Filed 1/18/18 P. v. Sneed CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>VERSHONDA C. SNEED,<br><br>Defendant and Appellant. | B276525<br><br>(Los Angeles County Super. Ct. No. TA137551-01) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Kelvin Filer, Judge. Affirmed in part; remanded in part.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

A jury rejected defendant Vershonda Charisse Sneed's self-defense claim and convicted her of first degree murder. The jury further found defendant personally and intentionally discharged a handgun causing death. (Pen. Code,[1] §§ 187, subd. (a), 12022.53, subd. (d).) The trial court sentenced defendant to 50 years to life in state prison. We affirm the judgment of conviction but remand to allow the trial court to exercise its discretion under section 12022.53, subdivision (h) as amended effective January 1, 2018.

## THE EVIDENCE

The prosecution's case at trial was that defendant shot the victim, Bobby King, in the presence of several witnesses, after her friendship with him had become strained. Defendant's position at trial was that she acted in self-defense or defense of others.

Defendant had been close friends with King for several years. Defendant and Shawnta Sawyers were also friends. Defendant introduced Sawyers to King, and Sawyers and King became romantically involved. But the relationship between defendant and King then soured. Defendant testified she felt King had become arrogant and selfish and was using her.

Defendant further testified that as her relationship with King deteriorated, she began to fear him. Defendant had

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[1] Further statutory references are to the Penal Code except where otherwise noted.

overheard King's conversation with a coworker during which King referenced his gang affiliation and expressed an inclination to be violent. She had seen him physically assault a girlfriend. She was also present when King was "jumping out on" Sawyers's then fiancé; King asked defendant for a gun because he wanted to show Sawyers's fiancé "who he is." One day in May 2015, a month prior to the shooting, defendant and King "had words," which led King to say, "Shonnie, I'll kill you." Following that incident, defendant blocked King from calling her cell phone.

In early June 2015, defendant, a barber, gave King a haircut. King was unhappy when defendant put aftershave on the back of his neck because it burned. He told her he was going to leave before he hurt her. On June 20, 2015, King's best friend, Taft, paid an unexpected visit to defendant at her home. Defendant testified Taft told her that if she could not straighten things out with King she would have to answer to Taft. Taft said, "[Y]ou already know how I get down." According to defendant, Taft was known to physically assault people. The prosecution presented rebuttal evidence that neither King nor Taft was in the CalGangs database.

Defendant shot King on June 25, 2015. That day, prior to the shooting, defendant, King's girlfriend Sawyers, and others had repeated conversations about King's relationship with another woman. King was angry after he discovered Sawyers had learned about the other relationship. King was further upset when Sawyers said she needed space and they were better off as friends.

That evening, Sawyers, defendant, and defendant's friend, Tyshonda Marie Powell, met at the home of Sawyers's sister, Lakeysha Wright-Lee. Sawyers was on the phone with King

when she saw that defendant and Powell were in front of Wright-Lee's house. Before hanging up, Sawyers told King that defendant was there. The four women stood in the driveway talking. During a sometimes heated conversation, the woman discussed what Sawyers and Wright-Lee apparently perceived as defendant's interference in Sawyers and King's relationship. Defendant disavowed any intention to intrude and apologized if Sawyers felt she had. At that point, King arrived, got out of his vehicle and approached the women.

Three eyewitnesses saw defendant point a gun at King and shoot him multiple times, including after King fell to the ground. The gunshot wound evidence was consistent with the eyewitnesses' accounts. Defendant pulled the trigger of her semiautomatic handgun eight times. She fired until she ran out of ammunition. According to prosecution witnesses, defendant said, "I got you" and "Fuck this nigger."

Defendant and Powell fled the scene in defendant's vehicle but were quickly apprehended.[2] King suffered multiple gunshot wounds. He was pronounced dead on arrival at the hospital.

Defendant testified she believed King was a gang member who carried a firearm. She told the jury she thought she saw "something chrome" in defendant's hand when he approached. Defendant further testified she acted in self-defense after King attacked Powell and her. Defendant said King repeatedly punched her in the head and face until she briefly lost

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[2] Powell was charged with being an accessory after the fact. (§ 32.) However, the jury was unable to reach a verdict on that count.

consciousness. She was bleeding from her mouth and nose. King also held Powell by the hair and repeatedly punched her.

None of the eyewitnesses saw King attack Powell or defendant. There was little if any physical evidence corroborating defendant's description of the assault. The deputy who arrested defendant did not see any injuries to her face. King did not have any injuries to his hands. No weapon was found on King's person. However, defendant's aunt testified that after she introduced herself to Sawyers in a courthouse bathroom, Sawyers told her King had been "all over" defendant and Powell, meaning he was punching them.

## DISCUSSION

### *A. Testimony About Defense Counsel's Relationship to Defendant*

Defendant was represented at trial by her maternal uncle, Miles Clark III. This fact emerged during the prosecutor's cross-examination of defendant's mother, Gloria Clark. Clark testified that she loved her daughter and would do "pretty much" anything for her; she had met with defense counsel only once; and defense counsel was her brother and defendant's uncle. The testimony was as follows: "Q. Mrs. Clark, you obviously love your daughter? [¶] A. Yes. [¶] Q. And you would do anything for her? [¶] A. Pretty much. [¶] Q. How many times have you met with Mr. [Miles] Clark about your testimony today? [¶] A. Once. [¶] Q. And I have to ask you: Are you related to Mr. [Miles] Clark? [¶] Mr. Clark: Objection, Your Honor, relevance. [¶] The Court: Overruled. [¶] The Witness: Yes.

[¶] . . . [¶] Q. How are you related to him? [¶] A. He's my brother. [¶] . . . [¶] Q. Okay. He's defendant Sneed's uncle? [¶] . . . [¶] A. Yes."

Defense counsel subsequently renewed his relevance objection and moved for a mistrial. The trial court ruled that although the question should not have been asked, it did not cause any prejudice to defendant and did not rise to a level requiring a mistrial grant. The court admonished the jury: "Yesterday, there was a question asked regarding a witness being related to Attorney Clark. [¶] And the Court is going to reverse its ruling that I should have sustained that objection. [¶] So you are to treat that question as though you never heard it and you are to disregard the answer and that issue is not to be discussed amongst you. And it has no bearing at all on how you are to carry out your responsibilities as jurors on this case."

On appeal, defendant argues the trial court erred because the prosecutor improperly elicited the challenged testimony to create clear innuendo defense counsel would do anything for his client including present perjured testimony.

1. There was no prosecutorial misconduct and no prejudice to defendant

Prosecutorial misconduct under federal law exists when there is a pattern of conduct so egregious as to render a defendant's trial fundamentally unfair in violation of his or her federal constitutional due process rights. (*People v. Cox* (2003) 30 Cal.4th 916, 952, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) ""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 trial court or the jury.'" [Citation.]" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332.) Deceptive or reprehensible methods include personal attacks on opposing counsel's integrity. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) A prosecutor also may not falsely accuse defense counsel of fabricating a defense. (*People v. Stitely* (2005) 35 Cal.4th 514, 560.) However, "'"[w]hat is crucial to a claim of prosecutorial misconduct is not the good faith *vel non* of the prosecutor, but the potential injury to the defendant." [Citation.]' [Citation.]" (*People v. Cox, supra*, 30 Cal.4th at p. 952.) "'A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law . . . 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071.)

Defendant's prosecutorial misconduct claim fails. The prosecutor's single question did not constitute a pattern of conduct so egregious as to render defendant's trial fundamentally unfair in violation of her federal constitutional due process rights. Nor, under state law, was the prosecutor's question a deceptive or reprehensible attempt to persuade the jury. The prosecutor did not impugn defense counsel's integrity. The simple fact that defendant was represented at trial by her material uncle did not give rise to any reasonable inference counsel was willing to suborn perjury to help his client. Stated differently, knowledge of the familial relationship alone had no tendency to persuade the jury that defense counsel colluded with defendant's mother or aunt (also a defense witness) to help defendant. To come to that

conclusion would require an unsupported leap. While the jurors might naturally suspect defendant's mother and aunt of wanting to help defendant, there was no reason for them to believe defendant's trial attorney would actively encourage those witnesses to lie. The prosecutor at no time suggested defense counsel had coached witnesses to lie. The prosecutor made no further reference to the familial relationship. Additionally, the trial court admonished the jury to disregard the question and answer. The jury is presumed to have followed the trial court's timely admonition. (*People v. Cox, supra*, 30 Cal.4th at p. 961.) And even assuming the prosecutor's inquiry was misconduct under state law, given that defendant shot King in front of multiple witnesses, it is not reasonably probable the jury would have reached a result more favorable to her absent the challenged testimony.

2. The trial court properly denied defendant's mistrial motion

For the same reasons, the trial court did not abuse its discretion in finding the matter curable by admonition and denying defendant's mistrial motion. (*People v. Cox, supra*, 30 Cal.4th at p. 953.) "'In reviewing rulings on motions for mistrial, we apply the deferential abuse of discretion standard. [Citation.] "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]" [Citation.]' [Citation.]" (*People v. Gonzalez* (2011) 51 Cal.4th

894, 921.) For the reasons discussed above, the trial court could reasonably conclude the isolated reference to defendant's representation by her uncle was not incurably prejudicial. There was no abuse of discretion.

*B. The Trial Court did not Abuse its Discretion when it Excluded Gang-Related Evidence in Connection with Defendant's Self-Defense Claim*

Defendant argues the trial court violated her federal constitutional rights when it excluded evidence offered to show she feared King and to counter prosecution evidence King was not a gang member. The trial court allowed some evidence defendant feared King because he was gang-affiliated and prone to violence. However, the trial court excluded: a video clip found on defendant's cell phone purportedly capturing King bragging about his gang membership; defendant's proposed testimony that King's fellow gang members spoke in her presence about "things that [King] ha[d] done as it relates to homicides"; and defendant's proposed testimony she believed Taft was a gang member. The trial court excluded the evidence under Evidence Code section 352.

The proffered evidence was arguably relevant to defendant's self-defense claim. The "defense of self-defense is established when the defendant has an honest and reasonable belief that bodily injury is about to be inflicted on him [or her], provided he [or she] uses force no greater than that reasonable under the circumstances." (*People v. Casares* (2016) 62 Cal.4th 808, 846.) "The threat of bodily injury must be imminent [citation] . . . ." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-

1065.) Reasonableness is an objective test "determined from the point of view of a reasonable person in the defendant's position." (*Id.* at p. 1065.) Evidence a defendant had been threatened by or feared the victim is admissible to support a self-defense claim. (*Ibid.*) "'Common sense and experience tell us that it is reasonable for a person threatened by another to be on heightened alert upon encountering that threatener, and to reasonably take [the threat] into account in deciding the necessity for, and the amount of, defensive action, in response to any act on the part of the threatener reasonably appearing to be calculated to carry out that threat.'" (*Ibid.*) Evidence a defendant had been threatened by a third party who in the defendant's mind was reasonably associated with the victim is likewise admissible to show the defendant's frame of mind. (*Id.* at pp. 1065-1066.)

The proffered evidence also was arguably relevant to show defendant feared King because of Taft's and his gang connections. Evidence of gang membership may be admissible when relevant and probative as to issues such as identity, motive, modus operandi or specific intent. (*People v. Becerrada* (2017) 2 Cal.5th 1009, 1022.) Defendant's proposed evidence was offered to establish her frame of mind—that she feared King because of Taft's and his gang affiliation. (*People v. Minifie, supra,* 13 Cal.4th at pp. 1065-1066.) But gang membership evidence also "'is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]'" (*People v. Becerrada supra,* 2 Cal.5th at p. 1022.)

The trial court nevertheless had the discretion to exclude the evidence under Evidence Code section 352. Pursuant to Evidence Code section 352, "The court in its discretion may

exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Our review is for an abuse of that discretion. (*People v. Becerrada, supra*, 2 Cal.5th at p. 1022.)

We find no abuse of discretion. With respect to the video clip, the record on appeal does not include any direct evidence of its content. But the trial court viewed the short clip. The court said it depicted King "bragging about celebrating a gang." The court made a reasoned finding, however, that the clip was not evidence King was a gang member.[3] Contrary to defendant's assertion, we do not have reason to conclude that the excluded

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[3] "The Court: I looked at it. It's about 15 seconds long, very short. Shows the victim in the back seat of a car making some innocuous claim about Crips and that they're celebrating Crips, very short. Really doesn't add anything. [¶] It's apparently January of 2015 which pre-dates the incident and someone bragging about Crip day or celebrating Crips. [¶] Certainly does not establish in any form or fashion actual gang membership. Unfortunately, kids do it all the time. [¶] And there's nothing - - he wasn't bragging about committing any sort of crime. He was bragging about celebrating a gang, 808. Some gang, I never heard of it. Doesn't show any gang tattoos. [¶] . . . [¶] So this short clip, any relevance is very, very slight and it's relevant on a collateral matter, specifically whether or not the victim belonged to a gang and in January of 2015. [¶] Apparently [defendant] filmed it or she wasn't concerned about anything he was saying on the video at the time. [¶] So again, that counteracts any claim that it would impact anything that happened on June 20, 2015. The Court is going to exercise its discretion under Evidence Code section 352 and deny the use of that video."

video clip provided evidence King was a gang member nor that it rebutted the prosecution's evidence.

As to the events in Las Vegas, the proffered conversation consisted of King's alleged fellow gang members' statements in defendant's presence about "things that [King] had done as it relates to homicides." Defense counsel argued, "[A]s a result of that conversation, that's when [defendant] says that she realized at that time who [King] really is and then she was afraid of him." The trial court could reasonably conclude that what King's purported fellow gang members had to say about King's prior conduct—even if the statements were made in defendant's and King's presence—had only slight if any probative value with respect to defendant's claim she feared King because of his gang affiliation. On the other hand, the evidence was inherently prejudicial to the victim. It was not an abuse of discretion to conclude the evidence was excludable under section 352.

With respect to Taft, the trial court ruled defendant could testify to what Taft said to her (and she did), but "without mentioning his alleged gang membership." Defendant argues her knowledge Taft was King's fellow gang member was relevant to her fear of Taft and King. But defendant's purported fear of Taft had no direct bearing on her fear of King. Although defendant described Taft as King's best friend, there was no evidence connecting King with Taft's statements and actions on the date he visited defendant's home. The trial court could reasonably conclude defendant's testimony she believed Taft was a gang member had only slight if any probative value with respect to her self defense claim.

Moreover, King's murder was not gang-related. As defendant herself testified, her animosity toward King arose out

of personal tensions. The central question before the jury was whether King attacked defendant and Powell and whether defendant was in reasonable fear of King when she shot him. The trial court could reasonably conclude that whether defendant feared King because of Taft's or his gang affiliation had only slight relevance to her self-defense claim but significant potential to prejudice the jury against the victim. It was not an abuse of discretion to exclude the evidence. (Cf. *People v. Valdez* (2012) 55 Cal.4th 82, 130-131 [gang evidence relevant to motive and identity]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051 [gang evidence relevant to motive and use of fear].)

On appeal, defendant does not assert the trial court abused its discretion in ruling as it did. Instead, she argues for the first time that the trial court's evidentiary rulings violated her federal constitutional right to confront and cross-examine witnesses and deprived her of a meaningful opportunity to present a complete defense. Because the trial court did not abuse its discretion in excluding the evidence, defendant's constitutional claims are without merit. (*People v. Riggs* (2008) 44 Cal.4th 248, 292.) Defendant's constitutional claims also fail because, "[T]he application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution . . . ." (*People v. Marks* (2003) 31 Cal.4th 197, 226-227.)

Defendant also relies on Evidence Code section 1103, subdivision (a). That reliance is misplaced. Evidence Code section 1103, subdivision (a), sets forth an exception to the rule that character evidence is inadmissible to prove conduct. Evidence Code section 1103, subdivision (a) states: "In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific

instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (a) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. [¶] (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1)." Evidence of King's purported gang membership was not offered to prove he acted in conformity with his gang affiliation during the altercation with defendant. As noted above, there was no evidence King's murder was gang-related. Instead, the evidence was offered to show defendant had reason to fear King. But, as noted above, the question central to defendant's self-defense claim was not whether she feared King in general but whether he physically assaulted Powell and her and whether she was in reasonable fear of him when she shot him. Defendant's self-defense claim failed not because of the excluded evidence challenged here but because eyewitnesses to the shooting never saw King physically assault defendant or Powell and there was scant if any evidence otherwise corroborating that claim.

### *C. There was no Prosecutorial Misconduct in Closing Argument*

We discussed the law governing prosecutorial misconduct claims above. Further, "'[w]hen a claim of misconduct is based on the prosecutor's comments 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.'" [Citations.]' [Citation.]" (*People v. Gonzales, supra,* 51 Cal.4th at p. 920.)

1. Burden-shifting

Defense counsel objected to a portion of the prosecutor's rebuttal closing argument. The prosecutor argued defendant's self-defense claim rested on her repeated lies to the jury. Further the prosecutor alleged : "And here's the problem with the lying and the manipulation and the minimizing and the embellishment. If you [are] going to shoot someone and *leave them to die on the sidewalk*, if you are going to *take their last breath on earth*, if you're going to *deprive them of the chance to ever say goodbye* to your family, *you better come in here with some proof*. You don't just get to throw mud at the wall, see what sticks when you take another human being's life. *You better back it up*. [¶] And they failed." (Italics added.) When defense counsel objected, the trial court admonished the jury, "Just keep in mind this is argument."

Defendant raises two arguments on appeal in connection with the foregoing comments. First, defendant argues the prosecutor improperly appealed to the jury's sympathies. Second, defendant asserts the prosecutor improperly shifted the burden of proof to her. Defendant forfeited the first claim by failing to voice it in the trial court. (*People v. Seumanu, supra*, 61 Cal.4th at p. 1328.)

Even if defendant's first argument was properly before us, we would not find any prosecutorial misconduct. A prosecutor may not appeal to the jury's passion or prejudice in closing argument during the guilt phase of a trial. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.) It is misconduct to appeal for sympathy for the victim. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130.) Here, the prosecutor described King's murder in zealous

terms—"leave [him] to die on the sidewalk," "take their last breath on earth," and "deprive [him] of the chance to ever say goodbye to [his] family." But the prosecutor did not ask the jurors to put themselves in the victim's place, describe the loss caused by the victim's death, or otherwise appeal to their sympathies. (Cf. *People v. Burton* (1989) 48 Cal.3d 843, 868 ["put yourselves . . . in [the relatives'] position and imagine the loss"]; *People v. Ghent* (1987) 43 Cal.3d 739, 772 ["think about how you would feel if it were your baby"].) There was no misconduct.

On the merits of defendant's second contention, the prosecutor's comments did not indicate that defendant bore the burden of proof or that she had an affirmative evidentiary burden to create reasonable doubt. The prosecutor's point, in context, was a comment on defendant's credibility and the lack of evidence corroborating her self-defense claim. This was proper argument. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.) As the Supreme Court held in *Bradford*, "[a] distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence. (*Ibid.*) It is not reasonably likely the jury construed or applied the prosecutor's remarks as placing a burden on defendant other than to provide credible evidentiary support for her defense.

Even if the jury interpreted the prosecutor's comments as placing a burden of proof on defendant, any such impression would have been dispelled by the jury instruction on burden of proof and arguments by trial counsel for both defendant and Powell emphasizing that the burden of proof rested with the prosecution. (*People v. Redd* (2010) 48 Cal.4th 691, 740.)

*People v. Hill* (1998) 17 Cal.4th 800, on which defendant relies, is distinguishable. There the prosecutor discussed *reasonable doubt* stating, "There has to be some evidence on which to base a doubt," and "There must be some evidence from which there is a reason for a doubt." (*Id.* at p. 831, italics omitted.) The Supreme Court found the comments were somewhat ambiguous, but "to the extent [the prosecutor] was claiming there must be some affirmative evidence demonstrating a reasonable doubt, she was mistaken as to the law, for the jury may simply not be persuaded by the prosecution's evidence. [Citation.]" (*Ibid.*) The Supreme Court concluded it was "reasonably likely [the prosecutor's] comments, taken in context, were understood by the jury to mean defendant had the burden of producing evidence to demonstrate a reasonable doubt of his guilt." (*Id.* at p. 832.) Here, the prosecutor did not misstate the law on reasonable doubt or argue defendant had a burden to prove her innocence. He simply commented on defendant's failure to present credible evidence in support of her defense.

2. The traffic analogy

Defendant challenges the prosecutor's use of a traffic analogy to illuminate the concepts of premeditation and deliberation. The prosecutor argued: "[W]hat I was explaining to you is that every day we all make decisions that are willful, deliberate, premeditated. When you come back to work and you obey the stop sign, you have to make the decision to look to the left and the right. And then you go. That is a premeditated and deliberate decision. [¶] Same thing with the stoplight. You're coming up. It's red and yellow and you have to make the

decision. It's a split second decision, but you deliberate should I go, should I not go, am I going to get a ticket, am I going to make it. You have to make that decision. Again, deliberation. [¶] And premeditation, you weigh it beforehand. Like I just said, you have to decide if you're going to go through that light or not—am I going to get in an accident, is this person going to come this way. These are all decisions being made that are deliberated and premeditated."

Defendant forfeited the present argument by failing to object and request an admonition in the trial court. (*People v. Seumanu, supra*, 61 Cal.4th at p. 1328.) An objection would not have been futile, nor would an admonition have been insufficient to cure any harm. (*Ibid.*) Defendant does not argue otherwise.

Even if the issue were properly before us, we would not find any misconduct. The prosecutor did not misstate the law. The prosecutor explained how the facts of the present case supported a finding defendant premeditated and deliberated. The prosecutor then simply illustrated, in understandable terms, the notion that a decision reached quickly may be premeditated and deliberate. This was a correct statement of the law. As explained in *People v. Perez* (1992) 2 Cal.4th 1117, 1127: "[P]remeditation can occur in a brief period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]"[4] Our Supreme Court approved a similar argument

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[4] The trial court instructed the present jury in similar terms: "The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and

in *People v. Avila* (2009) 46 Cal.4th 680, 715. That the prosecutor in *Avila* also informed the jury, "[T]he decision to kill is similar, but . . . not . . . in any way . . . the same," (*ibid.*) was an *additional*, not primary, reason the court upheld the argument. Defense counsel was not ineffective for failing to make an unmeritorious objection. (*People v. Lucero* (2000) 23 Cal.4th 692, 732.)

Additionally, the trial court properly instructed the jury on deliberation and premeditation. The trial court further instructed, "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." ""It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions." [Citation.]' [Citation.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 905.)

3. King's gang status

Defendant objects to the following argument: "[Defendant also lied about] the gang stuff. She says that Bobby [King] and Taft and Gary[, another of defendant's friends,] are all gang members when, in fact, she knows they're not. That is so offensive. Bobby King is not here to defend himself because she

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premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time."

killed him. [¶] And she adds insult to injury by throwing this gang stuff at you so that one of you will say, oh, my God, I'm scared. He's a gang member, oh, my gosh. [¶] That was a lie. That was a manipulation and you should see right through it. [¶] . . . [¶] So she throws out all these allegations that are uncorroborated." Defendant claims the prosecutor's argument was improper because evidence that would have corroborated defendant's claim—the video clip in which King purportedly said he was a gang member—was excluded at the prosecutor's request and the prosecutor, in the foregoing argument, "capitalized upon the improper exclusion of the King video."

We reject defendant's assertion for two reasons. First, she forfeited the issue by failing to object in the trial court. (*People v. Seumanu, supra*, 61 Cal.4th at p. 1328.) Second, as discussed above, the trial court found the video clip, which it had viewed, did not corroborate defendant's claim that King was a gang member. The court properly exercised its discretion to exclude that evidence. Under these circumstances, the prosecutor's argument was neither improper nor a miscarriage of justice. (*People v. Lawley* (2002) 27 Cal.4th 102, 156.)

4. Evidence outside the record

Defendant objects that the prosecutor argued evidence outside the record when he said that while there was evidence defendant suffered minor injuries, they occurred when cartridge casings ejected from her weapon "very fast and very hot" hit her in the face. This argument was also forfeited. (*People v. Seumanu, supra*, 61 Cal.4th at p. 1328.) On the merits, the prosecutor's argument was based on evidence in the record and

inferences therefrom. The prosecution's firearms expert testified cartridge casings are ejected "up and to the right." A senior criminalist testified: "[w]hen a gun is fired, the firing pin causes the primer material to explode. That explosion basically then sends a flash to ignite the smokeless powder above it. [¶] And in a fraction of a second high temperatures and pressures are formed inside the firearm. And those high pressures are what causes the bullet to travel downrange towards the target." Additionally, a forensic pathologist who had performed "over five thousand autopsies" testified he had "seen minor injuries on a known shooter as a result of firing a weapon." Whether the prosecutor's inferences were reasonable was for the jury to decide. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) Further, the jury was instructed: "You must decide what the facts are. It is up to all of you, and you alone to decide what happened, based only on the evidence that has been presented to you in this trial. [¶] . . . [¶] 'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence. [¶] Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence." As noted above, "'"[J]urors are presumed to be intelligent and capable of understanding and applying the court's instructions." [Citation.]' [Citation.]" (*People v. Covarrubias, supra*, 1 Cal.5th at p. 905.)

*D. Cumulative Error*

Defendant argues the cumulative effect of the trial court's errors denied her due process and a fair trial. We disagree. As

discussed above, the trial court did not err. And even if there had been error, none of the trial court's rulings affected the verdict and were therefore harmless, even accumulated. (*People v. Melendez* (2016) 2 Cal.5th 1, 33.)

*E. The Section 12022.53 Firearm Enhancement*

As of January 1, 2018, the trial court has discretion to strike or dismiss section 12022.53 firearm enhancements. We conclude this case must be remanded for the trial court to determine whether it wishes to exercise its discretion to resentence defendant.

As noted above, the jury found defendant personally and intentionally discharged a handgun causing death. (§ 12022.53, subd. (d).) The trial court imposed a consecutive 25-years-to-life sentence.[5] That sentence was mandatory. This is because, at the time defendant was sentenced, on July 11, 2016, section 12022.53, subdivision (h) prohibited a trial court from striking or dismissing the firearm enhancement. The subdivision stated: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Stats. 2010, ch. 711, § 5, eff. Jan. 1, 2012.) Effective January 1, 2018, however, section 12022.53, subdivision (h) was amended to allow a trial court to exercise its discretion under section 1385 to strike or dismiss a section 12022.53 firearm enhancement at the time of

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[5] The jury also returned true findings under subdivisions (b) and (c) of section 12022.53. The trial court imposed and stayed the applicable sentences. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130.)

sentencing or resentencing: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

In supplemental briefing, defendant has asked this court to apply the recent amendment to her case. In response, the Attorney General concedes the current version of section 12022.53, subdivision (h) applies retroactively to the present case and we agree. (*People v. Francis* (1969) 71 Cal.2d 66, 76; *In re Estrada* (1965) 63 Cal.2d 740, 742, 745, 748.) The trial court now has the discretion, if it elects to resentence defendant, to strike or dismiss the present firearm enhancement allegation or finding under section 12022.53.

The Attorney General argues, however, that a remand for resentencing is unnecessary as the record shows the trial court would not in any event have exercised that discretion. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1996.) In *Guitierrez,* Division Two of this appellate district held in a similar context that a remand for resentencing is not required when "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the [prior conviction] allegations." (*Ibid.*) We disagree with the Attorney General's position.

We cannot conclude on the present record that the trial court clearly indicated it would not have in any event exercised discretion to strike or dismiss the firearm enhancement allegations or findings. As a result, we will remand this matter for the trial court to determine whether it wishes to resentence

defendant. The Attorney General correctly notes that in the trial court's view the present crime was "one of those crimes where really it doesn't make sense": "When you think of the fact that the defendant and the victim were friends, good friends, and we have a young lady in front of us who had no prior criminal history, and, yet, carried out a crime that really was an execution. This young man did not deserve to be killed and he certainly did not deserve to be killed in the fashion in which he was." Consistent with the probation officer's report, the court found the aggravating factors outweighed the mitigating factors. The court noted, as factors in aggravation, that "the crime involved great violence, great bodily harm, and disclos[ed] a high degree of cruelty, viciousness and callousness on the part of [the defendant]," and the manner in which the crime was carried out "indicated . . . planning, sophistication, and professionalism." (Cal. Rules of Court, rule 4.421(a)(1), (a)(8).) The sole but arguably significant and compelling factor in mitigation was defendant's lack of a criminal record. (Cal. Rules of Court, rule 4.423(b)(1).) The probation department recommended the imposition of "a mid-base term." But the trial court was obligated by statute to impose 25 years to life for first degree murder and a consecutive 25 years to life under section 12022.53, subdivision (d). (*People v. Franklin* (2016) 63 Cal.4th 261, 263.) The trial court had, at the time, no discretion whatsoever to impose any lesser sentence. While there is nothing to indicate that the trial court will reduce the sentence using its newly recognized discretion, there is an insufficient basis to conclude that the court clearly indicated it would not do so.

## DISPOSITION

The judgment of conviction is affirmed. This matter is remanded to allow defendant to file a motion requesting the trial court exercise its discretion to resentence defendant pursuant to section 1385, or for the trial court to consider whether it wishes to act on its own motion to do so, given section 12022.53, subdivision (h) as amended effective January 1, 2018.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RAPHAEL, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, 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.