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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. MARQUIS TURNER et al., Defendants and Appellants.	B289947 (Los Angeles County Super. Ct. No. GA100994)

APPEAL from judgments of the Superior Court of Los Angeles County, Jared Moses, Judge. Affirmed and remanded with directions.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant Marquis Turner.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Edwards.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Marquis Turner and Anthony Edwards were each convicted by separate juries of conspiracy to commit murder (Pen. Code,[1] § 182, subd. (a)(1)) (Count 1), seven counts of attempted murder (§§ 664 & 187) (Counts 2-8) and one count of shooting at an occupied vehicle (§ 246) (Count 9). Both juries found true the allegations that the offenses were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b). The juries also found true the allegations that a principal in the conspiracy and the attempted murders personally and intentionally discharged a firearm causing great bodily injury (§ 12202.53, subds. (d) and (e)(1)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c) & (e)(1)) and personally used a firearm (§ 12022.53, subds. (b) & (e)). With respect to the section 246 vehicle shooting offense, the juries found true the allegations that a principal personally and intentionally discharged a firearm causing great bodily injury (§ 12202.53, subds. (d) and (e)(1)). Turner waived his right to a jury trial on the allegation that he had suffered a prior serious felony conviction within the meaning of sections 667, subdivision (a)(1) and the three strikes law (§§ 667, subd. (d) & 1170.12, subd. (b)). The court found the allegation true.

The trial court sentenced Edwards to a total term of 246 years to life in state prison. The trial court sentenced Turner to a total of 332 years to life in state prison. For both defendants, the court stayed the sentence for the conviction for shooting at an occupied vehicle pursuant to section 654, and imposed various fines, fees and assessments.

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[1] Further undesignated statutory references are to the Penal Code.

Edwards contends the trial court erred prejudicially in admitting statements from a Facebook account attributed to Turner; Turner joins in this contention to the extent it is applicable to him.

Turner separately contends (1) there is "insufficient identification evidence" to support his conviction; (2) the trial court abused its discretion in permitting a defense witness to be impeached with a remote conviction; (3) the prosecutor misstated the law during closing argument; and (4) the court erred in its handling of matters which are in the sealed portion of the record. In a January 14, 2019, supplemental letter brief, Turner contends he is entitled to relief under Senate Bill No. 1437, which changed the law concerning felony murder and the applicability of the natural and probable consequences doctrine to murder.[2] Turner further contends that he is entitled to a remand to permit the trial court to exercise its discretion under Senate Bill No. 1393 whether to strike the section 667, subdivision (a)(1) enhancements.

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[2] Edwards joins in all Turner's arguments and contentions to the extent they are applicable to him. The five contentions listed in this paragraph are not applicable to Edwards. Turner's arguments involving Senate Bill No. 1437 are focused on his culpability as a driver or as the supplier of the car used in the shooting. The prosecutor argued that Edwards was one of the shooters, and Turner's arguments do not apply to Edwards's role in the shooting. The prosecutor made different closing arguments to Turner's and Edwards's separate juries, and so Edwards's jury did not hear the remarks which Turner contends constitute misstatements. The evidence of guilt is different as to the two men. The impeached witness offered evidence only as to Turner. Matters in the sealed record pertain only to Turner.

Pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), both defendants contend they are entitled to a remand for a determination of their ability to pay the assessed fines and fees.[3] They also contend the sentence on count 1, the conspiracy conviction, must be stayed pursuant to section 654; the section 12022.53 subdivision (d) enhancements to counts 2 through 8, the attempted murder convictions, must be stricken because only one person sustained great bodily injury; and the section 12022.53, subdivisions (b) and (c) firearm findings must be stricken as to count 9, the conviction for shooting at an occupied vehicle.

Defendants have not shown error in the public trial proceedings. Turner's nontestimonial Facebook messages were properly admitted against Edwards under Evidence Code section 1230 as a declaration against Turner's penal interest, including the portion of the messages identifying Edwards; the reference to Edwards was inextricably intertwined with the remainder of Turner's messages and increased Turner's own culpability. Substantial evidence supports Turner's convictions; there is no requirement that an eyewitness identify a defendant. The trial court did not abuse its discretion in permitting the prosecution to impeach Turner's mother with a 10-year-old fraud conviction: there is no set age limit on prior convictions which may be used for impeachment of a witness. The prosecutor did not misstate the law during closing arguments: he did not shift the burden of proof when he permissibly commented on Turner's failure to produce evidence and he accurately set forth the knowledge requirement for aiding and abetting.

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[3] Turner makes this claim in a supplemental letter brief filed on March 4, 2019.

In the sealed proceedings, we find no error or abuse of discretion in the trial court's rulings on evidence relevant to Turner. Assuming there was error, however, it would be harmless under any standard of review due to the trial court's ruling at page 2717, line 7 through page 2718, line 3 of the sealed transcript and for the reason given by the trial court at page 3654, lines 13 through21 of the sealed transcript.

Assuming Turner's convictions fell within the scope of Senate Bill No. 1437, he must raise his claims in a petition filed in the trial court pursuant to section 1170.95

With regard to the sentencing claims, there is substantial evidence to support an implied finding that defendants had a different objective in the conspiracy to commit murder offense than in the attempted murders, and so section 654 does not apply. The California Supreme Court has expressly held that imposition of multiple section 12022.53, subdivision (d) enhancements as to multiple convictions is permissible when only one person suffers great bodily injury. (*People v. Oates* (2004) 32 Cal.4th 1048, 1055 (*Oates*).) That case remains good law. Defendants have forfeited their *Dueñas* claims by failing to object in the trial court.

Respondent agrees the matter must be remanded as to Turner for the trial court to exercise its discretion under Senate Bill No. 1393. Respondent also agrees the abstracts of judgment for both defendants show inapplicable firearm enhancements pursuant to section 12022.53, subdivisions (b) and (c) for count 9; respondent maintains the jury found true the applicable subdivision (d) enhancement and the abstract must be corrected to reflect this finding. We agree with respondent on both issues.

We remand this matter as to Turner on the Senate Bill No. 1393 issue only. Following resolution of that issue, the clerk of the trial court shall prepare an abstract of judgment which correctly reflects the firearm enhancements found true by the jury for count 9. We affirm Turner's conviction in all other respects.

We instruct the clerk of the superior court to prepare an amended abstract of judgment for Edwards showing the firearm enhancement actually found true by the jury for count 9. We affirm Edwards's conviction in all other respects.

BACKGROUND

At about 2:20 a.m. on January 16, 2017, seven individuals were sitting in or standing around two cars on Buckeye Street near Garfield Avenue in Pasadena. Although this location was in territory claimed by the Pasadena Denver Lanes gang (PDL), none of the individuals were gang members. A light-colored car drove slowly past on Garfield, turned around, and then stopped in the intersection at Buckeye. The car was about 36 feet away from the group of individuals. One man got out of the car and started firing at the group; another man fired at the group from inside the car. The car then drove away. At the scene, police later found 21 bullet casings from two different types of bullets.

Only one person in the group of seven suffered a significant injury. Ariana Flores was shot in her right hand and lost her ring finger; she lost movement in other parts of her hand. Neyda Moya suffered a small cut on the back of her head.

The victims' descriptions of the car and the shooters differed. Joey Knowles testified the car was a gray Infiniti; Satchel Robinson testified the car was gray and may have been an Infiniti; Flores said the car was gray and believed it was a

Chrysler; Aurelio Garcia told police the car was a four-door silver Infiniti; Neyda Moya believed the car was a gray Cadillac. Katrina Moya said the car had tinted windows.

Pasadena Police Department Detective Jordan Ling obtained security videos of the area around the shooting. A video showed a four-door sedan with a sunroof driving on Garfield Avenue a few minutes before the shooting. The car had tape in the passenger window and was gold, silver or silver-gray in color. The windows did not appear to be tinted.

On February 3, 2017, Los Angeles County Sheriff's Department Deputy Dominic Milano spoke with appellant Turner, who confirmed that a nearby Cadillac CTS with tape residue on the passenger window was his car. The car was champagne gold with a sunroof. Turner is a Du Roc gang member.

On March 7, 2017, police stopped Edwards for speeding. Edwards led police on a chase, then eventually fled on foot with a rifle. Officers pursued and arrested him. They found an AR-15 rifle behind a shed along Edwards's route. It was later determined casings recovered from the Pasadena shooting had been fired from this gun. Police recovered two AR-15 ammunition magazines and four cell phones from the car Edwards had been driving; he admitted three of the phones were his. Edwards is a Du Roc gang member.

On March 27, 2017, San Bernardino County Sheriff's Deputy Gina Kuhn investigated a hit-and-run accident in Apple Valley involving a gold Cadillac. The Cadillac was blocking an intersection with its driver's door open and no one inside. Deputy Kuhn found a cell phone in the front seat and Turner's driver's license in the console. When police later searched Turner's

residence, they found two more cell phones. Turner was arrested soon thereafter.

Police obtained cell phone records for Turner and Edwards. These records showed that between January 15 and January 17, 2017 there were 25 interactions between the men's phones. Analysis of cell site date for the men's cell phones showed that on the evening of January 15, Turner's cell phone began moving from Apple Valley into eastern Los Angeles County. The phone was in Duarte, near Edwards's home on Flagstone Avenue between 1:10 a.m. and 1:20 a.m. on January 16, 2017. Edwards's cell phone was also near his home at the same time. Between 2:20 a.m. and 2:26 a.m., Turner's cell phone was located near the area of the shooting on Garfield Avenue in Pasadena. Edwards's cell phone was in the same area at 2:25 a.m.

Between 2:26 a.m. and 2:28 a.m., both cells phones were moving away from the crime scene towards Duarte. Between 2:36 a.m. and 2:57 a.m., both phones were in the same general area. Between 2:57 a.m. and 3:50 a.m., Turner's cell phone was near Flagstone Avenue in Duarte. Between 2:36 a.m. and 3:01 a.m., Edwards's cell phone was near Flagstone Avenue. Between 5:45 a.m. and 6:19 a.m., Turner's phone moved eastward from Duarte, arriving back in Apple Valley by 7:00 a.m.

Police also obtained records for a Facebook account registered in Turner's name and for one linked to Edwards. Records for Turner's account showed that on the afternoon of January 17, 2017, he posted a news article about the shooting in this case and sent another article about the shooting to someone through a direct message. Turner later sent messages about Edwards's arrest to a friend. Turner stated: "Yung ace [Edwards] got caught upk wld da choppa in Pomona" and "I knw

we went on route wid dat shit 3." In gang culture, "choppa" refers to a firearm and going "on route" can refer to going somewhere to commit violence. In response to a message concerning Edwards's arrest, Turner replied, "You think Yung Ace finna talk?"

After Turner was taken into custody himself, he spoke with police. Two of Turner's interviews with police were played at trial. In the first interview, on April 2, 2017, Turner told police that on January 16, 2017 he was at a vigil in Montclair with Edwards and other Du Roc gang members when they heard a PDL gang member had shot a Du Roc member. Edwards left the vigil immediately. Turner learned the next day that Edwards was the shooter in the January 16 incident. Turner learned about the shooting from people discussing it the next day. Turner believed Edwards and his brother were the only ones involved in the shooting. Turner said Edwards thought the people they were shooting at were rival gang members. Another Du Roc member did drive a 2003 gold Buick. Turner also explained one of his cousins stole the AR-15 used in the shooting and then gave it to Edwards. Turner said the shooters also used a MAC pistol. Turner explained he did not "mind" talking about Edwards and his brother because their family members put Turner's cousins in jail and this was "payback."

In his second interview, Turner said the Montclair vigil was at night and he had been in Duarte during the day. He said he eventually slept at his house in Apple Valley. Turner confirmed (626) 931-9323 was one of his cell phone numbers. When asked if he let anyone take his cell phone away from him and into another city, Turner replied, "No. Shouldn't . . . nobody even have my phone. Like I say, I . . . had my phone." Turner denied shooting

anyone in Pasadena and denied being in the car involved in the shooting.

Los Angeles County Sheriff's Detective Matthew Thomas and Pasadena Police Department Officer Milton White testified about the two gangs involved in this case. Officer White testified PDL was a Blood gang with primarily African-American members. In 2016, PDL was engaged in "all-out war" with the Du Rocs, a Crips gang. The shootings in this case took place about a third of a mile from a stronghold or hub of PDL. Officer White opined generally that committing crimes would earn a gang member respect within the gang. He noted that falsely taking credit for crimes would not be viewed favorably within the gang and might have repercussions.

Detective Thomas opined that if two Du Roc gang members drove into PDL territory and shot multiple times at a group of young people, the shooting would be for the benefit of a street gang by maintaining a presence within the community. The crimes were associated with the gang because the gang members committed them together. Participating in the crimes would also benefit gang members by elevating their status. It would not alter the detective's opinion if the shooting victims were not gang members because the shooting would still show that the Du Roc gang could go into enemy territory and commit acts of violence against anyone they chose. Word would get around about who committed the crimes even if no one shouted the name of the gang during the shooting.

Edwards did not call any witnesses in his defense.

Turner called Detective Thomas as his witness. Thomas testified that Turner had told police that Edwards's family had snitched on members of Turner's family and put two of them in

prison for 40 years. The detective agreed that if a Du Roc gang member believed his family had been disrespected, that member could want to administer "payback." Detective Thomas did not believe, however, retaliation would be accomplished by snitching.

Karina Luna, one of Turner's neighbors in Apple Valley, testified that at about 9:30 p.m. on the night of the shooting, Turner drove Luna's husband to a liquor store to get cigarettes. Luna and Turner's girlfriend talked during the 10 to 15 minutes the two men were gone. Upon their return, the men talked outside for 30 to 60 minutes. Luna went to bed about 11:00 p.m. Another neighbor, Tammy Koich, testified she saw Turner standing in front of his apartment door when she took out the trash between 9:00 p.m. and 10:00 p.m. that night.

Turner's mother, Matilda Jackson, acknowledged that although Turner and Edwards were both members of a Crips gang, the two men did not get along. She had never seen Turner give Edwards a ride anywhere. They had been involved in at least three physical fights with each other. Jackson testified her family had known the Edwards family for 20 years and the two families did not get along. She confirmed that three to five years earlier, Edwards's mother and aunt testified against Jackson's nephews in a criminal trial where both men were convicted. Turner had told Jackson he hated Edwards and his family and he was mad about the convictions.

DISCUSSION

I. *Turner's Facebook Messages Were Properly Admitted Against Edwards.*

Edwards contends the trial court erred prejudicially in admitting messages from Turner's Facebook account pursuant to

Evidence Code section 1230.[4] He contends the statements in the messages were hearsay and the trial court erred in finding that the portions of the statements which referred to him were against Turner's penal interest. He relatedly contends the statements were not reliable. The statements at issue were: "Yung ace [Edwards] got caught upk wld da choppa [firearm] in [P]omona" and "I knw we went on route [violent] wid da shit 3." The trial court did not abuse its discretion in admitting the statements.

A. *Evidence Code Section 1230*

Hearsay is of an out-of-court statement offered to prove the truth of the matter asserted in the statement. (Evid. Code, § 1200.) Hearsay is inadmissible unless it falls within an exception to the hearsay rule. (*Ibid*.) One such exception is found in Evidence Code section 1230, which provides in pertinent part: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if . . . the statement, when made, . . . so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

The proponent of a declaration against penal interest must show that the declarant is unavailable, the declaration is in fact against the declarant's penal interest, and the declaration is sufficiently reliable to warrant admission. (*People v. Lucas* (1995) 12 Cal.4th 415, 462.) We review a trial court's ruling

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[4] Turner joins in all of Edwards's contentions to the extent they are applicable to him. Although Edwards's arguments about reliability are clearly applicable to Turner's situation, the remainder of Edwards's arguments are not as clearly applicable. We note these differences where appropriate.

under Evidence Code section 1230 for an abuse of discretion. (*People v. Grimes* (2016) 1 Cal.5th 698, 711–712.)

B. *Statements by Gang Members Bragging About Crimes Qualify As Statements Against Penal Interest.*

Edwards expressly concedes the Facebook messages were incriminatory as to Turner.[5] Edwards contends, however, that Turner was a gang member and that a reasonable man in his position might well have bragged about his criminal activities and even exaggerated them to enhance his standing within his gang and his gang's standing in the community. We agree with respondent that Edwards is, in effect, arguing that Turner's statements were not against his personal interest. Any particular individual might have a personal interest in confessing (or even confessing falsely), such as protecting a loved one or feeling an overwhelming sense of guilt. Personal interest, however, is not the test for the admissibility of statements under Evidence Code section 1230, which asks if the statement is against declarant's *penal* interest.

A statement is against a declarant's penal interest if it subjects him to criminal liability. Thus, statements by gang members bragging about criminal activity are considered admissions against penal interest. (See *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1400–1401 [gang member's "bragging" which incriminated himself and fellow gang members was a statement against penal interest]; *People v. Arceo* (2011)

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[5] Turner has not addressed this issue. Arguably his joinder in Edwards's contentions is a joinder in this concession. Even if it were not, we would have no difficulty finding the statements incriminatory as to Turner, as we discuss in subsection 3 below.

195 Cal.App.4th 556, 576 [gang member's self-incriminatory "bragging" were statements against penal interest.])

C. *Non-testimonial Statements Which Implicate a Co-Defendant May Qualify for Admission Under Evidence Code Section 1230.*

Edwards next contends that even if Turner's statements were against Turner's penal interest, Turner's identification of Edwards as the shooter was not against Turner's interest and should have been excluded or redacted. For discussion purposes, we number the two statements at issue: (1) "Yung ace [Edwards] got caught upk wld da choppa [firearm] in [P]omona" and (2) "I knw we went on route [violent] wid da shit 3."

The trial court acknowledged Edwards's argument that Turner's first statement, taken in isolation, was not self-incriminatory, but the court also recognized the statement need not be viewed in isolation. The court found the first statement "segues directly into" second statement, which was self-inculpatory. The court found the two statements together could be interpreted in the manner advanced by the People—that Turner was admitting that he drove to Pasadena with Edwards with the AR-15 rifle in the vehicle.[6]

A non-testimonial declaration against penal interest is admissible even if portions of the declaration implicate a co-defendant, provided that the statement is not "exculpatory, self-serving, or collateral" and is "inextricably tied to and part of a specific statement against penal interest." (*People v. Samuels*

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[6] The prosecutor represented that the p in "upk" was a reference to a Pasadena Denver Lanes and the k was for killer. This interpretation was not advanced at trial, and the phrase "upk" was treated as simply the word "up."

(2005) 36 Cal.4th 96, 120–121 [declarant's statement that defendant had paid him for the killing was disserving because "it intimated [declarant] had participated in a contract killing—a particularly heinous type of murder—and in a conspiracy to commit murder"].)[7]

Edwards contends his identity did not make Turner more or less culpable. Edwards cites to *People v. Lawley* (2002) 27 Cal.4th 102 (*Lawley*) in support of his argument.

We find the statements in this case to be more similar to the statements in *People v. Cortez* (2016) 63 Cal.4th 101 than those in *Lawley*. As our Supreme Court explained in *Cortez*, a shooter's statement implicating his co-defendant was disserving there because the shooter knew that being linked to his co-defendant would implicate him in a drive-by shooting for which his co-defendant had been arrested. (*Id.* at pp. 126–127.)

There is a similar linkage here. Turner's second sentence, about going "on route" with "da shit" is inculpatory, but also vague and broad. As gang expert Detective Thomas testified, the phrase "on route" indicates "going to do violence or that violence would have occurred." Read with the first sentence, it becomes clear that "da shit" refers to a "choppa," that is, a gun. In this regard, the two sentences are intertwined and increase Turner's culpability; gun violence is the worst form of violence. Considered with the reference to Edwards having possession of the gun when arrested, "da shit" is a specific gun: the rifle used in

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[7] A different analysis applies if the declaration involves testimonial hearsay. Here, such concerns are not present because Turner's statements are not testimonial and so do not implicate the Confrontation Clause. (*People v. Washington* (2017) 15 Cal.App.5th 19, 28–29.)

the shootings in this case. The two statements together thus suggest that Turner went "on route" with Edwards, and was involved in a shooting using the rifle used in this case.

Turner's statements tying himself to the rifle and to Edwards strengthened the case that Turner was involved in these shootings. Cell phone records showed Edwards and Turner travelling in tandem (if not together) to and from the location of the shooting. There is no evidence that they travelled in a similar manner on another occasion, particularly one which involved violence. Thus, Turner's statement that he was with Edwards and the rifle used in this case makes it more likely that he, in fact, was involved in the shootings in this case.

D. *Turner's Statements Were Authenticated and the Trial Court Did Not Abuse Its Discretion in Finding the Statements Trustworthy.*

Edwards further contends that even if the statements incriminate Turner, they are not reliable and so should not have been admitted. He maintains it cannot be said who actually posted the statements. As is shown by the California cases Edwards cites, he is really claiming the postings were not properly authenticated. (See *People v. Beckley* (2010) 185 Cal.App.4th 509, 515–518 [photograph from MySpace page and gang roster downloaded from a web page were not properly authenticated and should not have been admitted]; *United States v. Jackson* (7th Cir. 2000) 208 F.3d 633, 638 [website postings properly excluded because they "lacked authentication"].)

"Authentication of a writing . . . is required before it may be admitted in evidence. (§§ 250, 1401.) Authentication is to be determined by the trial court as a preliminary fact (§ 403, subd. (a)(3)) and is statutorily defined as 'the introduction of evidence

sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is' or 'the establishment of such facts by any other means provided by law' (§ 1400)." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266 (*Goldsmith*).) "When the object sought to be introduced is a writing, this preliminary showing of relevancy usually entails some proof that the writing is authentic—*i.e.,* that the writing was made or signed by its purported maker." (*Ibid*.) Authentication is often supplied by the person who created the writing or witnessed it being created but it also "may be supplied by other witness testimony, circumstantial evidence, content and location." (*Id*. at p. 268.) When dealing with a personal page on a website such as Facebook or MySpace, ownership of the page may be shown by the posting of personal photographs, communications and other details, particularly when there is a "pervasive consistency of the content of the page." (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1436 (*Valdez*).)

There is no requirement that the proponent of the writing eliminate all possibility of another author, or of tampering with the writing. All that is necessary is a prima facie case. " 'As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' " (*Goldsmith*, *supra*, 59 Cal.4th at p. 267; see *People v. Bacon* (2010) 50 Cal.4th 1082, 1102–1103 [trial court does not resolve conflicts in the evidence submitted on preliminary fact question].)

Here, Facebook records for Turner's account showed the "pervasive consistency" which supports a prima facie case of authenticity. (See *Valdez*, *supra,* 201 Cal.App.4th at p. 1436.)

The account was created in December 2015, well before the shootings in this case and was registered to Marquis Duran Turner. The records show that the page's owner repeatedly sent Turner's cell phone number ((626)-931-9323) to people. The Facebook records were thousands of pages long with numerous photographs; Turner was "featured in most of those photographs." Turner's Cadillac was also shown in numerous photographs. The records contained multiple uses of gang-related language, specific to the Du Roc gang of which Turner was a member. There were multiple photographs showing individuals, including Turner, indicating Du Roc gang allegiance by, among other things. making gang signs and displaying gang tattoos.

The reliability of the hearsay statement themselves are assessed differently. "There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception. 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." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.) "[T]he least reliable circumstance is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others." (*Id*. at p. 335.) "[T]he most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." (*Ibid*.)

Here, Turner made his statements to a Facebook friend in a private message to a friend. Private messages foster uninhibited

disclosure. There is no coercion at all present in such an exchange of messages. If Turner did not like the direction the exchange was heading, he could simply stop replying, close the Facebook website or app, and go about his normal business. Thus, the trial court did not abuse its discretion in finding prima facie authentication and sufficient indicia of reliability in the statements.

II. ***Substantial Evidence Supports Turner's Conviction.***

Turner contends there is insufficient evidence to support his conviction because no witness saw Turner at the scene, his car's license plate was not on the surveillance video, he denied participating in the shooting, and he had an alibi.

" 'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]' " (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) "If we determine that a rational trier of fact could have

found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15 of the California Constitution." (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

Turner owned a Cadillac which was very similar, if not identical, to the car in the surveillance video. Both cars had some sort of adhesive residue on a passenger window. Cell phone records and analysis showed Turner's cell phone was in a location in Duarte near Edwards's residence before the shootings, moved to Pasadena shortly before the shootings, was in the area of the shootings at the time of the shootings, and then moved back to the Duarte location. The phone moved too fast for the person carrying it to be on foot. Turner told police he would not lend his cell phone to another person to take to another city and that no one else should have had his phone. Cell phone records and analysis showed similar movement for Edwards's cell phone and communication with Turner's phone prior to the shooting. Edwards was later found in possession of one of the weapons used in the shooting. Viewing this evidence in the light most favorable to the judgment, this evidence places Turner at the shooting scene at the time of the shooting with one of the shooters.

Both Turner and Edwards were members of the Du Roc gang, and the shooting took place in the territory of rival gang PDL at a time of elevated tension between the gangs. This is evidence of motive. The car drove slowly past the victims, turned around, and stopped near the victims before the shooting started, supporting an inference of planning and intent.

Turner's subsequent messages supported the inference he was involved in the shooting. Turner sent Facebook messages stating that he and others ("we") had gone "on route" with the rifle used in the shooting. Turner also shared news articles about the shooting the day after it occurred. Although he did not comment on the article, expert testimony showed that it is common for gang members to share news articles about crimes they committed to gain status within the gang.

Turner points to other evidence which contradicts or undermines the above evidence, specifically the fact that a number of witnesses described the car used in the shooting as gray in color and either an Infiniti or a Chrysler and that Turner's firearm could not fire with casings found at the scene. Jurors were able to view the surveillance video and a photo of Turner's car and decide for themselves if the appearance of the car in the video matched Turner's car. The People's theory of the case was that Turner was the driver and two passengers were the shooters, and so Turner's possession of any particular firearm is not relevant.

"In our limited role on appeal, '[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' [Citation.]" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 161–162.)

III. *The Trial Court Properly Allowed The People To Impeach A Defense Witness With a 10-Year-Old Conviction.*

Turner contends the trial court abused its discretion in ruling that defense witness Jackson's 2008 felony fraud conviction could be used to impeach her.

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352." (*People v. Clark* (2011) 52 Cal.4th 856, 931, fn. omitted.) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion." (*Id*. at p. 932.)

"When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity [and] whether it is near or remote in time." (*People v. Clark*, *supra,* 52 Cal.4th at p. 931.) If the witness to be impeached is the defendant, the court should also consider whether the conviction "is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify." (*Ibid*.)

Here, there is no dispute that fraud is a crime of moral turpitude. Turner argues Jackson lived a crime-free life since her 2008 conviction and had rehabilitated herself, and so the trial court abused its discretion in admitting the conviction. Turner did not make this argument in the trial court. The People did not

offer evidence of other criminal conduct since 2008.[8] Thus, the record is effectively silent on Jackson's conduct since the fraud conviction.

In the trial court, Turner argued only that the offense was too remote in time. There is no dispute the trial court was aware of the age of the conviction, but found that "10 years is within a, certainly, reasonable period of time." Turner contends the reasoning of *People v. Pitts* (1990) 223 Cal.App.3d 1547 establishes the trial court abused its discretion. *Pitts* affirmed a trial court's use of 10 years as a presumptive cut-off date for the admissibility of prior convictions, that is, convictions "more than 10 years old cannot be used for impeachment." (*Id.* at p. 1554.) Here, Jackson's conviction was 10 years old, not "more than 10 years old" and so does not match the presumptive cut-off in *Pitts*. More importantly, *Pitts* did not affirm the trial court "as stating an absolute, ironclad rule from which it would never budge no matter what." (*Ibid.*) The court noted there is " 'no consensus among courts as to how remote a conviction must be before it is too remote.' " (*Ibid.*)

Assuming Jackson should not have been impeached with the conviction, and the jury found her not credible because of the conviction, there is no reasonable probability that Turner would have received a more favorable outcome if Jackson's conviction

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[8] We agree with Turner it is reasonable to infer that if Jackson had committed a more recent crime of moral turpitude, the prosecutor would have mentioned it. However, because Turner did not argue that Jackson had lived a crime-free life or had rehabilitated herself, the People had no reason to proffer evidence of other crimes. Thus, we cannot infer Jackson had no other criminal convictions.

had been excluded. (See *People v. Collins* (1986) 42 Cal.3d 378, 393 [applying reasonable probability standard of review; see *People v. Watson* (1956) 46 Cal.2d 818].) We do not agree with Turner that the evidence was so inflammatory that he was denied a fair trial and so the more stringent standard of review in *Chapman v. California* (1967) 386 U.S. 18 applies, but if it did we would find the error harmless under that standard as well.

Jackson did offer evidence that Turner had strong negative feelings toward Edwards. However, her testimony was not the sole or even the strongest, testimony on this topic. Jackson was, after all, Turner's mother, and could be expected to have a natural bias in his favor. More importantly, Turner himself "snitched" on Edwards to the police and explained he did so to payback to Edwards because Edwards's family had testified against Turner's cousins. This was quite powerful evidence of the feud between the families.

At the same time, there was very strong evidence that if Edwards and Turner were feuding with each other, it did not prevent them from working together to commit the charged crimes. Both men were members of the same gang. More particularly, cell phone evidence showed 25 interactions between the men's phones between January 15 and January 17, 2017. Cell data analysis showed the men's phones were together at or near Edwards's house about an hour before the shootings, and then travelled together or in concert to the scene of the shooting in Pasadena and back to Edwards's residence. Thus, impeachment of Jackson's testimony that the two men were feuding was harmless under any standard of review.

IV. ***The Prosecutor Did Not Misstate The Law in Closing Argument.***

Turner contends the prosecutor committed misconduct during closing argument when he (1) shifted the burden of proof by claiming the defense should have presented exculpatory evidence and (2) misstated the law by telling jurors they could convict Turner if he merely lent his car to the shooters. We see no burden shifting arguments or misstatement of the law.

A. *The Prosecutor's Arguments Did Not Shift the Burden of Proof.*

Turner challenges four sets of remarks. As Turner acknowledges, the prosecutor may properly remark on the state of the evidence and the failure of the defense to call logical witnesses, to introduce material evidence and to rebut the People's case. (*People v. Medina* (1995) 11 Cal.4th 694, 755; *People v. Woods* (2006) 146 Cal.App.4th 106, 112.) That is what the prosecutor did here.

1. Other car photographs

The prosecutor pointed out that Turner admitted owning a Cadillac CTS, and argued that it matched the car in the surveillance video. The prosecutor then stated "If there was an Infiniti or a Chrysler or a Dodge that looked anything like this, you would have seen a picture of it from the defense." The prosecutor also stated, "[I]f there was another car in the history of cars that looked like this car, other than the defendant's car, the defense would have shown you a photograph of that."

We understand the prosecutor's remarks as comment on Turner's failure to rebut evidence that the car in the surveillance video was a Cadillac CTS like Turner's. It was certainly within the province of the defense to produce evidence of another make

or model of car which looked like the car in the video, particularly since witnesses had given Turner a starting point with their statements that the car used in the shooting looked like an Infiniti or Chrysler.

2. Alternate cell phone numbers

The prosecutor asked, "Do you think if there was any evidence that [Turner] had any other phone number, was giving out any other phone number, or had lost his phone number and was telling people to call a different phone number, it would have been in those records which anyone can search and find?"[9] The prosecution had introduced evidence that the cell phone which was tracked traveling to the murder scene belonged to Turner. The prosecutor's remarks thus were comments on Turner's failure to rebut this evidence by providing records showing frequent usage of another cell phone or by calling witnesses to testify they been had given an alternate cell phone number for Turner.

3. Jackson

In rebuttal closing argument, the prosecutor asked, "Matilda Jackson, [Turner's mother], what did she really tell you? She did not provide an alibi. She did not provide the defendant's alternate cell phone. She wasn't there the night of the shooting." This statement cannot reasonably be understood as a comment

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[9] Turner contends the prosecutor made a similar argument at page 3347 of the reporter's transcript, but we see no suggestion on that page that Turner should have produced evidence of any sort. The entire page is devoted to an exposition of what the cell phone records showed. Turner also contends he objected, but the transcript does not reflect an objection or any statement by defense counsel.

on Turner's failure to produce evidence. It is simply a comment that Jackson did not provide any testimony useful to the defense. The statement acknowledged Jackson could not offer any evidence about Turner's whereabouts at the time of the shooting.

4. Lack of GPS data

In rebuttal closing argument, the prosecutor said: "The CTS infotainment system. Now, what you did hear is that Detective Ling tried to get the GPS records for this, which, you know, the fact that we have Turner's cell phone at the crime scene is just as inculpatory as this evidence would be. But if it was that important to the defense it was in evidence and if there's any way possible to have gotten any GPS records on that, the defense in this case would have done it. They chose not to."

The prosecutor's remarks are a response to the defense closing argument. Defense counsel asked why, after an initial failed attempt to extract GPS information from the OnStar system in Turner's Cadillac, detectives did not follow up and try again to extract the data. She asked, "Why wouldn't they follow up on evidence that strengthens their case?" This is a suggestion that the GPS evidence might not have helped the prosecution. The People's response was an alternate suggestion that perhaps the records would not have helped the defense. It was a fair comment on a question framed by Turner.

B. *The Prosecutor's Remarks Did Not Misstate the Law on Aiding and Abetting.*

Turner contends the prosecutor misstated the law by telling the jurors they could convict Turner if he simply lent his car to the perpetrators. That is not what the prosecutor said. The prosecutor argued: "And if you believe beyond a reasonable

doubt that the defendant knowingly provided that car, knowing that there was going to be a shooting, vote guilty."

Aiding and abetting requires that the defendant have knowledge of the unlawful purpose of the perpetrator and must intentionally promote the commission of that crime by acts or advice. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

Lending a car to someone knowing it will be used in a crime is an intentional act promoting the crime. Thus, the prosecutor did not misstate the law.

Turner similarly contends the prosecutor misstated the law by telling the jury that he could be guilty of the charged crimes even if he were only a passenger in the car. The prosecutor's argument was more nuanced than that. The prosecutor argued that he believed the evidence showed that Turner was the driver. He continued: "And if he wasn't the driver, then he was in the car because his cell tower records show he was there, and he uses the word 'we' when he talks about going on route. And the only way I can think of 'we' is to include me. [¶] So the thing I want you to understand with respect to how he's liable for this crime is that it does not matter that he did not pull the trigger on the AR-15 or the 9mm firearm."

There was testimony that "on route" was a term that gang members use to refer to going somewhere to commit violence. Thus, the prosecutor was arguing that even if Turner were simply a passenger in the car, he went along with knowledge that violence was planned, intending to be part of it in some way. This is a legally correct application of the law of aiding and abetting to the facts of this case. (See *People v. Prettyman*, *supra,* 14 Cal.4th at p. 259.)

V. *Section 654 Does Not Apply To Defendants' Conspiracy Conviction.*

Turner contends the trial court should have stayed the sentence on count 2 pursuant to section 654 because the perpetrator harbored the same intent for the conspiracy to commit murder count and the seven attempted murder counts. He points out there were only seven victims and eight separate sentences punishes him twice for shooting at one of the seven victims. Edwards joins this contention.

Section 654 bars multiple punishments for convictions arising out of an indivisible course of conduct committed pursuant to a single criminal intent or objective. (*People v. Hester* (2000) 22 Cal.4th 290, 294–295.) Section 654 does not bar multiple punishment for multiple objectives in an indivisible course of conduct. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564.)

" 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor.' " (*People v. Britt* (2004) 32 Cal.4th 944, 951–952 [potentially disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 343–344 & fn. 14].) "[C]ases have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous." (*Britt*, at p. 952.) Further, the multiple victim exception allows for punishment for acts of violence against more than one victim. (*People v. Deegan* (2016) 247 Cal.App.4th 532, 544.)

Punishment for both conspiracy and the underlying substantive offense is not permitted when the conspiracy contemplated only the act performed in the substantive offense or when the substantive offense is the means by which the conspiracy is carried out. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 615.) However, "[p]unishment for both conspiracy and substantive offenses has been upheld when the conspiracy has broader or different objectives from the specific substantive offenses." (*Id.* at pp. 615–616.)

"Intent and objective are factual questions for the trial court, which must find evidence to support the existence of a separate intent and objective for each sentenced offense." (*People v. Jackson* (2016) 1 Cal.5th 269, 354.) "A trial court's express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence." (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

Turner focuses more on the prosecution's theory of the case than on the evidence. The prosecutor argued that Turner and Edwards viewed the two black victims in the group as "stripes, a trophy, a notch on their belt. It doesn't matter that they're not PDL gang members." The prosecutor added, "All that matters is that they were young, they were black and they were in the right neighborhood." Turner claims these remarks show the shooters had only one narrow objective for their conspiracy.

The prosecutor's remarks refer to appellants' reasons for shooting at the group once they came across it: the group contained young black men. As the prosecutor also argued with respect to Turner: "That's what this defendant was doing. He was hunting. [¶] And in his hunt, in his pursuit for *perceived*

rivals, they make a left turn" and see the group of young people standing in the street. (Italics added.) The prosecutor further argued that gang evidence showed Turner was "gathering intelligence . . . about the enemy and sharing it to other people. [¶] This is motive. This, posting pictures of rival gang members and direct messaging your fellow gang members, is evidence of motive." Thus, taken as a whole, the prosecutor's theory of the case was that Turner was driving around looking for rival gang members to kill when he came across the group in the street.

The prosecutor made a similar argument about Edwards: "They did not intend to kill Ariana Flores. They planned to kill members of the Pasadena Denver Lanes. [¶] . . . [¶] So please don't be confused about the plan to kill rivals and the fact that they attempted to kill those young people."

Turner primarily relies on the prosecutor's statements during closing argument. Our inquiry, however, focuses on the sufficiency of the evidence to support the trial court's implied findings in support of separate sentences. We find substantial evidence supports an implied finding that the objective of the conspiracy was broader than attempting to kill the group on the street. The gang evidence alone supports an inference that the Du Roc members' objective was to find and kill PDL gang members.

Because the conspiracy in this case extended to more people that the seven victims, the trial court properly sentenced defendants separately for the conspiracy conviction and the seven attempted murder convictions. (See *People v. Vargas* (2001) 91 Cal.App.4th 506, 553, 570–571 [separate sentences for conspiracy to commit murder and murder were proper when defendant's gang conspired to kill persons other than the victim];

People v. Cooks (1983) 141 Cal.App.3d 224, 316–317 [conspiracy to kill "white people" was not limited to one victim, but extended to others and so separate sentences were permissible].)

VI. ***The Enhancements For Count 9 Must Be Corrected.***

The abstracts of judgment for appellants both show section 12022.53, subdivision (b) and section 12022.53, subdivision (c) enhancements to their count 9 convictions for shooting at an occupied vehicle. Defendants contend and respondent agrees that these enhancements do not apply to the underlying offense and were never found true by the jury. Further, the trial court did not orally impose such enhancement terms. The presence of the enhancements is a clerical error, and we order them stricken and the abstracts of judgment corrected.

VII. ***A Single Injury Can Support Imposition Of Multiple Section 12022.53, Subdivision (d) Enhancements.***

Turner contends the trial court erred in imposing multiple section 12022.53, subdivision (d) enhancements for the discharge of a firearm resulting in great bodily injury because only one of the seven victims suffered great bodily injury. Edwards joins in this contention.

As Turner acknowledges in his reply brief, our Supreme Court has held that multiple enhancements are permissible. (*Oates*, *supra*, 32 Cal.4th at p. 1055.) The *Oates* court explained that "by its terms, the subdivision (d) enhancement applies to 'any person' who, 'in the commission of' a specified felony, 'personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, *to any person other than an accomplice*.' " (*Ibid*.) The *Oates* court noted that "the parties here agree that the phrase, 'any person other than an accomplice,' does not mean 'the victim' of the underlying crime."

(*Ibid*.) The Court concluded that "[b]ased on the single injury to [the injured victim], the requirements of a subdivision (d) enhancement are met as to *each* of defendant's five attempted murder convictions, including those not involving the attempted murder of [the injured victim]." (*Ibid*.)

The *Oates* court pointed out that "the Legislature knows how to limit enhancements to harm done to a 'victim' when that is its intent." (*Oates, supra*, 32 Cal.4th at p. 1056.) In subdivision (f), the Legislature imposed "specific limitations on imposing multiple enhancements, but did not limit imposition of subdivision (d) enhancements based on the number of qualifying injuries." (*Oates*, at p. 1056.) The *Oates* court found "[t]he enactment of this subdivision shows that the Legislature specifically considered the issue of multiple enhancements and chose to limit the number imposed only 'for each crime,' not for each transaction or occurrence and not based on the number of qualifying injuries." (*Id*. at p. 1057.)

Turner contends *Oates* is no longer binding authority because it was decided prior to the 2017 enactment of Senate Bill No. 620, which gave trial court new discretion to dismiss section 12022.5 and section 12022.53 firearm enhancements pursuant to section 1385. We do not agree.

Justice Werdegar, in her concurring opinion in *Oates*, agreed with the majority that section 12022.53 as written allowed imposition of multiple subdivision (d) enhancements for great bodily injury when only one of several victims suffered such injury. (*Oates*, *supra,* 32 Cal.4th at pp. 1070–1071.) She expressed skepticism, however that this was the result the Legislature intended: "I suspect section 12022.53 was not meant to authorize imposition of multiple 25-year-to-life enhancements

for a single instance of great bodily injury. For whatever reason, however, the Legislature failed to include any clear limitation to this effect in the statute. In such cases, this court is powerless to rewrite the law but must depend on the Legislature to clarify its intent." (*Oates*, at p. 1071)

Despite the holding of the majority in *Oates*, and J. Werdegar's indication that the Legislature should take action if it did not agree with the holding of *Oates*, nothing in Senate Bill No. 620 changes the language of subdivision (d) or adds a limitation on the number of subdivision (d) enhancements which may be imposed. *Oates* remains binding authority for its interpretation of the meaning and significance of the phrase "to any person other than an accomplice." The trial court did not err in imposing multiple subdivision (d) enhancements.

VIII. ***Turner Is Entitled To A Remand Pursuant To Senate Bill No. 1393.***

The passage of Senate Bill No. 1393 during the pendency of this appeal gave courts discretion to strike serious felony conviction enhancements imposed pursuant to section 667. Turner contends this matter must be remanded to give the trial court the opportunity to exercise its discretion and consider whether to strike the enhancement. Respondent agrees. We agree as well. As respondent points out, the trial court did not clearly indicate at sentencing that it would not have dismissed the enhancement in any event.

IX. ***The Dueñas Claim Is Forfeited.***

Turner contends a remand is necessary under *Dueñas* to afford him the opportunity to request a hearing on his ability to pay $360 in fees (§ 1465.8), $270 in assessments (Gov. Code, § 70373), and a $10,000 restitution fine (§ 1202.4, subd. (b)).

Identical fees, assessments and fines were imposed against Edwards, who joins in all of Turner's contentions that are applicable to him.

Respondent contends Turner has forfeited this claim by failing to request a hearing in the trial court. Turner replies he did not forfeit the claim because *Dueñas* was decided after he was sentenced in this case.

As we previously explained in *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154–1155: "*Dueñas* was foreseeable. Dueñas herself foresaw it. The *Dueñas* opinion applied 'the *Griffin-Antazo-Bearden* analysis,' which flowed from *Griffin v. Illinois* (1956) 351 U.S. 12 [100 L.Ed. 891, 76 S.Ct. 585], *In re Antazo* (1970) 3 Cal.3d 100 [89 Cal.Rptr. 255, 473 P.2d 999], and *Bearden v. Georgia* (1983) 461 U.S. 660 [76 L.Ed.2d 221, 103 S.Ct. 2064]. (*Dueñas*, *supra,* 30 Cal.App.5th at p. 1168.) The *Dueñas* opinion likewise observed ' "[t]he principle that a punitive award must be considered in light of the defendant's financial condition is ancient." [Citation.] The Magna Carta prohibited civil sanctions that were disproportionate to the offense or that would deprive the wrongdoer of his means of livelihood. [Citation.]' (*Dueñas*, *supra,* 30 Cal.App.5th at p. 1170.) [¶] *Dueñas* applied law that was old, not new. We therefore stand by the traditional and prudential virtue of requiring parties to raise an issue in the trial court if they would like appellate review of that issue."

X. *Turner Must File A Petition In The Trial Court To Obtain The Benefit Of Senate Bill No. 1437.*

In a supplemental brief, Turner contends all his convictions should be vacated due to the enactment of Senate Bill No. 1437 while his case has been pending on appeal. Turner argues that

Senate Bill No. 1437 limits convictions for murder obtained under the natural and probable consequences doctrine.

We agree with our colleagues in Division 5 of this District Court of Appeal that a defendant must seek Senate Bill No. 1437 relief by filing a petition in the trial court pursuant to section 1170.95 even when his case is not yet final. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 727–728.) We decline Turner's invitation to reach the merits of his claim.

XI. ***The Trial Court Did Not Err Or Abuse Its Discretion On Any Issue Raised In The Sealed Proceedings.***

Near the close of the People's case-in-chief, the prosecutor disclosed previously undisclosed evidence. The trial court found that some of this evidence should have been disclosed before trial. The trial court directed Turner's counsel not to discuss the matter with Turner, and transcripts of the proceedings were ordered sealed. Those transcripts remain sealed and the parties filed their briefing on this issue under seal. We have reviewed the sealed briefing and transcripts and find the trial court did not err or abuse its discretion in handling this issue. We discuss Turner's claims of prejudice in limited detail in this opinion. On the record before us, we find no prejudice to Turner from this late disclosure (1) due to the trial court's ruling at page 2717, line 17 through page 2718, line 3 of the sealed transcript and (2) for the reason given by the trial court at page 3654, lines 13 through 21 of the sealed transcript.

A. *Prejudice - Strategy*

Counsel argues Turner was in fact prejudiced. If the evidence had been disclosed before trial, counsel would have been able to adapt the defense strategy and more accurately advise Turner on whether to seek a plea deal. There is nothing in the

record on appeal suggesting what those possible adaptations would have been or explaining how they would have made a more favorable result reasonably possible or probable. Similarly, the record on appeal is not adequate to assess what plea deal might have possible before trial. Accordingly, this claim fails.

B. *Prosecutorial Misconduct*

Counsel argues Turner was prejudiced by two instances of prosecutorial misconduct related to the late-disclosed evidence and committed during the sealed proceedings. The first instance occurred at page 2723, lines 2 through 5 of the sealed transcript. Counsel did not object to those statements, and so has forfeited the claim. Assuming the claim was not forfeited, we do not agree with Turner that the statements constitute misconduct. The second instance is described at pages 3650 through 3652 of the sealed transcript. We find no error in the trial court's ruling on this issue as set forth at page 3651, lines 6 through 10, for the reasons given by the prosecutor at page 3650, line 22 through page 3651, line 5, all in the sealed transcript.

C. *Conflict Of Interest*

The trial court ordered that counsel not discuss the contents of the sealed proceedings with Turner. Turner contends this created a conflict of interest between him and his attorney, and that prejudice is presumed from such a conflict. Counsel raised this issue during the sealed proceedings and the trial court found no conflict. The trial court's ruling is found at page 2742 of the sealed transcript. Assuming for the sake of argument that the trial court erred in making this ruling, Turner was required to show prejudice but has failed to do so.

"A criminal defendant is guaranteed the right to the assistance of counsel by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. This constitutional right includes the correlative right to representation free from any conflict of interest that undermines counsel's loyalty to his or her client." (*People v. Doolin* (2009) 45 Cal.4th 390, 417 (*Doolin*).) Thus, "claims of Sixth Amendment violations based on conflicts of interest are a category of ineffective assistance of counsel claims that, under [*Strickland v. Washington* (1984) 466 U.S. 668], generally require a defendant to show (1) counsel's deficient performance, and (2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been different." (*Doolin,* at p. 417.) " 'As a general proposition, such conflicts "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or his own interests. [Citation.]" ' " (*Ibid*.)

Turner mistakenly contends prejudice is presumed from a conflict of interest. (*Doolin*, *supra*, 45 Cal.4th at p. 428 [presumption applies only to conflicts arising from multiple concurrent representation; "*Strickland* provides the appropriate analytic framework for assessing prejudice arising from attorney conflicts of interest outside [that] context"].) In the sealed portion of his Opening Brief, at pages 74 and 75 of the Turner briefly claims some specific prejudice from the limitation on discussions. We see no prejudice, for the reason given by the trial court at page 3654, lines 13 through 21 of the sealed transcript.

Turner relatedly contends he had a constitutional right to be personally present at the sealed proceedings because it was a critical stage of the proceedings. Clearly, defendants do not have

a right to be present at all hearings. Defendants are not permitted to attend *Pitchess*[10] hearings, for example. The sealed proceedings were a discussion about newly-disclosed evidence. Turner has not provided any authority establishing that the sealed proceedings were in fact a critical stage of the proceedings at which he was entitled to be personally present.

D. *Brady Violation*

Turner contends the late disclosure was a violation of *Brady v. Maryland* (1963) 373 U.S. 83. We do not agree.

The three components of a *Brady* violation are: " 'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' " (*People v. Johnson* (2006) 142 Cal.App.4th 776, 782 (*Johnson*).) Impeachment evidence falls under *Brady* if it is "evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest." (*United States v. Bagley* (1985) 473 U.S. 667, 676.) The late disclosed evidence that was the subject of the sealed proceedings did not satisfy the first component of a *Brady* violation.

Further, even if the delayed disclosure satisfied the first component, Turner would be required to prove prejudice, and as we discuss above, he has not done so. (See *Johnson*, *supra*, 142 Cal.App.4th at pp. 782-783.) Prejudice is not presumed.

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[10] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

DISPOSITION

The matter is remanded as to Turner only for a hearing on his section 667, subdivision (a), enhancement. The clerk of the superior court is instructed to prepare an amended abstract of judgment for Turner and one for Edwards both correcting count 9 for each defendant to show only the firearm enhancement found true by the jury. The judgments of conviction are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J.

WILEY, J.