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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. JAIME ALBERTO ESPINOZA, Defendant and Appellant.	B280087 (Los Angeles County Super. Ct. No. MA064981)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Strassner, Judge. Remanded for reconsideration of sentence; judgment of conviction otherwise affirmed.

Janet Uson, 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, Shawn McGahey Webb and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

After a verbal altercation with rival gang members, Jaime Espinoza pursued and shot at them, seriously injuring young K.S. A jury convicted Espinoza of various offenses, including premeditated, willful and deliberate attempted murder. On appeal, he contends that the trial court erred by not allowing him to discover the identity of an informant cellmate to whom Espinoza confessed his crimes. He also contends he was entitled to self-defense and attempted voluntary manslaughter based on imperfect self-defense instructions, that the prosecutor committed misconduct, and that remand is necessary to give him a sufficient opportunity to make a record of information that will be relevant at his youth offender parole hearing. We conclude that no prejudicial error occurred. However, we remand the matter for reconsideration of Espinoza's sentence in light of Senate Bill No. 620.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

On December 19, 2014, Alexis was at Palmdale High School to pick up his 14- or 15-year-old sister, K.S. Alexis's friends Silverio and Elijah,[1] both of whom were Down as Fuck gang members, were with him. The boys were waiting in a parking lot for K.S. when they saw Espinoza, who was a member of a rival gang, Zoned Out Gangsters.[2] Silverio and Elijah approached

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[1] Because some victims were juveniles, we refer to all of them by first names or by initials.

[2] A gang expert testified that Silverio and Elijah and Espinoza belonged to rival gangs. We need not further summarize the expert's testimony because it is not relevant to the issues on appeal.

Espinoza and the boys yelled at each other and put up their arms as if to fight, but no punches were thrown. K.S.'s boyfriend, Dorian, saw Silverio "flip" off Espinoza. Espinoza ran, and Silverio and Elijah chased him. Having failed to catch Espinoza, Silverio and Elijah returned to the car, angry and saying, "Let's go get this fool," and calling Espinoza a "little bitch."

Alexis drove himself, K.S., Silverio, Elijah and Dorian to Silverio's house, which was just minutes away. While parked, gunshots rang out. Alexis was shot in the shoulder. K.S. was shot in the head.

Looking back, Alexis saw Espinoza in a white Honda Accord. Espinoza was smiling. Dorian also saw a white Honda Accord with tinted windows. Around this time, Aracely Casillas was nearby when she saw a speeding white car with three Hispanic men in their 20s inside. She identified Espinoza as the driver. Surveillance footage from a camera located near the shooting showed the suspect's vehicle, a white Honda Accord.

That same afternoon K.S. was shot, law enforcement officers stopped Espinoza in a white Honda Accord. Espinoza had gunshot residue on him. A .38 caliber semiautomatic handgun and .38 ammunition were in the car. A bullet recovered from K.S.'s head was fired from the gun.

Espinoza was arrested the same day he shot K.S. A few days later, on December 21, 2014, detectives placed Espinoza in an electronically monitored cell with a strategically placed cellmate who engaged Espinoza in conversation. Espinoza told his cellmate, who identified himself as Chuckie, that he was "Crazy" from Zoned Out Gangsters. When asked what he was in for, Espinoza said he "[b]lasted somebody" from close range. He "shot out the window," but he didn't think anyone got hit. He had

been at Palmdale High when some "fools" tried to jump him, but he got away. Espinoza got in a homie's car and went after "those fools." His homies had a gun in the car.

Although K.S. was not expected to live, she did. She is unable to walk, has limited speech capabilities, and requires daily nursing care.

II. Procedural background

Espinoza was charged with offenses arising out of these events, and, on September 19, 2016, a jury found him guilty of count 1, the willful, deliberate and premeditated attempted murder of Silverio (Pen. Code, §§ 664, 187, subd. (a))[3] with true findings on gun (§ 12022.53, subds. (b), (c)) and gang (§ 186.22, subd. (b)(4) & (5)) allegations; count 6, shooting at an occupied vehicle (§ 246) with true findings on gun (§ 12022.53, subds. (c), (d)) and gang (§ 186.22, subd. (b)(4) & (5)) allegations; counts 7, 8, 9, 10 and 11, assault with a semiautomatic firearm (§ 245, subd. (b)) with true findings on personal use of a firearm (§ 12022.5, subd. (a)) and gang (§ 186.22, subd. (b)(1)(A)) allegations.

On January 9 and 31, 2017, the trial court sentenced Espinoza, on count 1, to life with a minimum parole eligibility of 15 years plus 20 years (§ 12022.53, subd. (c)); count 6, life with a minimum parole eligibility of 15 years plus 25 years to life (§ 12022.53, subd. (d)); count 7, six years plus 10 years (§ 186.22, subd. (b)(1)(C)), and on counts 9 and 11, two years plus three

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[3] All further undesignated statutory references are to the Penal Code.

years four months, each (§ 186.22, subd. (b)(1)(C)).[4] The court imposed but stayed sentences on counts 8 and 10.

DISCUSSION

I. Discovery regarding informants

The trial court denied Espinoza's pretrial motion to discover his cellmate Chuckie's identity and, at trial, limited questioning about Chuckie. Espinoza now contends that the court violated his constitutional rights to due process and to a fair trial and to confront witnesses. We find that prejudicial error did not occur.

A. *Additional background*

At the preliminary hearing, Detective Frederick Morse asserted a privilege under Evidence Code section 1041 not to disclose Chuckie's identity.[5] Espinoza thereafter moved to compel disclosure of Chuckie's identity. The motion argued that Chuckie was a witness, because he gathered evidence against Espinoza. And although the jailhouse conversation was recorded, the recording did not reveal "defendant's demeanor and general attitude," which could "furnish evidence of an absence of premeditation and deliberation, whether he was coerced into

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[4] On count 1, the court stayed the sentence on the firearm enhancement (§ 12022.53, subd. (b)). On count 6, the court struck the true finding on the firearm enhancement (§ 12022.53, subd. (c)). On count 7, the court stayed the sentence on the firearm enhancement (§ 12022.5). Sentences on the firearm enhancements (§ 12022.5) in counts 8, 9, 10 and 11 were stayed.

[5] Law enforcement did not thereafter pursue the claim that Chuckie's identity was subject to protection under Evidence Code sections 1041 and 1042, which protect an informant's identity.

making the statement; and if any of the statement included exonerating evidence that may have been omitted from the recorded conversation."

At the hearing on the motion, the trial court (Hon. Daviann L. Mitchell) expressed doubt that Chuckie was a confidential informant under the Evidence Code and questioned the relevancy of the discovery because, based on the court's review of the recording, Chuckie could offer nothing exculpatory. Defense counsel conceded that "[n]othing in the transcripts" exonerated Espinoza but "[t]he point is to learn the identity of the witness so we are able to talk to him to find out if he does possess exculpatory information" or information that might lead to exculpatory evidence. Chuckie "may have been placed in there before. There may be some evidence that might tend to exonerate my client. There may have . . . been some conversation or something not recorded . . . ." The court denied the motion based on its findings that Chuckie was not a confidential informant; disclosure was not required under section 1054.1 since the People did not intend to call Chuckie as a witness at trial and he had no exculpatory evidence; and the evidence was not favorable to the accused and material to issues of guilt or punishment under *Brady v. Maryland* (1963) 373 U.S. 83.[6]

At trial, during direct examination of Detective Morse, the prosecutor played the audio of Espinoza's statement. Defense counsel told the trial court that he intended to ask the detective how he selected Chuckie to be Espinoza's cellmate; what, if any, compensation Chuckie received; and his real identity. The court

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[6] Defense counsel renewed the motion before the trial judge, and it was again denied.

pointed out that compensation was only relevant to Chuckie's credibility, but his credibility was irrelevant because he was not testifying. The prosecutor concurred, saying that Espinoza's statements were "the evidence." Defense counsel protested that preventing him from showing that Chuckie was an informant violated Espinoza's federal and state constitutional rights to due process. The court overruled the objections and ruled that because Chuckie was not a witness the evidence was irrelevant and excludable under Evidence Code section 352.

B. *Chuckie was an informant.*

Although the trial court found that Chuckie was not an informant, the People do not contest on appeal that he was an informant. Nor could the People make that argument. Evidence Code section 1041 allows law enforcement to refuse to disclose an informer's identity when disclosure would be against public interest. Under that section, an informer is someone who confidentially discloses a violation of law. (*People v. Bradley* (2017) 7 Cal.App.5th 607, 619 (*Bradley*).) However, "confidentiality" in Evidence Code section 1041 does not refer to the information communicated but to the "public interest in the confidentiality of the informant's identity for purposes of effective law enforcement." (*People v. Otte* (1989) 214 Cal.App.3d 1522, 1531.) That is, Evidence Code section 1041, "as it is written, broadly and clearly, . . . protect[s] an informer's identity beyond a single prosecution resulting from the informer's information." (*Bradley*, at p. 619.)

Also, the disclosures the informant makes need not concern the current case. Rather, "informers may be useful in ongoing investigations involving multiple parties, and their communications with police in those circumstances may not always concern every person prosecuted as a result of the investigation. Nonetheless, the informer's and the government's interests in protecting the informer's identity is the same as when the informer's communication leads to prosecution of a certain person." (*Bradley*, *supra*, 7 Cal.App.5th at p. 619.)

Here, Chuckie was someone whose identity law enforcement sought to keep confidential. Hence, Chuckie was an informant.

C. *Chuckie was a material witness*.

To obtain disclosure of an informant's identity, there must be a showing the informant is a material witness. "An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant." (*People v. Lawley* (2002) 27 Cal.4th 102, 159.) Further, an informant may be a material witness if disclosure of his or her identity would be relevant and helpful to the defense or if disclosing the informant's identity is essential to a fair trial. (*People v. Hobbs* (1994) 7 Cal.4th 948, 959 (*Hobbs*); Hoffstadt, California Criminal Discovery (5th ed. 2015) State Statutory Privileges & Defenses, § 12.06(b)(ii), pp. 284–285 and cases cited therein.)

"The defendant need not prove that the informer would give testimony favorable to the defense in order to compel disclosure of his identity nor need he prove that the informer was a participant in or even an eyewitness to the crime. The

defendant's 'burden extends only to a showing that "in view of the evidence, the informer would be a material witness on the issue of guilt and nondisclosure of his identity would deprive the defendant of a fair trial." ' " (*Price v. Superior Court* (1970) 1 Cal.3d 836, 843 (*Price*); see also *Honore v. Superior Court* (1969) 70 Cal.2d 162; *People v. McShann* (1958) 50 Cal.2d 802.) A defendant discharges his or her burden when the defendant " ' "demonstrates a reasonable possibility that the anonymous informant whose identity is sought could give evidence on the issue of guilt which might result in defendant's exoneration." ' " (*Price*, at p. 843.)

Here, Chuckie was not a witness to the crime. But he *was* a material witness to Espinoza's incriminating statements. Indeed, Chuckie was the only witness to those statements and the only person who observed Espinoza make them. Although Chuckie's and Espinoza's conversation was recorded, only Chuckie was in a position to see Espinoza's facial expressions and demeanor—matters relevant to a person's believability and to the totality of the circumstances in which Espinoza made his statements. (See, e.g., CALJIC No. 2.20.) Espinoza's statements were crucial to the prosecution's case to establish not only that he committed the crimes but to establish he acted with premeditation and deliberation. Therefore, the defense needed to challenge Espinoza's statements. The defense could have done that by showing, via Chuckie, that Espinoza's demeanor or other attitude, conduct or interaction with Chuckie not captured on the recording undermined Espinoza's statements. (See *Michigan v. Bryant* (2011) 562 U.S. 344, 382 [noting, albeit in a different context, that interrogator's identity and content and tenor of the interrogator's questions can bear on declarant's intent].)

Was there, for example, something in Espinoza's demeanor suggesting he was exaggerating or puffing to impress his fellow gang member, Chuckie? This is precisely what the defense argued in its disclosure motion, that the recording did not reveal "defendant's demeanor and general attitude," which might be relevant to the absence of premeditation and deliberation.

This argument satisfied Espinoza's burden of demonstrating a reasonable possibility that Chuckie could give evidence that might be relevant or helpful on the issue of guilt or punishment. (*Hobbs*, *supra*, 7 Cal.4th at p. 959; Hoffstadt, California Criminal Discovery, *supra*, at p. 285.)
Indeed, it is unclear what more Espinoza, at that stage of the proceedings, could have shown. The nature of the problem confronting defendants is it is impossible for them, at the discovery stage of the proceedings, to state much more to show materiality of the informant's testimony. " 'No one knows what the undisclosed informer, if produced, might testify. He might contradict or persuasively explain away the prosecution's evidence. *It is the deprival of the defendants of the opportunity of producing evidence which MIGHT* [original emphasis] *result in their exoneration which constitutes the error*.' " ' " (*Price*, *supra*, 1 Cal.3d at p. 843.)

Because Chuckie was an informant and a material witness, the better practice here would have been to hold an in camera hearing to determine whether Chuckie had exculpatory information not reflected in the recording that bore on Espinoza's statements. (See generally *Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1277.) At that hearing, "the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its

determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial." (Evid. Code, § 1042, subd. (d).) Here, Chuckie did not have to be present at that hearing. And the prosecution might have defeated Espinoza's preliminary showing by presenting evidence that Chuckie observed nothing or had no information that might have gone to Espinoza's guilt or punishment. We merely find that the defense should have had the opportunity to discover that information.

D. *Harmless error*

Notwithstanding that the better practice here would have been for the trial court to hold an in camera hearing, on this record, any error was harmless under the beyond a reasonable doubt standard articulated in *Chapman v. California* (1967) 386 U.S. 18. (*Bradley*, *supra*, 7 Cal.App.5th at p. 627.) Aside from Espinoza's statements, Alexis and Dorian identified Espinoza as the person who fought with Silverio and Elijah at Palmdale High School. Alexis placed Espinoza at the scene of the shooting. Alexis and Dorian identified the shooter's car as a white Honda Accord, a fact surveillance footage supported. Around the time of the shooting, Casillas saw a white Honda Accord speeding away, and Casillas identified Espinoza as the driver. Officers stopped Espinoza in a white Honda Accord. He had gunshot residue on him and a gun was in the car. The bullet recovered from K.S.'s head was fired from that gun. This constituted overwhelming evidence of Espinoza's guilt.

E. *Espinoza's confrontation rights were not violated.*

Espinoza makes the related argument that the trial court violated his confrontation rights by limiting his counsel's cross-examination about Chuckie. (U.S. Const., 6th & 14th Amends; Cal. Const., art. I, § 15.) We disagree.

" 'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." ' " (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324; see also *Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) Although this right can be abridged by evidence rules that infringe on the weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve (*Holmes*, at p. 324), the ordinary rules of evidence generally do not impermissibly infringe on the accused's right to present a defense (*id.* at pp. 326–327; *People v. Lucas* (2014) 60 Cal.4th 153, 270, disapproved on another ground by *People v. Romero and Self* (2015) 62 Cal.4th 1, 53–54, fn. 19.)

Espinoza contends that his counsel was prevented from asking whether Chuckie was a paid informant.[7] Even if counsel should have been permitted to ask that and related questions, he was not deprived of his right to present a defense. It was arguably clear that Chuckie was an informant. Detective Morse testified that, at his direction, Detective Tony Robles placed

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[7] The trial court sustained relevance objections to defense counsel's questions whether the detective spoke to Chuckie before he was put in the cell; whether the detective instructed Chuckie; where Chuckie was housed before being transferred to Lancaster station where the recording happened; and whether he had to be transported.

Chuckie, who was not a police officer, in the cell before placing Espinoza in it. The defense clarified in argument that Chuckie was working for the detectives and had a motive to get Espinoza talking: "The first thing [Espinoza] says is that I blasted them. . . . That's the response to this guy, but then later on, he starts clarifying this thing, and he – the guy [Chuckie] now tries to draw him out, because, now, he's really doing his job for the cops and whatever he's going to get from the cops. Maybe he will [get] more and more if he draws this guy out and gets him to really sound like a braggart and an unfeeling person, but that's not what comes out." It was therefore made clear to the jury—albeit in argument—that Chuckie was working for law enforcement.

Espinoza also suggests on appeal that the jury would have had a "different impression" of Detective Morse's credibility had it known of the "ruse" he used to elicit Espinoza's statement. However, the jury *did* know that Chuckie was specifically placed in that cell to engage Espinoza in conversation.

We fail to see how precluding the defense from asking two or three additional questions deprived Espinoza of his constitutional right to present a defense.[8]

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[8] Arguably, Chuckie's credibility was subject to impeachment. Although his questions were admissible for the nonhearsay purpose of putting Espinoza's statements in context (*People v. Turner* (1994) 8 Cal.4th 137, 190, abrogated on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5), the prosecutor and the trial court agreed that some of his statements were hearsay. If that were the case, he was a hearsay declarant whose credibility was subject to impeachment. (Evid. Code, § 1202.)

II. Instructional error

Espinoza next contends that the trial court's refusal to instruct the jury on perfect self-defense and attempted voluntary manslaughter based on imperfect self-defense violated his federal and state constitutional rights to due process and a fair trial. As we explain, there was no evidence to support giving those instructions; hence, his constitutional rights were not violated.

A trial court must instruct the jury, sua sponte, on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) A trial court has a sua sponte duty to instruct regarding a defense if there is substantial evidence to support the defense and it is not inconsistent with the defendant's theory of the case. (*People v. Abilez* (2007) 41 Cal.4th 472, 517; *People v. Saavedra* (2007) 156 Cal.App.4th 561, 567.) Instructions on a lesser included offense also must be given when there is substantial evidence from which the jury could conclude the defendant is guilty of the lesser offense but not the charged offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*Ibid.*) But, substantial evidence is not *any* evidence, no matter how weak. (*Moye*, at p. 553.) We independently review whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

There are two types of self-defense: perfect and imperfect. (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168.) Perfect self-defense requires a defendant have an honest and reasonable belief in the need to defend himself or another, while imperfect self-defense is the killing of another human being under the

actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury. (*People v. Booker* (2011) 51 Cal.4th 141, 182; *In re Christian S.* (1994) 7 Cal.4th 768, 771, 773.) " '[U]nreasonable self-defense' is . . . not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter. And voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder." (*People v. Barton* (1995) 12 Cal.4th 186, 200–201.)

Here, Espinoza argues that the instructions should have been given because his fear of rival gang members Silverio and Elijah was "ongoing," and he, reasonably or unreasonably, believed that, although Silverio and Elijah had left, they would continue to pursue him. However, perfect and imperfect self-defense require the fear to be of imminent harm. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *In re Christian S.*, *supra*, 7 Cal.4th at p. 783.) " 'Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury.' " (*Humphrey*, at p. 1082; see also *People v. Butler* (2009) 46 Cal.4th 847, 868.) The defendant must fear a harm that must be instantly dealt with. (*In re Christian S.*, at p. 783.)

Espinoza's fear may have been "ongoing" but there was no evidence he was in danger of *imminent* harm. Rather, Silverio and Elijah had left in a car and were on their way home. Thus, even assuming Espinoza had been in danger, it ceased to exist when Silverio and Elijah left the parking lot. Espinoza, however, flagged down some homies who happened to be passing by, got

into their car, and told them to follow Alexis's car. Espinoza then shot at Silverio and Elijah and the others, including K.S., from behind. Espinoza admitted to Chuckie that he did not think his victims knew what happened and did not know that he had followed them. The evidence thus shows that Espinoza was not in imminent danger. Indeed, he was in *no* danger. (See, e.g., *People v. Nguyen* (2015) 61 Cal.4th 1015, 1066 [insufficient evidence to support instructions where the defendant followed victim into an arcade and shot him as he lay on floor].) No instructional error occurred.

III. Prosecutorial misconduct

Espinoza next contends that the prosecutor committed misconduct during his closing argument by commenting on his right to remain silent and by referring to facts not in evidence.

A. *Additional background*

In the context of arguing that Espinoza acted in self-defense and was not even aware of how many people were in the car, defense counsel argued that Espinoza told Chuckie that he did not think anyone got shot. The prosecutor rebutted this by arguing:

> "Was this all motivated by fear as [defense counsel] says? Well, you had a chance to hear him within either a day and a half, two days of when he committed the shooting. [¶] Did he sound like someone who was doing this out of fear? No. He was going to get back for what was done to him. *Did he ever express any remorse for what he did? No.* He never said it's too bad about that. [¶] Now, [defense counsel] said, well, you know, he's sitting there that

> he didn't know if he actually shot anybody. Well, we know from Detective Morse that, before being placed into there, he had – *Detective Morse had spoken to him. Detective Morse is a homicide investigator. Okay? So the defendant knew he had met with a homicide investigator about the shooting*." (Italics added.)

Defense counsel objected that there was no evidence Espinoza talked to Detective Morse. But, the trial court said that it was reasonable to infer that Espinoza knew someone had been hurt or killed because Detective Morse was a homicide investigator. The court therefore overruled the objection. Back in front of the jury, the prosecutor continued:

> "So Mr. Espinoza and Detective Morse, we heard, had some opportunity to speak before he was placed into that cell, Detective Morse being a Homicide investigator, an investigator who investigates crimes where people are killed. [¶] So it would be reasonable for the defendant to understand that, yes, he had hit someone and either killed someone, or someone was near death as a result of that shooting."

After arguments concluded, the trial court denied defense counsel's motion for a mistrial. The court also denied Espinoza's subsequent motion for a new trial.

B. *No prejudicial prosecutorial error*

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the

trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] . . . Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Here, Espinoza raises two instances of alleged prosecutorial misconduct. First, the prosecutor referred to facts not in evidence when he argued that Espinoza knew he had shot someone because he talked to a *homicide* detective. (See generally *People v. Davis* (2005) 36 Cal.4th 510, 550 [misstating or mischaracterizing evidence or asserting facts not in evidence is misconduct]; *People v. Hill* (1998) 17 Cal.4th 800, 827–828.) The detective did testify that he talked to Espinoza before he was placed in the cell. However, what the detective said to Espinoza (e.g., "I am investigating a possible homicide" or "I am a homicide investigator") was not in evidence.

Even if we assumed that the prosecutor could *not* reasonably infer that Detective Morse made such a statement to Espinoza, we fail to see any prejudice to defendant. There was other evidence that Espinoza knew he had hurt someone. When Chuckie first asked Espinoza what he was "in for," Espinoza said he "[b]lasted somebody." Thus, notwithstanding Espinoza's later protestations that he did not think he had hit anyone, Espinoza's own statement established that in fact he suspected he had shot

someone. In any event, whether Espinoza knew, after the fact, that he had injured someone was not crucial to his intent to kill and to whether he acted with premeditation. The facts critical to those issues were that he had an altercation with Silverio and Elijah, they left, Espinoza followed them, and then he shot at them from behind. Whether Espinoza knew that he had shot K.S. in the head and whether he felt bad about it were tangential issues. Hence, any error was not prejudicial.[9]

Second, Espinoza argues that the prosecutor, when he referred to Espinoza's lack of remorse, committed *Griffin* error.[10] *Griffin* error occurs when a prosecutor comments on an accused's invocation of the right to silence and not to testify. A prosecutor, however, may comment on a defendant's lack of remorse but in doing so may not refer to the defendant's failure to testify. (*People v. Crittenden* (1994) 9 Cal.4th 83, 147; *People v. Boyette* (2002) 29 Cal.4th 381, 453–454.) Here, the prosecutor commented on Espinoza's lack of remorse in the context of discussing Espinoza's jailhouse statement and, moreover, merely made a fair argument about how the jury should view Espinoza's statements. (See, e.g., *Crittenden*, at p. 147 [prosecutor's comments on defendant's lack of remorse was legitimate reference to his failure to express regret in correspondence]; see generally *People v. Centeno* (2014) 60 Cal.4th 659, 667 [defendant must show that, in the context of whole argument and

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[9] Although no party refers to this, the audio and transcript of the jailhouse conversation appear to show that Espinoza was removed from the cell for a prolonged period. When he returned, he made statements indicating that he had spoken to detectives, who had implied that Espinoza's homie snitched on him.

[10] *Griffin v. State of California* (1965) 380 U.S. 609.

instructions, there was a reasonable likelihood jury understood or applied the complained-of comments in improper manner].) The prosecutor did not comment on or otherwise allude to Espinoza's failure to testify or right to remain silent. No *Griffin* error occurred.

IV. *Franklin* hearing

Espinoza next contends that remand is necessary because the trial court failed to give him a sufficient opportunity to make a record for his future youth offender parole hearing. As we explain, remand for this purpose is unnecessary.

Because Espinoza was 19 years old when he committed these crimes, he will be entitled to a youth offender parole hearing during the 25th year of his incarceration. (§§ 3051, 4801.) Our California Supreme Court has therefore held that youth offenders, at the time of sentencing, must be given a "sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*People v. Franklin* (2016) 63 Cal.4th 261, 284 (*Franklin*).) In describing the types of matters that may be placed on the record, *Franklin* said that a trial court "may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence." (*Id.* at p. 284.) A defendant may also place on the record "any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such

proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law.' " (*Franklin*, at p. 284; see also § 3051, subd. (f)(1) & (2).)

Here, Espinoza's contention that the trial court failed to comply with *Franklin* rests on the court's refusal to appoint a sentencing mitigation expert. Although a sentence mitigation expert may be able to offer the type of information *Franklin* considered relevant, the record shows that Espinoza nonetheless was given a sufficient opportunity to present that information. First, the trial court did appoint a psychologist, Dr. Robert Rome. Dr. Rome found that Espinoza has "borderline intellectual functioning, within the margin of error of intellectual disability (mental retardation). This impacts his ability to understand situations and to see the consequences of his actions." Second, the trial court's refusal to appoint the sentence mitigation expert did not prevent the defense from otherwise obtaining information from Espinoza's "[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge" about him before the crime or his "growth and maturity since the time of the crime."[11] (§ 3051, subd. (f)(2).) There was no showing why the defense could not

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[11] Indeed, at the hearing at which the court appointed Dr. Rome, the court noted that defense counsel had not yet put together a "packet" for a future hearing under section 3051, although two months had passed since Espinoza had been found guilty.

obtain such information in the absence of an expert. Third, the prosecutor submitted "a large stack" entitled "People's statement of view," which the court said would also go to the Department of Corrections and Rehabilitation.[12] The record therefore shows that Espinoza had a sufficient opportunity to make his record for a parole hearing under section 3051.[13]

V. Senate Bill No. 620

When Espinoza was sentenced in 2017, the trial court lacked discretion to strike the firearm enhancements found true under sections 12022.5 and 12022.53. However, he is now entitled to the benefit of amendments to those sections giving trial courts discretion to strike such enhancements. (§§ 12022.5, subd. (c), 12022.53, subd. (h).) The People concede that Espinoza is entitled to remand so that the trial court can exercise its newly granted discretion under those sections. (See generally *People v. Arredondo* (2018) 21 Cal.App.5th 493; *People v. Woods* (2018) 19 Cal.App.5th 1080.) We agree but express no opinion about how the court should exercise that discretion.

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[12] The record on appeal does not contain the People's submission.

[13] Because we conclude that Espinoza had a sufficient opportunity to make a record, we need not address whether a defendant might be entitled to appointment of experts after trial in connection with a sentencing proceeding. (See generally *People v. Stuckey* (2009) 175 Cal.App.4th 898.)

DISPOSITION

The matter is remanded for reconsideration of Espinoza's sentence in light of Senate Bill No. 620. The judgment of conviction is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KALRA, J.*

We concur:

EDMON, P. J.

EGERTON, 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.