evidence was simply to inflame the jury." Evidence of a consciousness of guilt,

however, is relevant, admissible evidence. (*People v. Hannon* (1977) 19 Cal.3d 588, 599.) Defendant does not explain how the consciousness of guilt evidence was inflammatory. While such evidence was damaging to defendant's case, it was not unduly prejudicial within the meaning of Evidence Code section 352. (*People v. Karis, supra,* 46 Cal.3d at p. 638.)

As for defendant's claim that the presentation of the phone calls evidence involved an undue consumption of time, defendant admits that "it is impossible to gage from the record how much actual time this evidence took to present," although the transcription of the phone calls was 14 pages. Apart from defendant's inability to demonstrate how much time was taken in the presentation of the phone calls evidence, defendant fails to explain how any additional time spent presenting such evidence could have resulted in prejudice. Likewise, as for his claim that the presentation of the phone calls evidence might have confused the jury, defendant does not explain what about the phone calls evidence was confusing. Moreover, defendant does not explain how any confusion could have led to defendant's conviction on any of the charges. Accordingly, the trial court did not abuse its discretion when it admitted evidence of the contents of defendant's phone calls with Durden from jail. (*People v. Kelly, supra,* 42 Cal.4th at p. 783; *People v. Brown, supra,* 31 Cal.4th at pp. 550-551.)

III. The Trial Court Erred In Imposing Two Section 667.5, Subdivision (b) One-Year Prior Prison Term Enhancements

The convictions and prior prison terms underlying the two section 667.5, subdivision (b)[8] one-year prior prison term enhancements were defendant's 1995

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[8] Section 667.5, subdivision (b) provides, "Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision (h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony; provided that no additional term shall be imposed under this subdivision for any prison

conviction for robbery (case number YA021180), and his 2001 conviction for being a felon in possession of a firearm (case number YA045787). Defendant contends that the trial court erred in imposing the section 667.5, subdivision (b) enhancement with respect to his 1995 conviction because the trial court used that conviction to impose a five-year enhancement pursuant to section 667, subdivision (a)(1). Defendant contends that the trial court erred in imposing the section 667.5, subdivision (b) enhancement with respect to his 2001 conviction because that conviction had been "washed out"—that is, defendant remained free of prison custody and did not commit a new offense resulting in a felony conviction for five years after his release from prison.[9] Respondent concedes the errors.

A. 1995 Conviction

"[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*People v. Jones* (1993) 5 Cal.4th 1142, 1150 [a trial court may not impose both an enhancement pursuant to section 667, subdivision (a)(1) for a prior serious felony conviction and a section 667.5, subdivision (b) enhancement for a prior prison term resulting from that same conviction].) At defendant's sentencing hearing, the prosecutor informed the trial court that the People were not seeking imposition of the section 667.5, subdivision (b) enhancement as to defendant's 1995

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term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody or the imposition of a term of jail custody imposed under subdivision (h) of Section 1170 or any felony sentence that is not suspended. A term imposed under the provisions of paragraph (5) of subdivision (h) of Section 1170, wherein a portion of the term is suspended by the court to allow postrelease supervision, shall qualify as a prior county jail term for the purposes of the one-year enhancement."

[9] Because the trial court imposed unauthorized sentences, we may review the trial court's sentencing errors in the absence of an objection in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 354 ["a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case"].)

conviction because she believed there was "case law that suggests that if the five-year prior is imposed, the same conviction for a one-year prior cannot run consecutive." Nevertheless, the trial court imposed a five-year enhancement under section 667, subdivision (a)(1) and a one-year enhancement under section 667.5, subdivision (b) based on defendant's prior conviction and prior prison term in case number YA021180. The one-year term under section 667.5, subdivision (b) must be stricken. (*People v. Jones, supra,* 5 Cal.4th at p. 1153.)

B. 2001 Conviction

Pursuant to the "washout" rule, a section 667.5, subdivision (b) enhancement does not apply to a defendant who is free of both prison custody and the commission of a new felony for any five-year period following his discharge from custody or release on parole. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229.) "This means that for the prosecution to prevent application of the 'washout' rule, it must show a defendant *either* served time in prison *or* committed a crime leading to a felony conviction within the pertinent five-year period." (*Ibid.*)

At defendant's sentencing hearing, the prosecutor told the trial court that the People were not seeking imposition of the section 667.5, subdivision (b) enhancement as to defendant's 2001 conviction because, based on the prosecutor's review of the prison packets related to this case, defendant's 2001 conviction may have "washed out." With respect to defendant's 2001 conviction, defendant's probation report states that defendant was convicted and sentenced to prison for three years on May 22, 2001. Defendant was next arrested for a felony on May 7, 2010. Because the prosecution did not show that defendant failed to remain free of prison custody or the commission of a new felony for any five-year period following his discharge from custody or release on parole from his 1991 conviction, the one-year term under section 667.5, subdivision (b) must be stricken. (*People v. Fielder, supra,* 114 Cal.App.4th at p. 1229.)

DISPOSITION

Defendant's two one-year terms under section 667.5, subdivision (b) are stricken. The clerk of the Superior Court is ordered to issue an amended abstract of judgment. The judgment is otherwise affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.