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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY LEE ALLEN, Defendant and Appellant.	B278755 (Los Angeles County Super. Ct. No. BA387364)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy, Judge. Affirmed and remanded.

Ralph H. Goldsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller, Acting Supervising Deputy Attorney General, and Joseph P. Lee and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Defendant Timothy Lee Allen appeals following his jury conviction of the first degree murder of Taburi Watson, with true findings on allegations the offense was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(4) & (b)(1)(C)),[1] a principal personally and intentionally discharged a firearm causing Mr. Watson's death (§ 12022.53, subds. (d)&(e)(1)), and defendant personally and intentionally discharged a firearm (§ 12022.53, subd. (d)). The jury also convicted defendant of possession of a firearm by a person prohibited by law (former § 12021, subd. (a)(1) (now § 29800)), with a true finding on the gang allegation appended to that count. Defendant admitted a prior robbery conviction. The court sentenced defendant to 80 years to life.

On appeal, defendant challenges the admission in evidence, under the hearsay exception for statements against penal interest (Evid. Code, § 1230), of the videotaped recording of a conversation between another participant in the murder and a jailhouse informant. And, in supplemental briefing, defendant contends that legislation effective January 1, 2018, ending the statutory prohibition on a trial court's ability to strike a firearm enhancement (see §§ 12022.5 & 12022.53), applies and requires a remand for a new sentencing hearing.

We find no error in the admission of the videotaped recording. Accordingly, we affirm the judgment, but we agree that remand is required for the exercise of the trial court's discretion to decide whether to strike the firearm enhancement under the new legislation.

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[1] Further statutory references are to the Penal Code unless otherwise specified.

FACTS

1. The Murder

On the evening of December 29, 2010, 14-year-old Taburi Watson was shot and killed near St. Andrews Park in south Los Angeles. There were no eyewitnesses to the shooting, but several people heard multiple gunshots fired in rapid succession.

Fanta A. had just arrived at her apartment house. When she heard the gunshots, she went inside and "hit the floor." She crawled to the window after it "got quiet," and looked down onto the intersection of 87th Street and St. Andrews Place. She saw a bicycle lying in the roadway near the intersection.

Ms. A. also saw a dark-colored "older model" car on St. Andrews Place ("late '90s, early 2000[s]"), with the windows down despite the cold weather, that made a U-turn and slowed down. Ms. A. could not "actually make out" the people who were in the car, but there was a man of "light complexion" similar to Ms. A.'s complexion ("[m]edium African/American") in the front passenger seat, and there "seemed to be someone in the back seat." Ms. A. saw the passenger "look[ing] over" at something. She "wanted to see what they were looking at," so she went outside and saw they had been looking in the direction of "[t]he little boy's body," which she saw lying on the lawn of a neighbor's house.

Johnny M. was working at St. Andrews Park on the evening of the murder, and heard gunshots at around 7:15 or 7:30 p.m. He stayed inside his office for a minute or two, then went out. The victim was lying in the yard, and a bicycle was in the middle of the street. He saw a car coming toward the bicycle, so he "had the car slow down" and moved the bicycle out of the roadway and propped it against a pole. The victim was not moving, but was moaning. He saw two people about 100 yards away walking south on St. Andrews Place.

Two police officers on routine patrol heard the gunshots and drove slowly toward the park, a known gang hangout, looking for victims or evidence of a shooting. Three people "pointed us in a direction," and then they saw a woman pointing to the victim lying on her front lawn. He was bleeding, facedown, not conscious and barely breathing. He was taken to a hospital but died shortly after the shooting.

Investigators recovered seven discharged .45-caliber cartridge casings, all apparently fired from the same semi-automatic pistol (as opposed to a revolver), probably a Glock. No guns were recovered. The victim suffered four gunshot wounds. The fatal bullet entered his upper back, perforated the right lung and exited on the right neck, with an upward trajectory.

2. The Investigation

The police began their investigation with the theory that the murder was gang related. This theory was based on the location of the shooting and the clothing the victim was wearing, including a black beanie with the initials "TIP" in white lettering (standing for "Trey in Peace"). The Eight Trey Gangster Crip gang "commonly conduct gang business" in St. Andrews Park. Not long before the murder, Detective Kevin Currie had spoken with the victim, who admitted he was a member of a gang, and who was with another Eight Trey gang member when he (the companion) was arrested on an outstanding warrant. There had been several other shootings in the month of December that appeared to involve the rivalry between the Eight Trey gang and the Rollin' 90's gang.

The police made no progress in identifying any suspects until almost two months later. In late February 2011, C.W. called and then came to the 77th Street station with information about the murder, and about an apparent gang shooting that had occurred several weeks before the murder.

The information C.W. related to the police was given to her by her then-boyfriend and the father of her child, Theron Shakir. Mr. Shakir told C.W., during "pillow-talk," that he and defendant (both members of the Rollin' 90's gang) had killed Taburi Watson, and that Marques Binns (who was not a gang member) had driven them to St. Andrews Park for the purpose of killing an Eight Trey gang member and had picked them up after the shooting. The background and the details C.W. gave to police are as follows.

a. The background

The murder of Taburi Watson was committed on December 29, 2010. By the beginning of December 2010, C.W. and Mr. Shakir were not getting along well with each other, and "there was a lot of drama between [them]." Mr. Shakir had two other children with two other women, and C.W. was upset about his ongoing relationships with other women and his neglect of her and their baby son. In early December, an argument culminated with C.W. stabbing Mr. Shakir in the arm. Mr. Shakir drove himself and a friend, Brandon Warren, to the hospital in a rented black Chevrolet HHR.

Mr. Shakir could not drive when he left the hospital, so his "other kid's mom came and got [him], and [Brandon Warren] drove [Mr. Shakir's] rental car." While driving the car, Mr. Warren was shot. Mr. Warren and Marques Binns were cousins.

At the end of 2010, Mr. Shakir and C.W. "were still having some relationship . . . dating, living together, whatever," "[o]ff and on."

b. C.W.'s interviews

The police (Officer Samuel Arnold and Detective John Ferreira) interviewed C.W. when she came to the station on February 22, 2011. The interview was recorded.

C.W. began by telling the investigators about the Brandon Warren shooting, which occurred shortly before the murder of Taburi Watson. "He got shot in the Eight Treys," and this [(the Taburi Watson murder)] was, like, the retaliation."

C.W. said that she knew about the Taburi Watson murder "because I was told and everything. And so I said, okay. So, I'm gonna look up – it was a little boy on a bike. I didn't know he was that young though." She repeatedly said she was "scared because the guys know where I live at" and where family members live, and "these guys are dangerous." "It was three" guys involved. "[T]hey rode through the park. Then they got out of the car." "They knew what they were gonna do though, because I guess they felt like it was time to do it." "[T]hey said they parked on the street. So, they walked through the park and then they seen a boy riding up on a bike." "[T]hey asked where the boy was from. I don't know what he said. But the boy tried to run and they end up shooting the boy." "[O]ne boy had a gun, and the other boy had a gun. And the other boy, who I told you don't gang bang was in the car. [¶] . . . [¶] . . . So, I guess they left the scene." They were in a blue KIA.

C.W. said that "[t]he boy that was involved from [the Rollin' 90's gang] is my ex-boyfriend. His friend [(defendant)] is from 90s too." C.W. explained that "I was, like really, really tight with my ex-boyfriend – [¶] . . . [¶] . . . – that he told me all the business. His homeboys will be mad. That's why I know, like, if something get out they're gonna know it was me. [¶] . . . [¶] . . . Because he's the only one who tells. He pillow talks. That's what they call him." She identified her ex-boyfriend as Theron Shakir, and said he was with "Lil Grape" (defendant) and Marques Binns.

C.W. explained that Mr. Shakir "used to stay with me," and "they were supposed to go do something totally different," but "all

of a sudden, they come back all hostile. Talking about what they did. Talking about turning on the news and stuff like that." She said that Mr. Shakir "went back to Marques Binns' house over there, but I guess, to take the gun or something. And then they went to my house on Gardena." "They dropped the guns off" at Mr. Binns's house and "then they came to my house to talk . . . ." "And they was like Brandon gonna be happy. . . . Basically talking about Brandon's gonna be happy or whatever." "[T]hen that night [Mr. Shakir] end up telling me the whole story and it just stayed on my mind, like, oh, my gosh. So something told me to just look on the Internet and then I really seen it," and "the time and everything was just corresponding with everything."

C.W. again described what Mr. Shakir told her when he returned to her apartment on the night of the murder. "And he was, like, oh, I need to watch the news . . . . He, like, yeah we parked over there, and then we hopped out. We walked through the park and [the victim] banged on us . . . ." "And so that's when they put out their guns. They shot him. I'm like . . . who was he? . . . You know, I'm like nervous and stuff. I think somebody gonna come and raid my house . . . . So I'm, like – he was in his mom car. They didn't have no paper plates, you know?" And: "[H]e told me about how they did it and stuff. And one of them had a revolver. [¶] . . . [¶] . . . And the other one had, I think, a Nine. I don't know." C.W. said, "I know he said one of them for sure had a revolver," and she thought that was Mr. Shakir. Later she said that "Theron say he had a revolver, Lil Grape the other gun." She confirmed that "Binns is the one who drove" and said, "Binns is the one who stay right there in the car," and "Binns picked them up." She had not seen Mr. Shakir with a gun before, but he had brought some bullets to her house that she still had.

C.W. also told the investigators that "they were trying to find a place to hide the gun," and "they buried it right next door"

to Mr. Binns's house. She did not know if it was still there, "because I broke up with him and I'm not friends with him no more." Officer Arnold asked her if they buried both the guns or just one of them, and C.W. replied: "Oh, . . . I think Lil Grape had – they was talking about taking a gun apart."

C.W. said, "this I know is the right – is the right scene [(referring to St. Andrews Park)]. Because the, uh, because the little boy on the bike," and "[t]hat's how I know. That's the key term." She said: "the little boy on the bike. Because when I looked it up on Google – [¶] . . . [¶] – it came right up." She repeated, "It came right up. And it was the same night." She also told investigators that "[t]he boy tried to run. The boy tried to run. [Mr. Shakir] said the boy tried to run and the boy was like, um, I'm sorry, I'm sorry." C.W. said: "[T]hat's what [Mr. Shakir] said he say, I was just wondering why the boy kept saying I'm sorry, I'm sorry. And I was just sitting there, like, oh, my gosh, why they doin' some of this?"

Officer Arnold and Detective Eric Crosson interviewed C.W. again on March 29, 2011. She told much the same story. She also said she knew the victim "was from Eight Trey," because Mr. Shakir told her "[w]e got a tramp[.]" (The word "tramp" is "a disrespect word towards the Eight Trey Gangster Crips.")

c. Mr. Binns's statements to an informant

As a result of the information from C.W., the police arrested Mr. Shakir and Mr. Binns on August 2, 2011. Detective Crosson informed Mr. Binns that police had information that he had driven persons involved in the murder of Taburi Watson to St. Andrews Park; that those persons were Theron Shakir and defendant; that the shooting was in retaliation for the shooting of Brandon Warren, Mr. Binns's cousin; that the vehicle used was Mr. Shakir's mother's Kia; that after the shooting Mr. Shakir and defendant had gotten back into the car driven by Mr. Binns; that

they went back to Mr. Binns's home; that police had cell phone information that could pinpoint locations of the persons involved; and other facts related to the shooting.

In this conversation, Detective Crosson hinted that the information was coming from Mr. Shakir. Detective Crosson and Officer Arnold reinforced that impression by "arrang[ing] for them to see each other after having been joking with Theron [Shakir], and Theron would have a relaxed look or laughing," and "that's the way it worked out . . . ."

After seeing Mr. Shakir laughing with the detectives, Mr. Binns was then placed in a cell with a confidential informant, and their conversation was monitored and videotaped. Mr. Binns told the informant he was in for murder but was not a "banger" (gang member). The informant said he was also in for murder, and was "Little Baby Muggs, homie, from 6-0." Mr. Binns answered affirmatively when the informant asked if "[t]hey got you for killing a tramp." Among other things, Mr. Binns said he "live[d] in 90s," but he "ain't no banger," and "you know how it go, I got caught up." Mr. Binns repeatedly said, referring to the police, "[t]hey knew everything." The informant asked, "They said it was you?" and Mr. Binns answered, "Well, [the detective] said it was, like, because of me, but really I ain't even shoot nothing, you feel me? They – they talking all sorts of crazy shit, talking about shit on phones, all type of crazy shit. I'm like, damn, boy."

Mr. Binns told the informant: "Yeah – they done did it. He was 14." "I wasn't there, though, I was like, around the corner." When the informant asked, "why did they say you did it if you wasn't with them?" Mr. Binns said, " 'Cause they say they got our cell phones together." The informant asked, "Was you talking to them . . . ?" and Mr. Binns said, "Well, yeah. . . . [¶] . . . [¶] . . . And, then, like, they're pretty much like this, like – I end up

scooping them up right after that shit, so it's like I'm right in the center. But I ain't though, you know what I'm saying?" The informant asked, "Did you know they was doing that shit or they just was like – " and Mr. Binns answered, "Like, last minute."

Mr. Binns told the informant that "they got all the cell phones together, they got witness that saw me driving and some other shit. Somebody been snitching up in 90s." "They pretty much said I orchestrated it. Like, I got two n----s together and they did me a favor for my cousin who (Unintelligible) got shot by the Treys." Mr. Binns told the informant that the third person involved ("another one of the homies") was "still on the loose[.]"

When the informant said, "But you wasn't there?" Mr. Binns replied, "I wasn't there when the shooting was going down. Don't get me wrong, I was in the car . . . ." Mr. Binns explained that "I was driving the car," and "that's the first thing [the other two] was saying too, like, we don't need you around while we do this . . . . So I'm really not feeling like, I was going to be involved in no type of way anyway, you know[], this is a shock for me, I feel like they was doing me a favor, you know what I'm saying?" The others told him, "you let us off over here, we get back with you in a few minutes. Let us do our shit. . . . [L]et us take care of this . . . ."

The informant asked "what y'all do after that," and Mr. Binns replied, "We went to my house. Then, we went to his house." The informant asked what they did with the guns, and Mr. Binns said "[t]hey ain't going to never find the burners. That's for sure. They ain't going to never find them." Mr. Binns told them, "Y'all not leaving this shit at my house." "So now I'm like, now I'm in a terrible position. I'm like, I'm going to get these m-----f-----s up out of here. Not going to leave them here . . . ."

The informant asked Mr. Binns if he "[broke] them all the way down," and Mr. Binns replied, "Oh they gone." He said he

got a friend "from Jungles to take care of it for me . . . . I broke them all the way down to a science. And we broke – wrapped them in these bags, and set these mutha f------s out to the dumpster."

d. Defendant's trial

Defendant was not apprehended until several years later.

In September 2015, defendant was charged by information with the murder of Mr. Watson and with possession of a firearm by a felon, together with various firearm and gang enhancements. An amended information in January 2016 alleged a prior strike conviction for robbery. A jury trial held in early 2016 ended in a mistrial, with jurors unable to reach a verdict. After the retrial described below, the jury convicted defendant of first degree murder.

In addition to testimony and documents establishing the facts we have described above, the evidence and events at the second trial included the following.

i. C.W.'s testimony

C.W. testified that she fabricated her statements to the police. She stated she saw the incident on the news and then looked it up on the internet, and told police "everything that I read on the internet." She testified she told police that Mr. Shakir had killed the boy, and "also involved his friends," "Marques Binns and Li'l Grape," describing "what each of them did in that incident[.]" She testified she told police that Mr. Shakir had given her the information, but "I don't know what I said because I made it up." She confirmed that her testimony was that she "made up every connection between Theron Shakir and that incident[.]" She lied to police because she "was hurt and . . . frustrated and . . . angry." She was "kind of like jealous," their baby had cerebral palsy and, since she "wasn't able to get

ahold of Theron" and was "devastated," she thought, "well, the only other option is to like get him in jail forever."

From February to July 2011, C.W. had no contact with Mr. Shakir. She testified "[h]e called me one time from jail." A recording of that call, the day after Mr. Shakir's arrest, was played for the jury. Mr. Shakir told C.W. he was in jail "[f]or 187," and "somebody told that I did it." Mr. Shakir said that "they saying basically that somebody, somebody like tipped them off," and "[w]hen I go to court they – whoever tipped them off will have to come in on the stand. So, then I'll find out . . . ."

ii. The cell phone location evidence

The police obtained from C.W. her cell telephone number and the numbers of Mr. Shakir, Mr. Binns and defendant. The prosecutor presented testimony from Detective Sean Hansen, who is a task force officer with the FBI's cellular analysis survey team. Among other things, that team provides expert testimony in historical cell site analysis. Such analysis uses records from service providers "that have the actual cell towers and the sides of the towers that were used when someone made or received a call," and "we plot them on maps, and then we use that to identify areas where a phone would have been when it made or received a phone call."

Detective Hansen's evidence showed, for example, that on the afternoon of the murder (which occurred around 7:15 or 7:30 p.m.), multiple calls were made from cell phones belonging to Mr. Binns, Mr. Shakir and defendant that used cell towers near C.W.'s residence. Later, from 6:43 p.m. to 7:04 p.m., defendant's phone used a tower about 0.3 miles from the murder scene. At 7:20 p.m., a call was made from defendant's phone to Mr. Shakir's phone. At 7:23 p.m., a call was made from defendant's phone using a cell tower that covered the area of the murder scene. Still later, calls were made from the phones of

defendant, Mr. Shakir and Mr. Binns using cell towers that "put[] all the phones within the same general area" where Marques Binns lived. Beginning at 8:37 p.m. and until 10:59 p.m., Mr. Shakir's phone used a cell tower in the area of C.W.'s residence.[2]

iii. Gang evidence

Defendant does not challenge the sufficiency of the gang evidence, stating that he did not challenge evidence he was a member of Rollin' 90's at trial, and that Mr. Shakir "claimed not to be a member, but the evidence of his membership was undeniable." Further, defendant tells us "[t]here is no purpose to summarizing the basis for the gang expert opinion. The gang expert . . . testified to his opinions that [defendant] and Shakir are members of [Rollin' 90's], that [Rollin' 90's] has an ongoing rivalry with the Eight Trey Gangster Crips, that [the murder victim] was a member of the Eight Trey gang, and that in his opinion, the shooting . . . was a retaliatory shooting committed for the benefit of the 90's." The parties stipulated that the Rollin' 90's engaged in a pattern of criminal activities.

iv. Other evidence

Mr. Shakir testified, denying participation in the murder and denying having told C.W. that he was involved. He also

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[2] Defendant does not cite any of this evidence, or any other evidence on the location of the cell phones. Instead, defendant "adopts the description of Hansen's testimony conveyed to the jury in statements and arguments of counsel." He simply describes the defense arguments, including that Mr. Hansen "could not say who was using the cell phones at the pertinent times," and that defendant "had two phones, and the Hansen testimony proved, at best, only that [defendant] was using one of those phones in the area in which he lived at the time the shooting occurred."

testified that when he called C.W. from jail, he was not calling to threaten her. When asked why he called, he said, "Because she had already said that she was going to try to get me killed or put in jail, so I knew that could be the only reason that I would be in jail for this."

The prosecution called Mr. Binns as a witness, but on the witness stand Mr. Binns refused to take the oath or participate in any manner. The jury saw and heard the videotape of his conversation with the informant in its entirety.

e. The verdict and sentence

The jury found defendant guilty of the first degree murder of Mr. Watson and the firearm possession count, and found true the gang and firearm allegations.

Defendant admitted his prior robbery conviction.

On October 26, 2016, the court sentenced defendant to 80 years to life (25 years to life for the murder, doubled for the strike (§§ 667, subds. (b)-(i) & 1170.12), plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (e)(1)), plus a 5-year enhancement for his prior serious felony conviction (§ 667, subd. (a)(1))). The court imposed a concurrent seven-year sentence for the firearm possession and related gang enhancement. The court also awarded custody credits and made further orders not at issue on this appeal.

DISCUSSION

1. The Declarations Against Interest

Defendant challenges the admission into evidence of Mr. Binns's statements to the informant as declarations against interest. He asserts the statements were "blame-shifting [and] self-serving," and allowing them in evidence "violated [his] sixth amendment right to confrontation and his due process right to a trial with reliable evidence of guilt[.]" Defendant questions the validity of precedents on which the trial court relied, and asserts

the statements in question were "inherently unreliable" under controlling California authority.

We reject defendant's claims and conclude, applying applicable precedents, that "consider[ing] each statement in context," a reasonable person in Mr. Binns's position " 'would not have made the statement[s] unless he believed [them] to be true.' " (*People v. Grimes* (2016) 1 Cal.5th 698, 716 (*Grimes*).) Because the statements were nontestimonial and reliable, they present no Sixth Amendment or due process concerns.

a. The trial court's decision

Before trial, the prosecutor filed a motion to admit the Binns recording. Among other things, the prosecutor argued Mr. Binns's statements were trustworthy when scrutinized under criteria described in *People v. Greenberger* (1997) 58 Cal.App.4th 298, 334 (*Greenberger*), and repeated in *People v. Cervantes* (2004) 118 Cal.App.4th 162, 175 (*Cervantes*) (" 'The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry' "; *ibid.* [" 'the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures' "]).

Defendant objected, contending the "lengthy, muddled statements" were "largely self-serving"; the thrust of the statements was "to deny his own knowledge and minimize his own alleged participation as a driver"; and the statements were made under unreliable circumstances because they were preceded by interviews with the detectives and elicited by a planted informant.

The trial court held a hearing under Evidence Code section 402, but most of the discussion related to the

admissibility of selected portions of police interviews with Mr. Binns (during which detectives told him the details they knew about the crime, including that Mr. Binns had driven persons involved in the murder to St. Andrews Park and those persons were Mr. Shakir and defendant). The court observed that "then [the Binns-informant tape] comes in, which I think it probably does under *Greenberger, Cervantes*. And then you all can argue what that means, 'they know everything.' " (The court excluded the police interview, instead allowing Detective Crosson to testify (as already described) about what he told Mr. Binns the police knew.)

Later, during the trial, the defense again moved to exclude the Binns statements, arguing that Mr. Binns was "primarily minimizing his own role," so "it doesn't even qualify" as a declaration against penal interest[3] and "it's testimonial[.]" The prosecutor countered that Mr. Binns "had no idea he was talking to a police agent. He did not make those statements in preparation for trial. This is not a testimonial issue at all; it is a hearsay issue," and Mr. Binns "is not minimizing; he is clarifying

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[3] Defendant's motion identified the following as "self-serving statements": "I wasn't there, though, I was like, around the corner." "I end up scooping them up right after that shit, so it's like I'm right in the center. But I ain't though, you know what I am saying?" "And I don't got no record, either." "I didn't even see nobody get shot or nothing, though, you see what I'm saying?" "So now I'm trying to face a hot one and I ain't even seen nothing, or nothing." "I wasn't there when the shooting was going down. Don't get me wrong, I was in the car, but I'm like – I'll put it to you – I'm like – " "So I'm really not feeling like, I was going to be involved in no type of way anyway, you know, this is a shock for me . . . ." "It wasn't even in front of me." "I didn't know what the script was, but they was like, you know . . . , but we not going to have you doing all that." "I didn't even want this."

his role and acknowledging, knowing that wrongdoing was going to happen, knowingly the covering up after the fact of the murder, knowing a murder had happened. [¶] It's 100 percent within *Greenberger*."

The court concluded that a case cited by defense counsel had not overruled the *Greenberger-Cervantes* line of cases, and "I'm going to stand by my previous ruling and deny your motion at this time."

b. The legal principles

In his opening brief, defendant provides us with a five-page introduction, followed by a four-page discussion of the standard of review, followed by a seven-page recitation "trac[ing] the evolution of the current controlling authority." He concludes "[t]he rule remains that blame-shifting statements are inadmissible," and then elaborates on his contention the Binns statements "were exculpatory and blame shifting, and his motives to lie were many." We disagree with defendant's characterization of Mr. Binns's statements as well as with his legal analysis.

We need not discuss the multiplicity of authorities defendant cites. The principles we must follow, including the standard of review, are thoroughly described in *Grimes, supra*, 1 Cal.5th 698.

i. The standard of review

"We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion. [Citations.] Whether a trial court has correctly construed Evidence Code section 1230 is, however, a question of law that we review de novo." (*Grimes, supra,* 1 Cal.5th at pp. 711-712; see *id.* at p. 712 ["The trial court's ruling reflects a misunderstanding of the law governing the admission of statements against interest."].) Thus, "the application of the

against-interest exception 'to the peculiar facts of the individual case' is reviewed for abuse of discretion" (*ibid.*), but a conclusion of law underlying the court's ruling is reviewed de novo.

ii. The applicable law

Grimes begins with a few basic principles. Evidence Code section 1230 "permits the admission of any statement that 'when made, . . . so far subjected [the declarant] to the risk of . . . criminal liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.' " (*Grimes, supra,* 1 Cal.5th at pp. 710-711.)

"To demonstrate that an out-of-court declaration is admissible as a declaration against interest, '[t]he proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' " (*Grimes, supra,* 1 Cal.5th at p. 711, quoting *People v. Duarte* (2000) 24 Cal.4th 603, 610-611 (*Duarte*).)

" 'In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' " (*Grimes, supra,* 1 Cal.5th at p. 711.)

Then *Grimes* discusses the *Leach* rule, to which defendant adverts throughout his brief: that Evidence Code section 1230 is "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant." (*People v. Leach* (1975) 15 Cal.3d 419, 441 (*Leach*).) Observing that "the proper application of the *Leach* rule appears to have generated some confusion," *Grimes* examines "the origins

and purpose of the rule in some depth." (*Grimes, supra,* 1 Cal.5th at pp. 713, 713-717.) The court concluded:

"In short, the nature and purpose of the against-interest exception does not require courts to sever and excise any and all portions of an otherwise inculpatory statement that do not 'further incriminate' the declarant. Ultimately, courts must consider each statement in context in order to answer the ultimate question under Evidence Code section 1230: Whether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that 'a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true.' " (*Grimes, supra,* 1 Cal.5th at p. 716.) The court explained further:

"A rule that permitted admission of no more of a declarant's statement than was necessary to expose him to criminal liability, requiring courts to mechanically sever and excise the rest, certainly might be easier to apply. But . . . this is not the rule we have: Under the law as it has developed in California, as in the federal system, context matters in determining whether a statement or portion thereof is admissible under the against-interest exception. This contextual approach accords with the rationales underlying the modern expansion of the rule governing the admission of statements against interest." (*Grimes, supra,* 1 Cal.5th at p. 717.)

In the discussion culminating in the conclusions just quoted, *Grimes* offers further observations pertinent here.

Noting that "[o]ur cases . . . have taken a contextual approach to the application of the *Leach* rule," the court explains: "We have applied *Leach* to bar admission of those portions of a third party's confession that are self-serving or otherwise appear to shift responsibility to others. (*Duarte, supra,* 24 Cal.4th at p. 612 [excluding portions of confession that, 'far from "specifically

disserving" [the declarant's] penal interests, positively served those interests'] . . . . *But we have permitted the admission of those portions of a confession that, though not independently disserving of the declarant's penal interests, also are not merely 'self-serving,' but 'inextricably tied to and part of a specific statement against penal interest.'* (*People v. Samuels* (2005) 36 Cal.4th 96, 120-121 (*Samuels*) [upholding the trial court's admission of declarant's assertion that the defendant had paid him to kill the victim, and rejecting the argument that the reference to the defendant 'should have been purged,' where the statement in question was 'in no way exculpatory, self-serving, or collateral'].)"[4] (*Grimes, supra,* 1 Cal.5th at p. 715, italics added.)

Thus *Grimes* explicitly rejected "a rigid or hypertechnical application of the *Leach* rule that would in all cases require exclusion of even those portions of a confession that are inextricably intertwined with the declarant's admission of criminal liability." (*Grimes, supra,* 1 Cal.5th at p. 716; see also *People v. Smith* (2017) 12 Cal.App.5th 766, 792 (*Smith*) ["[t]he cases . . . make it clear that the fact a hearsay statement portrays the declarant as a more minimal participant in a crime by itself does not require exclusion or end our analysis"; "[o]nly when there is both blame shifting by the declarant and *other* circumstances suggest some improper motive for the blame

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[4] In *Grimes*, the court concluded the trial court erred in excluding statements made by the actual killer in which the killer claimed that he acted alone and that the defendant was not involved. (*Grimes, supra*, 1 Cal.5th at p. 703.) Defendant asserts that *Grimes* "should be understood as a rule unique to the *exculpatory use* of collateral assertions." The *Grimes* court's reliance on *Samuels, supra,* 36 Cal.4th 96, demonstrates the lack of merit in defendant's contention. (*Grimes,* at pp. 715, 716.)

shifting have courts found admission of a hearsay statement error"].)

c. Contentions and conclusions

i. Statements against penal interest

That brings us to defendant's contention the trial court "did not understand the law" because "it reasoned that *Greenberger* applies whenever the declarant trusts the recipient, regardless of whether a statement is blame-shifting," and "[r]eliance on *Greenberger* in a case involving blame-shifting statements is wrong as a matter of law."

This contention is untenable, as *Grimes* makes clear when it refers to the admissibility of portions of a confession that are " 'inextricably tied to and part of a specific statement against penal interest.' " (*Grimes, supra,* 1 Cal.5th at p. 715.) This, it appears to us, is exactly such a case.

Defendant insists that Mr. Binns's statements were "largely self-serving, exculpatory and blame shifting, and should be understood in context as an effort (1) to lay a foundation for lenient treatment of Binns and (2) retaliate against Shakir for what Binns believed to be Shakir's treachery." A reading of the transcript of Mr. Binns's conversation with the informant reveals no basis at all for defendant's imaginative interpretation of the motivation for Mr. Binns's statements.

As to the latter claim (that Mr. Binns's statements may be understood as an effort to retaliate against Mr. Shakir), the statement demonstrates exactly the contrary. Mr. Binns clearly thought that someone had snitched ("Somebody been snitching up in the 90s"), and "[b]ecause, like, so many people started snitching, that's like, *I can't even get mad at [Mr. Shakir], you feel me?* Because it's like, these [detectives] know too much, dude, way too much." (Italics added.)

Nor can Mr. Binns's statements reasonably be understood as an effort to lay a foundation for lenient treatment. *Grimes* requires "a contextual approach" (*Grimes, supra,* 1 Cal.5th at p. 715), and so did *Greenberger* and *Cervantes* (" '[t]he trial court must look to the totality of the circumstances' ") (*Cervantes, supra,* 118 Cal.App.4th at p. 175). The most telling circumstance is that Mr. Binns thought he was talking to a Rollin' 60's gang member "in here" for murder who was "a tramp-killer, too." It is impossible that Mr. Binns could "lay a foundation for lenient treatment" by talking to someone he believed to be a fellow-inmate. And nothing in the transcript of the conversation (or the surrounding circumstances) suggests that Mr. Binns believed or suspected that he was talking to a police agent or that the informant could otherwise do anything to obtain leniency for him.

Certainly Mr. Binns's statements indicate that he was the driver and not the shooter, did not see the shooting, and had never been in jail, and he may well have thought this made him less culpable. But, viewed in context (as *Grimes* and all other Supreme Court authorities require), that does not make his statements to the informant less trustworthy, or convert them into the "unmistakabl[e] . . . 'attempts to shift blame or curry favor' " condemned in *Duarte*. (*Duarte, supra,* 24 Cal.4th at pp. 614-615.)

Mr. Binns knew at the "last minute" that defendant and Mr. Shakir planned to kill a rival gang member to avenge the shooting of Mr. Binns's cousin and did not want him (Mr. Binns) to be a part of it. Knowing that, he dropped them off, waited in the car, "scoop[ed] them up" afterward, and disposed of the guns. His statements that he "wasn't there, though, I was like, around the corner," and "didn't even see nobody get shot or nothing" and "wasn't there when the shooting was going down" were not

"blame-shifting" in any reasonable sense of that term, and there was no one with whom to "curry favor."

Defendant insists that the just-quoted portions of Mr. Binns's conversation with the informant and other similar comments "deprived **everything he said to the informant** of trustworthiness."[5] This assertion depends on the erroneous proposition that, under *Duarte*, where a declarant's statement is "blame-shifting or otherwise self-serving" (defendant's words), the trial court "does not have discretion to treat the context as sufficient to warrant admissibility[.]" In addition to erroneously attributing "blame-shifting" to Mr. Binns's statements about not seeing the shooting, defendant's reliance on *Duarte* is misplaced.

Duarte concluded that a declarant's postarrest statements implicating the defendant, "in light of the circumstances under which they were uttered and the possible motivation of the declarant," were not sufficiently reliable. (*Duarte, supra,* 24 Cal.4th at p. 614.) The "circumstances under which they were uttered" were that they were postarrest statements to a police officer, " 'made in the coercive atmosphere of official interrogation.' " (*Id.* at p. 617.) The declarant's statements "unmistakably also were 'attempts to shift blame or curry favor' . . . with the authorities." (*Id.* at p. 615, citation omitted.) "[F]rom start to finish, [the declarant] evidently was 'trying to fasten guilt' on others, including defendant, while 'keeping his own skirts as clean as possible' . . . under the circumstances." (*Id.* at p. 616, citation omitted.) *Duarte* does not stand for the

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5 The statements defendant cites are the same as those he identified to the trial court (see fn. 3, *ante*), plus two more: "Well, [the detective] said it was, like, because of me, but really I ain't even shoot nothing, you feel me?" and "Got at my folk. So like, it was, like, more like they feel obligated to do they thing."

proposition that statements of the sort Mr. Binns made "are inherently unreliable no matter to [whom] they are directed," as defendant asserts. On the contrary, *Duarte* expressly considered the declarant's motivation and the circumstances under which the statements were made. We do the same here.

At oral argument, defendant's counsel pointed to *People v. Gallardo* (2017) 18 Cal.App.5th 51 (*Gallardo*), a case decided after briefing in this case was complete. In *Gallardo*, our colleagues in Division Seven held it was error to admit, as a declaration against interest, a defendant's jailhouse statements to two paid informants, identifying his codefendants as the shooter and the driver in a gang murder case. We have no quarrel with the reasoning or the result in *Gallardo*, but it does not change our analysis. Indeed, it demonstrates the controlling principle in determining whether a statement is admissible under the against-interest exception: "context matters[.]" (*Grimes, supra,* 1 Cal.5th at p. 717.) The contexts in *Gallardo* and in this case are very different.

First, in *Gallardo*, "the jailhouse conversation shows [the declarant] was angry that authorities were attempting to blame him for the entire crime," and "repeatedly assert[ed] that law enforcement and a 'snitch' were trying to 'pin' the entire crime on him." (*Gallardo, supra,* 18 Cal.App.5th at pp. 75, 73.) (Here, Mr. Binns knew that the authorities believed at the outset that he was the driver, not one of the shooters.) Second, in *Gallardo*, "throughout the discussion [the declarant] provided conflicting versions of what had occurred, further mitigating his role in the offense with each successive telling." (The declarant first said he drove the vehicle that one codefendant had fired from, then claimed the same codefendant was the driver and the shooter, and finally claimed that one codefendant drove the other codefendant to conduct the shooting "while he [(the declarant)]

waited around the corner in a second vehicle.") (*Id.* at pp. 75-76, 74-75.) Third, in *Gallardo*, the declarant "only identified [his codefendants as the shooter and the driver] at the prompting of the informants, and after already having implicated himself in the crime." (*Id.* at p. 75.)

None of these circumstances bears any similarity to the context in this case. Mr. Binns's story did not change; the informant did not lead him into identifying the others as the shooters; and he did not think the authorities were trying to pin the entire crime on him. He was simply explaining his participation in the crime to a cellmate, and there were no circumstances suggesting an improper motive for any perceived "blame-shifting."

In short, as *Smith*, *Greenberger* and other cases tell us, "the fact a hearsay statement portrays the declarant as a more minimal participant in a crime by itself does not require exclusion or end our analysis." (*Smith, supra,* 12 Cal.App.5th at p. 792.) In *Smith*, there "was simply no way in which [the codefendant's] statements about being at the scene of the burglary, robbery and murder in which she was a relatively lesser participant would make any sense without reference to the major actors . . . ." (*Id.* at p. 793.) The same is true here ("I end up scooping them up right after that shit" and "I wasn't there when the shooting was going down. Don't get me wrong, I was in the car," and "I was driving the car").

This is not a case where Mr. Binns, by saying he did not see the shooting (because he was waiting in the car around the corner), was excusing himself to the authorities. He was explaining his participation in the crime to a cellmate he thought was a gang member and a "tramp-killer." Even if his statements about not seeing the shooting could be described as blame-shifting or exculpatory, there are no "*other* circumstances

suggest[ing] some improper motive for the blame shifting[.]" (*Smith, supra,* 12 Cal.App.5th at p. 792.) Nothing in the circumstances surrounding Mr. Binns's statements makes any of them less trustworthy than his statement that he was driving the car. As in *Smith*, "those portions of [the declarant's] statements that implicated [the declarant] in the murder were inextricably intertwined with the portions that implicated [the codefendant]." (*Id.* at p. 793.)

As *Grimes* tells us, the ultimate question is "[w]hether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that 'a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true.' " (*Grimes, supra,* 1 Cal.5th at p. 716.) We have no difficulty concluding that is so here.

Even had there been error (and we find there was none), defendant has not shown prejudice.

C.W.'s testimony confirmed that she had given the police highly incriminating details of the murder in two separate interviews. That evidence was corroborated by the cell phone location evidence, showing that calls made on cell phones belonging to the perpetrators used cell towers located near C.W.'s residence before the murder, near the crime scene at the time of the murder, and at Mr. Binns's house and later C.W.'s house after the murder.

On this record, we cannot say it is "reasonably probable that a result more favorable to [defendant] would have been reached" if the Binns statements had been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *id.* at p. 837 ["a reversal will result only when there exists . . . at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error has affected the result"].)

C.W. claimed at trial that, because she was angry at Mr. Shakir's treatment of her and their son, she lied about having received the details she gave the police from Mr. Shakir, and lied about his telling her that he, the defendant and Mr. Binns were the perpetrators. This is not enough to create an "equal balance of reasonable probabilities" that would leave this court in "serious doubt" as to whether admission of the Binns statement affected the result. (*Watson, supra,* 46 Cal.2d at p. 837.) Particularly is this so in light of Mr. Shakir's telephone call to C.W. after he was arrested (telling her that "whoever tipped them off will have to come in on the stand" and "then I'll find out"), and C.W.'s repeatedly expressed fear of "Li'l Grape" (defendant) in her police interviews ("these guys are dangerous"; "[Mr. Shakir's] homeboys will be mad"; "[i]t's [Mr. Shakir's] friend that I'm scared of"; Li'l Grape is "the one I'm scared of"). Also, C.W.'s statements to police that "the boy tried to run" were consistent with the medical examiner's testimony that Mr. Watson died of a gunshot wound to the back.

Defendant insists it is "absurd" to conclude he would have been convicted without Mr. Binns's statement, "in light of Shakir's acquittal and the prior hung jury in this case." We are not persuaded to find prejudice in this case owing to the hung jury or Mr. Shakir's acquittal, as our concern is the record of this trial. On this record, defendant has not established a reasonable probability of a different result if Mr. Binns's statement had been excluded. (*Watson, supra,* 46 Cal.2d at p. 837 ["the test . . . must necessarily be based upon reasonable probabilities rather than upon mere possibilities"].)

ii. Constitutional claims

Defendant tells us that his "primary argument" on appeal is that the Binns's statements were not "sufficiently trustworthy to be introduced as declarations against interest[,]" but that he is

"rais[ing] constitutional issues as well as hearsay issues." He contends that "misapplication of a state law hearsay exception to non-testimonial hearsay still implicates the Sixth Amendment right of confrontation"; that Mr. Binns's statements to a police agent should be deemed testimonial; and that the due process clause "remains a constraint on the introduction of unreliable evidence" and this court should "reach the merits of his due process claim if it cannot agree with his hearsay contention."

None of these claims need detain us long.

First, this court and a "chorus" of others have concluded, based on high court precedents, that the confrontation clause applies only to testimonial statements. (*People v. Washington* (2017) 15 Cal.App.5th 19, 28, 29 [citing *People v. Arceo* (2011) 195 Cal.App.4th 556, 575 and "the majority of the federal circuit courts"].)

Second, the authorities are clear that unwitting statements to a Government informant are not testimonial. (See *Davis v. Washington* (2006) 547 U.S. 813, 825 [referring to "statements made unwittingly to a Government informant" and "statements from one prisoner to another" as "clearly nontestimonial"]; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1402 ["We hold that statements unwittingly made to an informant are not 'testimonial' within the meaning of the confrontation clause," citing federal courts that have "repeated[ly]" so held]; see *ibid.* [rejecting argument that the informant "was 'prepped' by the police and conducted a de facto interrogation"; it is " ' "the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate" ' "].)

Third, defendant's assertion of a due process violation is founded on the proposition that the Binns statements were unreliable, a claim we have already rejected. (Cf. *People v. Washington, supra,* 15 Cal.App.5th at pp. 30-31 [observing that

" 'reliability is the linchpin of admissibility under the Due Process Clause,' " and nontestimonial statements, "especially ones like the jailhouse conversation between [codefendants who made statements implicating themselves and the defendant] are, by definition, more likely to be trustworthy"].)

2. The Firearm Enhancement

As mentioned earlier, defendant's 80-years-to-life sentence included a mandatory 25 years to life for the firearm enhancement under section 12022.53, subdivision (e)(1). At the time of defendant's sentencing (on October 26, 2016), section 12022.53 specified that "[n]otwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Former § 12022.53, subd. (h).)

Effective January 1, 2018, as a result of the enactment of Senate Bill No. 620, the prohibition against striking a firearm enhancement was eliminated. Now, section 12022.53 provides that "[t]he court 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 by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).)

The parties filed supplemental briefing on the effect of amended section 12022.53 on defendant's case. Both parties agree the new legislation applies retroactively, but they disagree on whether remand is necessary in this case. Respondent asserts remand is unnecessary "because no reasonable trial court would exercise its discretion to strike the enhancement."

We agree the legislation applies to all cases not yet final, and we conclude that remand to the trial court for the exercise of its discretion is appropriate in this case.

First, the case is not yet final. Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), when the Legislature has amended a statute to reduce the punishment for a particular offense, we assume, unless there is evidence to the contrary, that the Legislature intended the amended statute to apply "to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown* (2012) 54 Cal.4th 314, 323.) The *Estrada* rule has been applied to statutes governing penalty enhancements (*People v. Nasalga* (1996) 12 Cal.4th 784, 792) and to situations where the amendment "vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty" (*People v. Francis* (1969) 71 Cal.2d 66, 76).

The amendments made by Senate Bill No. 620 do not specify that the change applies only to crimes committed on or after a particular date. Nor do the amendments contain any other indication of legislative intent contrary to the *Estrada* rule. Consequently, the amendments apply to defendants whose judgments were not yet final on January 1, 2018.

Second, the record does not support respondent's claim that the trial court "manifested its intention to impose the maximum sentence legally available." On the contrary, the trial court expressly recognized that "the personal discharge of a firearm causing death . . . adds another 25 years to life to the sentence *as required by law*." (Italics added.) The court lamented the senselessness of gang killings and stated "there are no winners here," noting both the loss of the victim and "the defendant is in a position where his life, for all intents and purposes, is going to be spent behind bars." While the court stated that "the only thing really that the court can do at this point is to take predators off the street," and "defendant qualifies as a predator," nothing in these or any other of the court's comments tells us what the court

would have done had it had the discretion to impose a 75-, 65- or 55-year sentence instead of an 80-year sentence.

Accordingly, under the new legislation, the case must be remanded to give the court an opportunity to exercise its discretion.

DISPOSITION

The judgment is affirmed. The cause is remanded to the trial court for the limited purpose of exercising its discretion under Penal Code section 12022.53, subdivision (h) and, if appropriate following exercise of that discretion, resentencing defendant accordingly.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

HALL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.