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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DEMITRIUS TRAVOR THOMAS,

Defendant and Appellant.

B266820

Los Angeles County
Super. Ct. No.
MA059465

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed in part, vacated in part, and remanded for resentencing.

Valerie G. Wass, 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, Assistant Attorney General, Scott A. Taryle and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Demetrius Travor Thomas guilty of premeditated murder, attempted murder, and negligent discharge of a firearm, and found true firearm allegations and gang enhancements. He appeals, arguing the trial court should have dismissed a juror and the evidence did not support the gang enhancements, and the matter should be remanded to allow the trial court to exercise its discretion to strike the firearm enhancements. We affirm the judgment of conviction and remand for resentencing.

BACKGROUND

An information filed October 11, 2013, charged Thomas with the premeditated murder of James Nabors and the attempted premeditated murder of Deveion C., both in violation of Penal Code section 187, subdivision (a)¹; and discharging a firearm with gross negligence, in violation of section 246.3, subdivision (a). The information alleged that in connection with the murder and attempted murder counts, Thomas personally used and discharged a firearm, causing great bodily injury and death, in violation of section 12022.53, subdivisions (b), (c), and (d). Each of the three counts also alleged a criminal street gang enhancement under section 186.22, subdivision (b). Thomas pleaded not guilty and denied the special allegations.

¹ All subsequent statutory references are to the Penal Code.

Prosecution evidence at trial

At trial, Tyshane R. testified that on the night of December 29, 2012, a friend driving a black Camaro gave Tyshane and her friend Shaquita a ride to a party in Lancaster. After about a half hour, they drove to a second party in Lancaster, giving a ride to Thomas, who she knew as Teddy G. When Tyshane spoke to detectives on January 3, 2013, she told them that when they arrived at the second party, Thomas said he had a gun with 10 bullets. Later, when she was in the car ready to leave, Tyshane heard shots, and Shaquita said, “‘Oh my god, did you just, did you just see him do that?’” and “‘do you see him lying there? . . . He look dead a[s] fuck.’” Thomas ran up and jumped into the car. As they drove away, Thomas took his sweater off and threw it out of the window. They dropped him off on a block where everyone hung out. Tyshane testified that Thomas was in the car when they drove to the second party, but she did not remember any details about the party because she was drunk, and she did not remember giving any additional information to the detectives.

Deveion C. testified that he was at the second party, held at his girlfriend's house. Toward the end of the party, people were yelling out gang names, including Duroc, Rolling 40's, and P.M. Dubs. Shortly thereafter, the party ended and Deveion walked outside to accompany a female friend to her car. A dark Camaro was parked on the street. Deveion saw his friend James Nabors, a Pasadena Denver Lanes (PDL) gang member. As Deveion walked toward Nabors, an individual stopped Deveion and asked, “where are you from?,” which Deveion understood to be a gang challenge. Deveion answered, “I don't bang,” and kept walking. The individual walked away toward a car.

Deveion heard the individual tell someone he knew named Reggie to “‘get out of the way,’” and Reggie answered, “‘Hold on. I want to make sure all my people are okay. They’re getting in the car.’” The individual wore a light gray hoodie and Deveion could not see his face. The individual turned and shot toward Deveion. He heard a total of five shots and was hit three times. Deveion ran back to the house. He was taken to the hospital, where he learned that Nabors also had been shot. Nabors later died of two of his five gunshot wounds.

Shaquita C. testified her boyfriend drove the black Camaro to the Lancaster parties. She was in the back seat of the black Camaro (with Tyshane) when she heard gunshots. Thomas jumped into the front passenger seat and they drove off. They made a U-turn, and she saw an African-American man lying on the ground. The next morning, she texted Tyshane: “Hell yeah. He shot another boy. But the pickup from last night.”

Dwayne P. testified he was in his car about to leave the party when he heard shots and drove away fast. He saw Thomas, carrying a silver semiautomatic handgun and wearing a white hoodie, run toward a black Camaro and get into the front passenger seat. After he talked to the police, men in cars had threatened him three times, saying, “just for the homie James and for their homie T.G.,” including a group identifying themselves as “PDL.” Dwayne P. had identified Thomas’s photo as the shooter, from among six individual photos.

DNA matching Thomas’s was on the cuff of a white hooded sweatshirt, found on the roadside near the area where the shooting took place. Gunshot residue was on the outside of the sweatshirt. A fired bullet extracted from Deveion C., four fired bullets found at the scene, and a live cartridge found in a car at

Thomas's home had all been fired from or cycled through the same .45-caliber firearm.

After testimony from a gang expert, the prosecution rested and the defense presented no evidence.

DISCUSSION

1. Thomas's right to an impartial jury was not violated when the trial court did not replace Juror No. 5

During a break in testimony and outside the presence of the jury, the prosecutor informed the court that one of the jurors had been seen speaking to the victim's brother and sister-in-law, who were present throughout the trial. When a detective asked what they were talking about, the juror said she "was simply giving them their condolences." The court stated it would inquire at the end of the day out of the presence of the other jurors.

The court later dismissed the jury and asked Juror No. 5 to remain in the courtroom. The court then asked the juror if she had any contact with a family member involved in the case, and she answered: "I just offered him my condolences on the loss of his brother. I have a brother that was killed also years ago." The court asked how she knew the victim was his brother, and she replied she overheard him referring to the victim as his brother. The court responded: "I talked about this a little bit in jury selection. And you know, we're all human. And I understand the sentiment; and I appreciate it. But there is a need in our system to keep up the appearance of propriety at all times. So I'm going to ask you to please refrain from having any conversation with anybody involved in this case, whether or not it's a witness or family member or somebody you see here in court, even in the audience. I just would hate to have somebody question your impartiality because of any of that; okay?" Juror No. 5 said she

understood. The court ordered her back the next morning and she left the courtroom.

The court invited counsel to be heard, and defense counsel asked that the court replace the juror. The prosecutor responded that the court had admonished the juror, and the simple fact that she offered condolences would not affect the juror's ability to serve. Defense counsel replied that the juror "took it upon herself" to approach the relative after overhearing a conversation.

The court stated that the question was "whether or not this . . . in any way indicates any sort of bias on the part of the juror." Juror No. 5 had expressed condolences for a loss, and she had disclosed her similar loss during jury selection. The only issue at trial was who committed the murder and under what circumstances, "and if anything in the juror's conduct made me think that somehow she was already making up her mind about that, then I think I would be more troubled. But, here, we simply have a human expression of condolences about a fact that is not in dispute; the fact that this young man was killed. And so at this point, I do not see good cause to remove the juror. Obviously, if she does not obey my admonition from here on out, then we'll be in a totally different position. But for now, I believe that the admonition is sufficient."

Thomas argues that the trial court's decision not to remove Juror No. 5 denied him his due process rights to a fair trial by an impartial jury. We disagree.

"An impartial jury is one in which no member has been improperly influenced . . . and every member is 'capable and willing to decide the case solely on the evidence before it.'"
(*In re Hamilton* (1999) 20 Cal.4th 273, 294.) A defendant may

challenge a jury's impartiality with evidence of statements made outside the jury room, if the statements are likely to have improperly influenced the verdict, but not with evidence to show the statements' actual effect, or the mental processes determining the verdict. (*Ibid.*) When faced with the possibility of a juror's misconduct, the court must first determine whether the information warrants any investigation into the issue, and "must take care not to conduct an investigation that is too cursory." (*People v. Fuiava* (2012) 53 Cal.4th 622, 710.) "After having completed an adequate (but not overly invasive) inquiry into the misconduct issue, the trial court must then decide whether, under section 1089, there is 'good cause' to excuse the juror at issue." (*Ibid.*)

Our review is "under the 'demonstrable reality' test." (*People v. Fuiava, supra*, 53 Cal.4th at p. 711.) We do not reweigh the evidence, but " 'must be confident the trial court's conclusion is manifestly supported by evidence on which the court actually relied. . . . [T]he reviewing panel will consider not just the evidence itself, but the record of reasons the court provides.' " (*Id.* at p. 712.)

Here, the trial court conducted an inquiry after learning that Juror No. 5 had expressed her condolences to the victim's brother. The juror explained that (as she had revealed in voir dire),² her brother had died and so she offered her condolences to the victim's brother. The court admonished her not to speak to anyone involved in the case, including anyone in the audience.

² Thomas does not argue that the juror's statement about her brother at voir dire should have caused his lawyer to challenge her for cause, and there is no reporter's transcript of the jury selection.

The court concluded the juror’s “human expression of condolences” about the undisputed fact of Nabors’s death did not mean she was making up her mind about whether Thomas was guilty, and her statement of condolences alone was not good cause to remove her.

Thomas argues that the trial court did not conduct a sufficient inquiry when it questioned Juror No. 5. “[D]efendant has waived this claim by his failure to seek a more extensive or broader inquiry of the juror at the time, or in any other way to object to the trial court’s course of action. . . . Having failed to suggest any additional examination was required, thereby preventing the trial court from considering any arguments for conducting further examination, defendant ‘is not privileged to make the argument now for the first time on appeal.’” (*People v. Holloway* (2004) 33 Cal.4th 96, 126-127; *People v. Zaragoza* (2016) 1 Cal.5th 21, 59.)

On the merits, we conclude the trial court’s conclusion is supported by the evidence and by the reasons it provided for not removing Juror No. 5. “One may assume the juror felt considerable sympathy for the victims . . . but such sympathy does not equal or imply a disqualifying bias against the defense, especially where the defendant claims to be innocent of the crime.” (*People v. Holloway, supra*, 33 Cal.4th at p. 127.) The trial court’s observation of the juror’s “tone and demeanor” allowed it to judge whether the juror’s sympathy for the victims was “so intense and gripping as to disable [her] from serving impartially.” (*Ibid.*) The court concluded the juror’s conduct did not mean she could not be impartial. After reviewing the entire record, we conclude there is no reasonable probability of actual harm to Thomas. (*People v. Jackson* (2016) 1 Cal.5th 269, 332;

People v. Hardy (1992) 2 Cal.4th 86, 174.) The decision not to replace Juror No. 5 was “within the sound discretion of the trial court.” (*People v. Zaragoza, supra*, 1 Cal.5th at p. 59.)

2. Sufficient evidence supported the jury’s true findings on the gang enhancements

Thomas argues that the jury’s true findings on the criminal street gang enhancements on all three counts must be stricken, because the prosecution failed to introduce sufficient evidence to prove that the Bad Influence Gang (B.I.G.) was a street gang whose primary activities were offenses listed in section 186.22, subdivision (f). We conclude sufficient evidence supported the true findings.

Los Angeles County Deputy Sheriff Daniel Welle testified he had first worked for four years in the jails, where he spoke to over a thousand gang members about gang structure and culture. He currently worked in the patrol division of the East Palmdale and Lancaster station, in the gang enforcement team and as an investigator. He had interviewed easily over a thousand gang members, had taken two 40-hour gang courses, and had testified as a gang expert over 25 times.

In late 2012, the gang unit had counted 80 members of B.I.G., and there were many more who had not been contacted. B.I.G. was a homegrown, African-American gang that wore black (as opposed to blue or red). Although they stayed out of “the Blood/Crip kind of beefs,” over the last couple of years B.I.G. had had issues with Blood gangs, such as PDL, including in 2013.

B.I.G.’s primary activities were pimping, narcotics sales, assaults, thefts, and shootings. Deputy Welle had personally investigated these types of primary activities. In August 2009, a B.I.G. member pleaded guilty to attempted murder. In

November 2010, a B.I.G. member had been convicted of two counts of assault with a firearm with a great bodily injury enhancement, and one count of shooting from a motor vehicle, with true findings on gang enhancement on each count. Deputy Welle had assisted in both investigations. Deputy Welle was currently wrapping up an investigation into three shootings by B.I.G. in retaliation for a double murder.

Shaquita C. was an associate of B.I.G. Nabors was a member of PDL.

Deputy Welle had known Thomas personally for several years. Thomas had told Deputy Welle he had been a member of a now-defunct gang (T.A.F.) that either died out or joined up with B.I.G. Field identification cards from 2006 showed Thomas as a T.A.F. member, and cards from 2011 (in Detective Welle's handwriting) and 2012 indicated Thomas was a self-admitted and known B.I.G. member with the moniker "Teddy G." Gangs in the Antelope Valley were transient, without traditional gang areas. Members of different gangs mingled at parties where they were expected not to call out hood names ("no set tripping"). A particular song at a party, or the reactions of partygoers, might lead to throwing out gang names and then could erupt into violence ranging from fistfights to shootings. Anyone who "snitched" to the police about a gang-related crime, including by testifying at a preliminary hearing or at trial, would face intimidation or worse.

Presented with a hypothetical similar to the evidence at trial, Deputy Welle opined the shooting was done for the benefit of B.I.G. A B.I.G. member who shot someone from PDL and another person would gain notoriety within his gang, as "shooters

are a rare commodity.” Shooting a PDL member would also support the Duroc gang and make people more fearful of B.I.G.

Section 186.22, subdivision (f), defines a criminal street gang as an ongoing association or group, formal or informal, “having as one of its primary activities the commission of one or more of the criminal acts enumerated in . . . subdivision (e).” Section 186.22, subdivision (e)(1) lists assault with a deadly weapon; (e)(3) lists unlawful homicide or manslaughter; and (e)(4) lists the sale of narcotics. Deputy Welle testified these three offenses were primary activities of the gang, and he had investigated these types of primary activities. He described two predicate offenses by B.I.G. members which he helped investigate, including attempted murder, assault with a firearm, and shooting from an occupied vehicle. (§ 186.22, subd. (e)(6).) Asked what kinds of shootings were the primary or chief activities of B.I.G., Deputy Welle answered: “Retaliation shootings They’re not just shooting rounds in the air. These retaliation shootings are—they’re shooting at women, children and shooting into an occupied house.” (§ 186.22, subd. (e)(5).) He was currently investigating three shootings by B.I.G. members in retaliation for a double murder.

Thomas argues that the evidence was insufficient to show that the crimes were B.I.G.’s *primary* activities, because it does not “prove that B.I.G. *consistently and repeatedly* committed the types of crimes identified by [Deputy] Welle as the gang’s primary activities.”

We examine the record in the light most favorable to the jury’s true findings on the gang enhancement allegations. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1329.) Substantial evidence that “the commission of one or more of the statutorily

enumerated crimes [was] one of [B.I.G.'s] 'chief' or 'principal' occupations" must show the gang's members have "*consistently and repeatedly*" committed criminal activity listed in section 186.22, subdivision (e); the merely occasional commission of those crimes by the gang will not suffice. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324.) Evidence of past offenses by the gang, present offenses (including the crimes charged in the case before the court), and a gang expert's testimony (founded on conversations with gang members, personal investigation of gang crimes, and information obtained from law enforcement colleagues) all may be taken into account. (*Ibid.*)

Thomas cites *In re Alexander L.* (2007) 149 Cal.App.4th 605, in which the only evidence of primary activities was an expert's testimony that he " 'kn[e]w' " the gang had committed various offenses, "[n]o specifics were elicited as to the circumstances of these crimes, or where, when, or how [the expert] had obtained the information," and the expert did not directly testify that criminal activities were the primary activities of the gang. (*Id.* at pp. 611-612.) There is much more evidence in this case. Thomas does not challenge Deputy Welle's qualification as a gang expert. Deputy Welle testified that B.I.G.'s primary activities included assaults and shootings; he had personally investigated these and other primary activities of the gang, including the offenses of assault with a firearm and shooting from a motor vehicle; another primary activity of B.I.G. was retaliatory shootings, including shootings into an occupied house, and he was presently wrapping up an investigation into three such shootings by B.I.G. A jury could rationally conclude that B.I.G. consistently and repeatedly engaged in offenses

enumerated in section 186.22, subdivision (e), as the gang's primary activities.

3. We remand for a new sentencing hearing in light of Senate Bill No. 620

In supplemental briefing, Thomas argues we should remand his case to the trial court to allow the court to exercise its discretion to strike the firearm enhancements imposed under former section 12022.53, subdivision (h). We agree and remand.

When the trial court sentenced Thomas in July 2014, it had no discretion to strike firearm enhancements imposed under section 12022.53. (Former § 12022.53, subd. (h).) In October 2017, the Legislature passed Senate Bill No. 620, which took effect on January 1, 2018. Section 12022.53, subdivision (h), now states: “The 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 People concede the amendment applies retroactively to Thomas’s nonfinal judgment, but argue we should decline to remand because the record shows the trial court would not have exercised its discretion to strike the firearm enhancement.

“Remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

At Thomas’s sentencing hearing, the trial court stated that it had read the probation report and agreed with all the factors in aggravation. These were: (1) the crime involved great violence and great bodily harm “disclosing [a] high degree of cruelty, viciousness, or callousness”; (2) Thomas used a weapon in

committing the crime; (3) the crime's commission showed planning, sophistication, or professionalism; (4) Thomas's prior convictions were numerous or increasing in seriousness; (5) Thomas was on probation when he committed the crime; and (6) his prior performance on probation and parole was unsatisfactory. The court stated: "I can't consider No. 2 cited, which was that he used a weapon at the time, because that is part of the sentencing here. But certainly, as far as all the other factors in aggravation are concerned, I agree with them. I find no factors in mitigation. And, here, we did have separate victims of violent crimes. And so I believe the sentencing as set forth is appropriate here." The court imposed two separate 25-years-to-life terms for two section 12022.53, subdivision (d) firearm enhancements as part of Thomas's 90-years-to-life prison term. Nevertheless, "the trial court gave no indication whether it would exercise discretion to strike the firearm enhancement . . . if it had such discretion." (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.) "[S]peculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111.) We therefore remand for the trial court to exercise its independent discretion whether to strike or dismiss the firearm enhancements.

DISPOSITION

The judgment of conviction is affirmed, the sentence is vacated, and the matter is remanded for the limited purpose of allowing the trial court to consider whether to strike the firearm enhancements imposed under Penal Code section 12022.53.

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EGERTON, J.

We concur:

LAVIN, Acting P. J.

KALRA, J.*

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