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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. PRINCE LAMAR JORDAN et al., Defendants and Appellants.	B268998 (Los Angeles County Super. Ct. No. BA411326)

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie A. Swain, Judge. Affirmed in part, remanded in part.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant Prince Lamar Jordan.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant David Jackson Cash.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Prince Jordan and David Cash appeal the judgment following their convictions of two counts each of attempted premeditated murder surrounding two separate gang-related shootings and an intentional hit-and-run of a witness who fled the second shooting on his bicycle. Cash raises a host of challenges to his conviction and Jordan joins in two of those contentions. We find no errors warranting reversal and affirm their convictions. We remand for resentencing of both defendants pursuant to the newly enacted Senate Bill 620 (SB 620) related to firearm enhancements. (Stats. 2017, ch. 682, § 2.)

PROCEDURAL BACKGROUND

An amended information alleged three counts of attempted murder involving three separate victims: Terrence Dow in count 1; Davion Young in count 2; and Qudane Campbell in count 3. (Pen. Code, §§ 664/187.)[1] Jordan was charged in all three counts, while Cash was only charged in counts 2 and 3. The information alleged each count was committed willfully, deliberately, and with premeditation (§ 664, subd. (a)) and was committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subds. (b)(1)(A) & (b)(5)). The information also alleged in counts 1 and 2 that a principal personally discharged a firearm. (§ 12022.53, subds. (b), (c), (d), & (e)(1).) The information further alleged Jordan had one prior strike conviction and Cash had 12 prior strike convictions (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), and one prior serious felony conviction (§ 667, subd. (a)(1)).

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[1] All undesignated statutory citations are to the Penal Code unless noted otherwise.

Following trial, a jury convicted Jordan of counts 1 and 2 and found the allegations as to those counts true, but acquitted him on count 3. The jury convicted Cash of both counts 2 and 3 charged against him and found all allegations true. Following separate court trials, the court found all the prior conviction allegations true. The court sentenced Jordan to 78 years to life, which included consecutive 25-years-to-life terms for each of counts 1 and 2 pursuant to section 12022.53, subdivision (d). The court sentenced Cash to 112 years to life, which included a consecutive 25-years-to-life term pursuant to section 12022.53, subdivision (d).

FACTUAL BACKGROUND

1. Count 1: The Shooting of Terrence Dow

Jordan was charged alone in count 1 with the attempted premeditated murder of Terrence Dow. At approximately 10:40 p.m. on May 13, 2013, Dow was sitting in the driver's seat of a car parked outside his apartment complex located at the intersection of Menlo Avenue and 42nd Street in Los Angeles. A "white old school Cadillac" stopped next to his vehicle and then drove off. Moments later, a black SUV stopped next to his vehicle. A black man was driving, and a black woman was in the front passenger seat. The woman looked toward Dow, then toward the driver. The driver exited the SUV and went around the back toward Dow's car. The man was wearing a black hooded sweatshirt. He said, "What's up, Hoove? Fuck funkies." The man fired a nine-millimeter semiautomatic handgun repeatedly at Dow, and a bullet hit Dow in the thigh. Dow "play[ed] dead" until the man got into the SUV and drove away. Dow was later transported to the hospital via ambulance. He was unable to identify the shooter.

Police recovered three expended nine-millimeter bullet casings and two spent bullets from the scene. All came from the same firearm, but they did not come from the firearm found after the second shooting discussed below.

Dow testified the term "Hoove" referred to the Hoovers criminal street gang, while "funkies" was a disrespectful term used by Hoovers gang members toward members of the Rolling 40's gang. Dow testified he was "affiliated" with the Rolling 40's gang, but he was not a member.

2. Counts 2 and 3: The Shooting of Davion Young and the Collision with Qudane Campbell on His Bicycle

Both defendants were charged in count 2 with the attempted premeditated murder of Davion Young based on a drive-by shooting that took place a little over 90 minutes after the Dow shooting. They were also both charged in count 3 with the attempted premeditated murder of witness Qudane Campbell when the SUV involved in the shooting hit him as he rode his bicycle away from the scene. (Jordan was acquitted of count 3.)

At approximately 12:15 a.m. on May 14, 2013, Davion Young was standing in front of the Prince Market at the intersection of 69th Street and Figueroa Street in Los Angeles.[2] He was talking with friends, including Campbell, who was on his bicycle. A black, four-door SUV stopped in front of the store on the 69th Street side. The driver was a black male, and the front passenger seat was empty. A dark-skinned male rode in the left rear seat behind the driver. Jordan sat in the right rear passenger seat. He asked Young and the others, "Where are you

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[2] Young testified that he had smoked marijuana before arriving and was "drunk" or "buzzed" from "two beers."

guys from?" Young understood him to be asking about their gang affiliation. One of Young's friends responded that they were not gang members. After "a minute or two," Jordan shot at them repeatedly, hitting Young in the back and abdomen, which later required colon surgery. The SUV drove away, turning right onto Figueroa Street.

Campbell rode away on his bicycle to tell Young's parents that Young had been shot. He rode north on Figueroa Street, turned left on 68th Street, and turned right on Denver Avenue. Driving toward Campbell on Denver Avenue, defendants' black SUV struck him head-on without swerving or slowing. Campbell was knocked from his bicycle, flying 10 feet and suffering injuries. The SUV sped away. Campbell believed the driver "had to have seen" him.

Los Angeles Police Officer Brady Lamas was on patrol driving southbound on Figueroa Street when he heard gunshots nearby. He turned onto 65th Street. Defendants' SUV turned onto 65th Street from Denver Avenue and came toward him at a high rate of speed. It failed to stop at a stop sign and almost collided with Officer Lamas's car. Officer Lamas made a u-turn, called for backup, and pursued defendants' SUV.

Defendants stopped the SUV on Flower Street and fled on foot. Officer Lamas arrived at the abandoned SUV; backup arrived seconds later. Officers quickly set up a perimeter for the area. Jordan surrendered moments later, emerging from the driveway of a residence. A canine unit found Cash hiding behind a truck in the carport of a residence.

A nine-millimeter handgun was recovered from a driveway within the perimeter area. An expended nine-millimeter bullet casing and a bullet fragment were recovered from near the Prince Market. The casing matched the recovered handgun.

At trial, Young identified Jordan as the shooter. At a photographic lineup after the shooting, Young also identified Jordan's photograph, although he was not positive at the time. At the preliminary hearing, Young did not identify Jordan. At trial, Young eventually admitted he lied at the preliminary hearing because he did not want to cooperate in the proceedings at the time, even though he recognized Jordan as the shooter.

3. Additional Prosecution Evidence

The SUV was registered to Gwendolyn Shallowhorn, and Cash also went by the name David Shallowhorn. It had a dent in the center of the hood just above the grill. A search of the SUV yielded credit and debit cards in Cash's name in the glove compartment.

After their arrests, defendants' hands were swabbed for gunshot residue. Cash's hands tested positive while Jordan's hands tested negative. A positive test can mean an individual fired a gun, was near a gun when it was fired, or handled something with gunshot residue on it.

Jordan was wearing a GPS device on the night of the offenses. It placed him at the scenes of both shootings. A video was played for the jury showing his movements.

4. Gang Expert

The prosecution called Los Angeles Police Officer Michael Hernandez as a gang expert. He testified Cash and Jordan were members of the Hoovers gang. Cash was a member of the 8-Trey Hoovers subset, and Jordan was a member of the 5-Deuce

Hoovers subset. In response to hypothetical questions based on the facts of the case, Officer Hernandez opined that both shootings and the hit-and-run would have been committed for the benefit of and in association with the Hoovers criminal street gang. We set forth Officer Hernandez's testimony in detail in the discussion section below.

5. Defense Evidence

Jordan called an experimental psychologist, who discussed factors that can affect the accuracy of eyewitness identification, including stress level during a traumatic event, fatigue or intoxication of a witness, the passage of time, and procedures used in an identification process. He explained a large body of scientific research has yielded a "very low level of reliability" for eyewitness identification under even the "best of circumstances." There is also no relationship between an eyewitness's confidence in an identification and its accuracy.

Cash recalled Officer Lamas, who booked the evidence collected at the crime scenes. Officer Lamas testified that a mistake was made in a property report mixing up certain items collected for DNA analysis. DNA testing on the items collected was inconclusive.

DISCUSSION

Cash raises 12 challenges to his conviction and sentence: (1) insufficient evidence supported the gang enhancements pursuant to *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*); (2) the court erroneously refused to bifurcate the gang enhancements from trial on the substantive offenses; (3) insufficient evidence supported the attempted premeditated murder of Campbell in count 3; (4) insufficient evidence supported the gang enhancement attached to the attempted

premeditated murder of Campbell in count 3; (5) insufficient evidence supported aiding and abetting the attempted premeditated murder of Young in count 2; (6) the verdict forms' use of the term "malice aforethought" was inadequate to sustain the attempted murder convictions; (7) the trial court erroneously denied Cash's motion to sever his trial from Jordan's trial and his motion for a new trial on the same ground; (8) the trial court erroneously denied a mistrial motion after a prospective juror commented that one of the defendant's "teardrop" tattoos signified in gang language that he had killed someone; (9) the trial court erroneously refused to give a requested accident instruction related to the attempted murder of Campbell; (10) the court erroneously excluded an investigating officer's opinion that the collision with Campbell was an accident; (11) cumulative error warrants reversal; and (12) remand for resentencing is necessary in light of the changes made by SB 620 related to the gun use enhancements.

Jordan filed separate briefs, joining in and providing additional argument on the contentions that the gang enhancements were not supported by sufficient evidence under *Prunty* and the court should have declared a mistrial after the prospective juror's "teardrop" tattoo comment. He also joined in Cash's request for resentencing pursuant to SB 620.

For the reasons that follow, we find no error warranting reversal of defendants' convictions.[3] Respondent did not oppose

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[3] To the extent defendants raise accompanying federal constitutional challenges on the same grounds as their state law contentions, we find no constitutional violations based on the reasons we reject their state-law claims. We need not separately discuss those issues. (See *People v. Brady* (2010) 50 Cal.4th 547,

remand for resentencing pursuant to SB 620, and we find remand proper.

I. Sufficient Evidence Supported the Gang Enhancements under *Prunty*

The jury found true allegations that the attempted murders were "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) *Prunty* recently held that, "when the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Prunty, supra,* 62 Cal.4th at pp. 67–68.) Defendants contend the evidence in this case was insufficient under *Prunty*. As we explain, *Prunty* addressed a different factual scenario than presented here, and unlike in that case, the evidence here was more than sufficient to support the gang enhancements.

A. Gang Expert Testimony

Officer Hernandez worked for the Los Angeles Police Department assigned to the 77th Division, Gang Enforcement Detail. For the last several years, he had been assigned to the Figueroa corridor, which was the main throughway for the

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557–558, fn. 4 (*Brady*) [" '[R]ejection, on the merits, of a claim that the trial court erred on the issue actually before the court necessarily leads to rejection of the newly applied constitutional "gloss" as well. No separate constitutional discussion is required in such cases, and we therefore provide none.' "].)

Hoovers criminal street gang. He had made well over a thousand contacts with gang members and made numerous arrests of Hoovers gang members for vandalism, burglaries, robberies, shootings, and attempted murders. Most recently, he had been tasked with monitoring "the Hoover gangs, specifically 5-Deuce, 5-9, 5-1 Trouble, which is a gang that links up with 5-Deuce, 74 Hoovers, and 8-Trey Hoovers."

The Hoovers street gang has between 1,500 and 2,000 members with primary activities of vandalism, thefts, burglaries, assaults, assaults with deadly weapons, shootings, drive-by shootings, murders, identity theft, and human trafficking. The Prince Market was located in the Hoovers territory, and Hoovers commit shootings in their own territory to defend it. The Hoovers gang's main rival is the Rollin 40s gang, and one derogatory term used for them is "Funky." The location of the Dow shooting was in Rollin 40s territory, and Hoovers gang members commonly go into Rollin 40s territory to commit shootings. Dow was a Rollin 40s gang member.

As for organizational structure, the Hoovers gang is divided into subsets. "Each set is their individual gang; however, they all get along, and they all say Hoovers are Hoovers." The subsets are generally based on their geographic area within a territory extending north to Vernon Avenue; east to the 110 freeway; west to Vermont Avenue; and south to Manchester Avenue.

Cash was a self-identified member of the 8-Trey Hoovers subset, and Jordan was a member of the 5-Deuce Hoovers subset. Members of those two subsets get along and commit crimes together.

As predicate offenses, the People introduced certified records of attempted murder convictions for Bryan Anthony Cook and Travis Odell Foster. Officer Hernandez opined they were both members of the Hoovers gang, but did not testify they belonged to any particular subset.

The most common symbol for the Hoovers gang is the Houston Astros baseball team's five-pointed star with an "H" in the center. Members often get tattoos ranging from the basic "Hoover" to the different subsets they belong to. Officer Hernandez has seen members of the 5-Deuce Hoovers tattoo every subset on their body with the Houston Astros star in the middle, signaling "all Hoovers are united." Hoovers members also use a common hand signal in the form of an "H".

Both Cash and Jordan were covered in tattoos signifying both the Hoovers gang generally and their specific subsets. On his face, Cash had the word "Hoover" with the o's replaced with 8 and 3 to signify his subset and the letters "V.A." commonly used by Hoovers gang members. On his neck, he had a large "H" signifying Hoovers. On his left forearm, he had the Houston Astros five-pointed star with the "H" in the center used by Hoovers members. On his left hand, he had "8-3" to signify his subset and the depiction of the hand symbol Hoovers members use. On his right arm, he had "8-3" and "ETH" signifying his 8-Trey Hoover subset, as well as "H," "S," and "T" signifying Hoover Street. On his chest, he had "HCG" for Hoover Criminal Gangster. On his stomach, he had "HOOVER" and a series of tattoos under it signifying the subsets of 5-Deuce, 8-Trey, 7-4, 9-Deuce, 9-4, and 11-Deuce. On his right shoulder, he had the depiction of the Hoovers hand signal with an "8" and "3" on the fingernails signifying his subset and the word "HOOVA" above it.

On his face, Jordan had an "H" for Hoovers. On his neck, he had the Houston Astros star with the "H" in the center. On his temple, he had "5-2" for his subset. On his chest, he had "HOOVER" with the o's replaced with a "5" and a "2" for his subset. On his left arm, he had the depiction of the hand signal for the 5-Deuce Hoovers surrounded by the Hoovers subsets of 74, 8-Trey, and 5-Deuce. On the back of his neck he had "Everybody Killer" and on his back he had "West Side," both of which related to the Hoovers gang. On his arms, he had "HG" for Hoover Gangsters and the Houston Astros star with an "H" in the center.

Based on hypothetical questions tracking the evidence, Officer Hernandez opined the Dow shooting was committed to benefit the Hoovers gang because it occurred in rival territory and was preceded by a rival gang challenge. He opined the Young shooting was committed in association with and to benefit the Hoovers gang because it was preceded by a gang challenge and would have been committed to protect their gang territory. He opined the Campbell collision benefitted the gang because it would aid members in escaping prosecution by deterring witnesses from cooperating with police.

B. Legal Standard

" 'In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify

the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.' " (*People v. Resendez* (2017) 13 Cal.App.5th 181, 187–188 (*Resendez*).)

C. The Decision in Prunty

Under section 186.22, a "criminal street gang" is defined as any " 'ongoing organization, association, or group of three or more persons' that shares a common name or common identifying symbol; that has as one of its 'primary activities' the commission of certain enumerated offenses; and 'whose members individually or collectively' have committed or attempted to commit certain predicate offenses." (*Prunty, supra,* 62 Cal.4th at p. 67, quoting § 186.22, subd. (f).) *Prunty* concluded this provision "requires the prosecution to introduce evidence showing an associational or organizational connection that unites members of a putative criminal street gang. The prosecution has significant discretion in how it proves this associational or organizational connection to exist," but "when the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Prunty, supra,* at pp. 67–68.)

The court offered several "illustrative examples" of strategies the prosecution could use to demonstrate this required connection. (*Prunty, supra,* 62 Cal.4th at pp. 76–81.) Most pertinent here, the evidence might show "a degree of collaboration, unity of purpose, and shared activity to support a fact finder's reasonable conclusion that a single organization,

association, or group is present." (*Id.* at p. 78.) Such a showing might include evidence that "members of different subsets have 'work[ed] in concert to commit a crime,' [citation]; or that members have strategized, formally or informally, to carry out their activities"; or that subsets "have professed or exhibited loyalty to one another"; or even more informally, that "members of two gang subsets 'hang out together' and 'back up each other.' " (*Ibid,* fn. omitted.) Evidence of a connection might also take the form of "mutually acknowledg[ing] one another as part of that same organization, and evidence may be presented that the organization in question tends to operate in decentralized fashion and in the relevant geographic area." (*Id.* at p. 79.)

In *Prunty*, proof of the requisite connection was lacking. The prosecution attempted to show the defendant committed the charged crimes to benefit the umbrella Norteños criminal street gang through gang expert testimony that the defendant was a member of the Norteño gang, and specifically the "Detroit Boulevard Norteño" subset. (*Prunty, supra,* 62 Cal.4th at pp. 68–69.) The expert described the Norteños as a Hispanic gang active in Sacramento and throughout California, with 1,500 local members. (*Id.* at p. 69.) He testified that "Sacramento-area Norteños are not associated with any particular 'turf' but are instead 'all over Sacramento' with 'a lot of subsets based on different neighborhoods.' " (*Ibid.*) For predicate offenses, he described the convictions of two Varrio Gardenland Norteños subset members stemming from a confrontation with the Del Paso Heights Norteños subset, and an incident in which members of the Varrio Central Norteños subset shot at a former Norteño gang member. (*Ibid.*) Other than the expert's testimony that those gang subsets referred to themselves as "Norteños," the

prosecution offered no evidence showing those subsets identified with a larger Norteño group, nor did the expert testify that they were connected to each other or any other Norteño-identified subset. (*Ibid.*)

The court found this evidence insufficient to prove "that the Sacramento-area Norteños were indeed the ones who committed the two or more predicate offenses that an 'organization, association, or group' must commit to coincide with" the definition of a criminal street gang. (*Prunty, supra,* 62 Cal.4th at pp. 69, 82.) "Although [the expert] characterized these groups as Norteños, he otherwise provided no evidence that could connect these groups to one another, or to an overarching Sacramento-area Norteño criminal street gang. [The expert] did not describe any evidence tending to show collaboration, association, direct contact, or any other sort of relationship among any of the subsets he described. None of his testimony indicated that any of the alleged subsets had shared information, defended the same turf, had members commonly present in the same vicinity, or otherwise behaved in a manner that permitted the inference of an associational or organizational connection among the subsets." (*Id.* at p. 82.)

The court continued, "Nor did [the expert's] testimony demonstrate that the subsets that committed the predicate offenses, or any of their members, self-identified as members of the larger Norteño association that the defendant sought to benefit. Although there was ample evidence that Prunty himself identified as both a member of the Detroit Boulevard Norteños and the larger umbrella Norteño gang, and that he collaborated with a member of another subset to commit his present offenses, the prosecution presented no evidence that the members of the

Varrio Gardenland and Varrio Centro Norteños self-identified as part of the umbrella Norteño gang. . . . [The expert] simply described the subsets by name, characterized them as Nortenos, and testified as to the alleged predicate offenses. He offered no additional information about their behavior or practices that could reasonably lead the jury to conclude they shared an identity with a larger group." (*Prunty, supra,* 62 Cal.4th at pp. 82–83, fn. omitted.)

The court concluded, "When, as here, the prosecution relies on the conduct of subsets to show a criminal street gang's existence, the prosecution must show a connection among those subsets, and also that the gang those subsets comprise is the same gang the defendant sought to benefit." (*Prunty, supra,* 62 Cal.4th at p. 85.) That showing was not made with the evidence presented. (*Id.* at p. 84.)

D. Analysis

Defendants contend the evidence in this case was insufficient in light of *Prunty*. But *Prunty* involved a different prosecutorial strategy than the one pursued by the prosecution here. As in *Prunty*, the prosecution in this case sought to show defendants committed the attempted murders to benefit the umbrella Hoovers criminal street gang. But unlike the predicate offenses in *Prunty*, in order to prove the Hoovers were a criminal street gang, Officer Hernandez testified that two predicate offenses were committed by Hoovers gang members *without identifying any particular subset*. *Prunty* did not address this scenario. (See *Prunty, supra,* 62 Cal.4th at p. 87 (conc. & dis. opn. of Cantil-Sakauye, C.J.) ["specific and narrow issue" is what evidence is necessary to show defendant committed felony "to benefit a street gang that operates through subsets, but the

predicate offenses are committed by members of a subset of such gang"]; *id.* at p. 91 (conc. & dis. opn. of Corrigan, J.) ["narrow" issue in case "arises only when the prosecution seeks to prove a street gang enhancement by showing the defendant committed a felony to benefit a broader umbrella gang, but seeks to prove the requisite pattern of criminal gang activity with evidence of felonies committed by members of subsets to the umbrella gang"]; see also *People v. Pettie* (2017) 16 Cal.App.5th 23, 50 (*Pettie*) [*Prunty* inapplicable to prosecution theory of single unitary gang]; *People v. Ewing* (2016) 244 Cal.App.4th 359, 372–373 [*Prunty* arguably did not apply because prosecution did not proffer predicate crimes of subset gang members].)

Thus, the question here is not whether there was a sufficient connection between the predicate offenses and the umbrella Hoovers gang defendants sought to benefit—there clearly was. (See *Pettie, supra,* 16 Cal.App.5th at p. 49 [qualifying predicate offenses committed by gang members not identified as members of any subset].) Instead, the question here is whether sufficient evidence showed a connection between defendants who identified with particular Hoovers gang subsets and the umbrella Hoovers gang. In *Prunty,* the evidence on *that* point was ample. (*Prunty, supra,* 62 Cal.4th at pp. 82–83.) The same is true here.

Officer Hernandez testified the Hoovers gang occupies a relatively confined geographic area in Los Angeles. (See *Resendez, supra,* 13 Cal.App.5th at p. 191 [distinguishing *Prunty* in part because "[u]nlike the Norteños, who are not associated with any particular turf in the Sacramento area, the East Side Bolen gang claims a well-defined territory within the city of Baldwin Park"].) Although each subset is "their individual gang,"

all of the subsets "get along" and "say Hoovers are Hoovers." Common Hoovers tattoos include the basic "Hoover" and the Houston Astros five-pointed star with an "H" in the middle surrounded by the subsets, which signals "all Hoovers are united." And the Hoovers use a common hand signal in the form of an "H."

For Jordan and Cash specifically, they belonged to different Hoovers subsets but committed the Young shooting together. Officer Hernandez testified members of their subsets—8-Trey Hoovers and 5-Deuce Hoovers—get along and commit crimes together. Just before Jordan opened fire on Dow, he mentioned the Hoovers gang and not his specific subset when he said "What's up, Hoove?" (See *People v. Vasquez* (2016) 247 Cal.App.4th 909, 925 [connection shown by defendant shouting "Norteños" during crime rather than any subset].) Dow was a member of the Hoovers rival Rollin 40s gang, and Officer Hernandez did not suggest that rivalry was limited to Jordan's subset or any other Hoovers subset.

Both defendants were also covered in tattoos demonstrating their close connection to the umbrella Hoovers gang and the various Hoover subsets, including the Houston Astros five-pointed star with the "H" in the center; Cash's "HOOVER" tattoo on his stomach with a series of tattoos signifying the subsets of 5-Deuce, 8-Trey, 7-4, 9-Deuce, 9-4, and 11-Deuce; and Jordan's tattoos of the hand signal for the 5-Deuce Hoovers surrounded by the Hoovers subsets of 74, 8-Trey, and 5-Deuce. (See *People v. Garcia* (2017) 9 Cal.App.5th 364, 379

[defendant's tattoos for both umbrella gang and subset showed connection between them].)[4]

This evidence was more than sufficient to show the required connection between defendants' subsets and the umbrella Hoovers gang that defendants intended to benefit with their crimes.[5]

II. The Court Properly Refused to Bifurcate the Gang Enhancements

Before trial, Cash moved to bifurcate trial on the substantive crimes from trial on the gang enhancements, arguing the gang evidence was inflammatory and unduly prejudicial. The court denied the motion because the gang evidence would be probative of motive on the substantive counts. Cash argues the court abused its discretion in reaching this conclusion, but we disagree.

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[4] *Prunty* opined that common gang signs, tattoos, graffiti, colors, and rivals do not show the required connection between the umbrella gang and its subsets. (*Prunty, supra,* 62 Cal.4th at pp. 83–84 ["[T]his evidence tends to show that the alleged subsets use common symbols or common identifying colors and thereby fulfill the element of section 186.22(f) requiring such common characteristics; it does not show that the subsets are united together or with a larger group as a single 'organization, association, or group.' "].) But defendants' tattoos here show more than just common symbols; they actually communicate the close connection between the subsets and the umbrella Hoovers gang and among the Hoovers subsets.

[5] Jordan asserts a host of additional points to support his argument under *Prunty*. The relevance of these contentions is not immediately clear. Nonetheless, we have considered them and find them unpersuasive.

A trial court has discretion to bifurcate trial of a gang allegation from trial of the substantive offense. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049–1050 (*Hernandez*); *People v. Franklin* (2016) 248 Cal.App.4th 938, 952 (*Franklin*).) Gang evidence may be probative during a trial of substantive offenses because "[e]vidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Hernandez, supra,* at p. 1049.) Bifurcation may be appropriate, however, if the gang evidence is "so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Ibid.*) The defendant bears the burden " 'to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' " (*Id.* at p. 1051.) We review the court's bifurcation decision for abuse of discretion. (*Franklin, supra,* at p. 952.)

The court did not abuse its discretion in denying bifurcation because the gang evidence here was unquestionably relevant to Cash's substantive crimes in nearly all the categories mentioned in *Hernandez*: identity, motive, modus operandi, and specific intent. Cash himself injected the gang evidence into the Young shooting when he drove Jordan, a fellow gang member, to the Prince Market in their own territory, and then Jordan issued the gang challenge, "Where are you from." (See *Hernandez, supra,* 33 Cal.4th at p. 1050.) Officer Hernandez's expert testimony provided the jury necessary background and context to explain the modus operandi of the Hoovers criminal street gang

and the specific motive behind both this drive-by shooting and the later collision with Campbell in order to eliminate a potential witness and intimidate other witnesses to benefit the gang. Those points were also relevant to proving Cash's knowledge of Jordan's intent during the drive-by shooting and Cash's own intent to kill.

Cash seems to concede the relevance of the gang evidence but contends that the predicate attempted murder convictions of other Hoovers gang members and evidence of the gang's primary activities would not have been admissible in a separate trial on the substantive offenses. He is correct, but that did not compel bifurcation. There was no suggestion Cash was involved in any of those offenses and that evidence was not particularly inflammatory in comparison to his own attempted murder charges, so there was little risk of prejudice or jury confusion. (*Hernandez, supra,* 33 Cal.4th at p. 1051.) The jury was also properly instructed only to consider the gang evidence for the limited purposes of "deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang related crimes and enhancements or the defendant had a motive to commit the charged crimes." It was instructed not to use the evidence to conclude defendants had bad character or criminal disposition. We presume the jury followed these instructions. (*Franklin, supra,* 248 Cal.App.4th at p. 953.) The court did not abuse its discretion in finding bifurcation unwarranted.

III. Sufficient Evidence Supported Cash's Attempted Premeditated Murder of Campbell

Cash contends the evidence was insufficient to show he intended to kill Campbell or that he did so with premeditation and deliberation. Again, " 'In reviewing the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' [Citation.] We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence." (*People v. Medina* (2009) 46 Cal.4th 913, 919; see *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1262.) Reversal is not warranted "unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*).)

Attempted murder requires " ' "the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." ' " (*People v. Perez* (2010) 50 Cal.4th 222, 229 (*Perez*).) When the attempted murder is alleged to be willful, deliberate, and premeditated, " ' " '[d]eliberation' refers to careful weighing of considerations in forming a course of action [and] 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation . . . does not require any extended 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.]' " [Citation.]' " (*People v. Virgo* (2013) 222 Cal.App.4th 788, 798–799; see *Bolin, supra,* 18 Cal.4th at p. 332.)

Courts generally look to three kinds of evidence when evaluating premeditation and deliberation: motive, planning activity, and manner of killing. (*People v. Stitely* (2005) 35 Cal.4th 514, 543 (*Stitely*).) They need not be present in any particular combination, but " '[w]hen the record discloses evidence in all three categories, the verdict generally will be sustained.' " (*Ibid.*) Further, first degree murder convictions have typically been upheld when there is " ' "either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing." [Citations.]' " (*People v. Proctor* (1992) 4 Cal.4th 499, 529 (*Proctor*).)

Substantial evidence supported the jury's conclusions that Cash harbored a specific intent to kill Campbell and he attempted to do so willfully, deliberately, and with premeditation.[6] First, there was evidence of motive. Campbell was with Young at the Prince Market when Jordan opened fire on them from Cash's SUV for gang-motivated reasons. The jury could have reasonably inferred that when Cash spotted Campbell on his bicycle, he recognized him and wanted to eliminate him as a witness or to finish the job he and Jordan had begun when they opened fire at perceived rival gang members at the Prince Market. (See *Stitely, supra,* 35 Cal.4th at p. 543 [jury could reasonably believe defendant killed rape victim to silence her as possible witness]; see also *Bolin, supra,* 18 Cal.4th at p. 332.)

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[6] Although Cash separately argues the evidence was insufficient to show either an intent to kill or premeditation and deliberation, his basic point is the same—neither element was present because the collision was an accident. The same evidence showed both intent to kill and premeditation and deliberation, so we analyze the two elements together.

Indeed, Officer Hernandez opined that this hit-and-run would have been done for the benefit of the Hoovers gang because it could have intimidated witnesses, thereby helping gang members escape prosecution.

The manner of the collision also suggested it was deliberate. Campbell testified the driver of the SUV "had to have seen" him, but the SUV did not swerve or slow down. After it struck Campbell and threw him 10 feet, it sped away. It was later recovered with a dent in the center of the hood, showing it hit Campbell squarely and head-on. Coupled with the evidence of motive, this evidence could have readily supported a reasonable inference that Cash made a deliberate choice to kill Campbell in the short time between spotting him and running him over. This mix of motive and the deliberate manner of the collision sufficiently supported intent to kill and premeditation and deliberation.

In arguing otherwise, Cash focuses on the alleged "serendipitous[]" circumstance that brought Cash and Campbell onto Denver Avenue, suggesting the collision was an accident. His argument misunderstands the scope of our review. "[W]e must decide whether the circumstances reasonably justify the findings of the trier of fact, but our opinion that the circumstances might also reasonably be reconciled with a contrary finding would not warrant reversal of the judgment." (*Proctor, supra,* 4 Cal.4th at pp. 528–529.) Ample evidence supported the jury's verdict.

IV. Sufficient Evidence Supported the Gang Enhancement for Cash's Attempted Murder of Campbell

In an argument closely related to his challenge to the evidence supporting the attempted murder of Campbell, Cash challenges the sufficiency of Officer Hernandez's expert opinion that the collision with Campbell benefited the Hoovers gang. In response to a hypothetical tracking the evidence of the collision, Officer Hernandez opined the collision benefited the Hoovers gang because it deterred and intimidated that witness and other potential witnesses, which assists gang members in escaping prosecution. On cross-examination, Officer Hernandez conceded his opinion was based on the "assumption" that the collision was intentional. Cash contends that assumption was "factually incorrect" and rendered Officer Hernandez's opinion insufficient to support the gang enhancement. We disagree.

Expert testimony is permissible to establish the gang enhancement in section 186.22, subdivision (b)(1). (*Franklin, supra,* 248 Cal.App.4th at pp. 948–949.) "While an expert may render an opinion assuming the truth of facts set forth in a hypothetical question, the 'hypothetical question must be rooted in facts shown by the evidence.' [Citation.] Indeed, an 'expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors." ' " (*Id.* at p. 949.) We need not repeat the evidence discussed above supporting the jury's verdict of attempted premeditated murder of Campbell. Suffice it to say that same evidence supported Officer Hernandez's assumption that the collision was intentional, so Officer Hernandez's opinion was not speculative for that reason.

Cash also suggests that Officer Hernandez's opinion was speculative because there was no evidence Campbell or any other witness was *actually* intimidated. Cash has pointed to nothing that would require the prosecution to present evidence of actual intimidation in order for Officer Hernandez to opine that a gang member would have hit a witness like Campbell in order to intimidate witnesses "for the benefit of . . . any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

Cash does not contend the evidence was otherwise insufficient to satisfy the enhancement, so we reject his challenge.

V. Sufficient Evidence Showed Cash Aided and Abetted the Attempted Murder of Young

Cash concedes that sufficient evidence showed he was an aider and abettor to the shooting of Young at the Prince Market "since the shots were fired from the vehicle he drove." But he argues the evidence was insufficient to prove his "knowledge and intent to kill required for aiding and abetting liability" for attempted murder because there was no direct evidence that he knew Jordan planned to kill Young. The evidence was more than sufficient.

" 'A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' " (*People v. Delgado* (2013) 56 Cal.4th 480, 486.) Relevant factors include "presence at the crime scene, companionship, and conduct before and after the offense." (*In re*

Juan G. (2003) 112 Cal.App.4th 1, 5, fn. omitted.) "Whether a person has aided and abetted in the commission of a crime is a question of fact, and on appeal all conflicts in the evidence and attendant reasonable inferences are resolved in favor of the judgment." (*Ibid*, fn. omitted.)

Overwhelming evidence demonstrated Cash knew of Jordan's intent to kill and shared that intent. Cash drove Jordan—a fellow Hoovers gang member—to the Prince Market, and no one exited the vehicle. Oddly, the front passenger seat was empty, where Jordan surely would have been sitting had he and Cash arrived at the Prince Market for innocent reasons. Jordan sat in the back passenger seat, which Officer Hernandez explained is the position often occupied by the shooter in a drive-by shooting committed by gang members. Jordan yelled a gang-related challenge to Young and his friends, but did not open fire until "a minute or two" after one of Young's friends responded that they were not gang members. Cash did not pull away in that time, suggesting he knew Jordan planned to open fire and gave him time to do so. After Jordan shot at Young and the others, Cash sped away from the scene with Jordan, leading police on a short pursuit. He squarely collided with Campbell, a witness to the shooting, and sped away from *that* incident. Then he and Jordan discarded the gun and abandoned Cash's SUV, hiding near one another until police caught them. This evidence sufficiently supported Cash's conviction on this count based on an aiding and abetting theory.

VI. Cash Forfeited His Challenge to the Verdict Forms; Even if Not, They Were Correct

The verdict forms for counts 2 and 3 indicated the jury found Cash guilty of attempted murder, "in violation of Penal

Code section 664–187(a), a felony, who did unlawfully and with *malice aforethought* attempt to murder" Young and Campbell. (Italics added.) On the verdict forms, the jury separately found true the allegation that each attempted murder "was willful, deliberate and premeditated."

Cash contends the use of the phrase "malice aforethought" on the verdict forms allowed the jury to convict him based on theory of implied malice, rather than the required specific intent to kill. (See *Perez, supra,* 50 Cal.4th at p. 229.)

Cash did not object to the verdict form in the trial court, so he forfeited the claim on appeal. (*Bolin, supra,* 18 Cal.4th at p. 330.) Citing *In re Birdwell* (1996) 50 Cal.App.4th 926 (*Birdwell*), he argues he did not forfeit the issue because the error resulted in an unauthorized sentence. He is correct that *Birdwell* carved out a limited exception to forfeiture because the verdict form there improperly omitted the statutory requirement that the verdict identify the degree of the murder at issue, resulting in an unauthorized first-degree murder sentence. (*Birdwell, supra,* at p. 931.) However, Cash's contention is entirely different, based upon the allegedly ambiguous use of the phrase "malice aforethought" in the verdict forms. Had he objected below, the trial court could have easily addressed the issue. His claim is not saved by *Birdwell*.

Even overlooking forfeiture, we find his contention meritless. " ' "A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions to the court." [Citations.]' [Citations.] 'The form of a verdict is immaterial provided the intention to convict of the crime charged is unmistakably expressed. [Citation.]' " (*People v. Jones* (1997) 58 Cal.App.4th 693, 710.) The jury was

specifically instructed that to find Cash guilty of attempted murder, the People must prove "[t]he defendant intended to kill" the victim. Also, as part of the instruction on the willful, deliberate, and premeditated allegation, the jury was instructed, "The defendant acted willfully if he *intended to kill* when he acted." (Italics added.) Having found the willful, deliberate, and premeditated allegations true, the jury unmistakably concluded Cash acted with intent to kill. There was simply no possibility the jury convicted him based on a theory of implied malice due to the verdict forms' use of the term "malice aforethought."

VII. The Court Properly Denied Cash's Motion to Sever

Before trial, Cash moved to sever his trial from Jordan's trial on the grounds that the admission of Jordan's extrajudicial statements during a police interview in a joint trial would violate Cash's Sixth Amendment right to confrontation; a "great disparity" existed in the weight of the evidence against him and against Jordan because Jordan was solely charged in the shooting of Dow; and a jury would likely convict Cash based on guilt by association. The prosecution separately filed a motion to try defendants jointly, which was essentially an opposition to Cash's motion. It represented that it would not seek to admit Jordan's extrajudicial statements in a joint trial, eliminating any confrontation issue. It argued joinder was presumptively appropriate and warranted under the circumstances.

The motion was heard and denied by a judge different than the judge who presided over the trial. The judge found "enough similarity in this case with respect to the charges and the timing and everything else concerning the underlying evidence" to try defendants together.

Just prior to trial, Cash renewed the motion to sever before the judge who presided over trial. Cash's counsel argued the evidence of the Dow shooting charged against Jordan "would unnecessarily prejudice the jury against my client." The prosecutor responded that he had "no intention of linking that particular incident to" Cash. The court again denied the motion, holding that "judicial economy involved in trying both shootings together and the crossover of evidence, et cetera, is outweighed by any prejudicial—any prejudicial nature with respect to Mr. Cash. And also, having been previously denied, I would be disinclined to reopen that issue since there have been no change of circumstances."

After trial, Cash moved for a new trial based in part on the denial of his severance motions. The court heard the motion and denied it, stating it did not "believe there was any inflaming of the passions of the jury" to justify a new trial.

Cash argues the trial court abused its discretion in denying his motion to sever. We are not persuaded. Our Legislature has expressed a strong preference for joint trials, as reflected in section 1098, which states in pertinent part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." (§ 1098; see *People v. Souza* (2012) 54 Cal.4th 90, 109 (*Souza*).) Under this provision, " 'a trial court *must* order a joint trial as the "rule" and *may* order separate trials only as an "exception." ' " (*People v. Cleveland* (2004) 32 Cal.4th 704, 726 (*Cleveland*).)

Severance may be warranted " 'when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable

judgment about guilt or innocence." ' " (*Souza, supra,* 54 Cal.4th at p. 109.) Severance may also be called for " ' "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." ' " (*Souza, supra,* at p. 110; see *Cleveland, supra,* 32 Cal.4th at p. 726.)

We review the denial of a severance motion for abuse of discretion " 'based upon the facts as they appeared when the court ruled on the motion.' " (*Souza, supra,* 54 Cal.4th at p. 109.) " 'If we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial.' [Citations.] 'If the court's joinder ruling was proper when it was made, however, we may reverse a judgment only on a showing that joinder " 'resulted in "gross unfairness" amounting to a denial of due process.' " ' " (*Ibid.*; see *Cleveland, supra,* 32 Cal.4th at p. 726.)

Cash does not contend that he was improperly joined with Jordan for the jointly charged attempted murders of Young and Campbell. Nor could he, given that " 'committ[ing] "common crimes involving common events and victims" ' present[s] a ' " 'classic case' " for a joint trial.' " (*People v. Homick* (2012) 55 Cal.4th 816, 849.) Thus, the question is whether the trial court abused its discretion in joining the attempted murder of Dow charged only against Jordan with the jointly charged counts, and if there was no abuse of discretion, whether the joinder resulted in gross unfairness to Cash at trial. We find no abuse of discretion or unfairness.

All three counts were in the same class of crimes—attempted premeditated murder of perceived rival gang members and a witness—and occurred about 90 minutes apart. Jordan was the common link for the crimes, and it greatly served judicial economy to try all the counts together with both Jordan and Cash, rather than try Cash separately in a duplicate trial on counts 2 and 3. There was no real risk the details of the Dow shooting would prejudice Cash on counts 2 and 3 because the prosecution did not attempt to link Cash to the Dow shooting in count 1, and the details about that shooting were no more inflammatory than the *two* attempted murders charged against Cash, including the deliberate attempt to run down a witness.

Cash points out that a black SUV was involved in the Dow shooting, and the prosecutor "prejudicially linked" it to the Young shooting and Campbell collision. Cash is correct the prosecutor seemed to link the shootings by commenting, "You've got a car that's been recognized and identified as being involved in multiple incidents, two shootings, a person gets run over [on] a bike." But this inference was not *unduly* prejudicial to Cash because, again, no evidence showed Cash himself was in any way involved in the Dow shooting, even if his vehicle might have been. In any case, evidence that Jordan may have been driving Cash's SUV for the Dow shooting could have been admissible against Cash in a separate trial to show his knowledge and intent in aiding and abetting Jordan during the Young shooting a short time later.

Citing *People v. Massie* (1967) 66 Cal.2d 899, Cash nonetheless argues the trial court had an incorrect view of the facts because the prosecution allegedly shifted its position on the cross-admissibility of the evidence of the SUV used in the Dow

shooting. (See *Id.* at pp. 917–918.) He points out the prosecution argued before the first judge that evidence that Jordan used a black SUV during the Dow shooting would be admissible in a separate trial to show Cash's knowledge, although the prosecution also noted "that's not the end of the inquiry." The prosecution later argued to the trial judge that it had "no intention" to link Cash to the Dow shooting but "nothing has changed" since the prior denial of the motion. This was not a shift in position—the prosecution could cogently avoid linking Cash *himself* to the Dow shooting while arguing Jordan's use of Cash's SUV in that shooting showed Cash's later knowledge and intent during the Young shooting. In any case, this record does not demonstrate the trial court based its decision on an incorrect view of the *facts*. Regardless of the prosecution's strategy, the trial court could have reasonably concluded that all the relevant factors together, including even the possibility that the SUV evidence would be cross-admissible, justified joinder.

Cash also cites *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, but it is distinguishable. In that case, the defendant was named with a codefendant in two counts of attempted murder arising out of one shooting, and was not named in other counts for murder and attempted murder against the codefendant and a third person arising out of a separate shooting two weeks earlier. (*Id.* at p. 935.) The court found joinder inappropriate because nothing from the earlier incident would have been admissible against the defendant except potentially in relation to a gang allegation (*id.* at pp. 939–940); the earlier shooting was gratuitous and execution-style in contrast to the later shooting (*id.* at pp. 941); and the evidence against defendant for the later shooting was weak (*ibid.*).

Here, in contrast, the shootings took place close in time, the evidence of the black SUV used in the Dow shooting was at least potentially cross-admissible to show Cash's knowledge of Jordan's intent for the later shooting, and the Dow shooting was no more inflammatory (arguably *less* so) than the Young drive-by shooting and the attempted murder of Campbell, a witness.

Even if the court abused its discretion in joining count 3 with the counts against Cash, Cash suffered no conceivable prejudice because the evidence against him for the counts charged against him was overwhelming. Cash and Jordan were fellow gang members who committed the drive-by shooting of Young together, fled the scene together, and were arrested near each other after they abandoned Cash's SUV. Cash conceded at trial that he was the driver, which was unquestionably demonstrated by the evidence. His defense was that he did not know Jordan planned to shoot at anyone, so when Jordan opened fire, Cash "panicked and he sped off." Cash "panicked again" when the police were chasing him and hit Campbell. As we have explained, however, overwhelming evidence refuted this defense and demonstrated his requisite intent for both counts. Given Cash was not personally linked to the Dow shooting, the jury would not have been prompted by that evidence to convict Cash of the separate charges involving Young and Campbell. Thus, reversal is not warranted.

VIII. The Court Properly Denied the Mistrial Motion During Voir Dire

Defendants contend the court abused its discretion by denying their mistrial motion during voir dire based on a comment by a prospective juror that a teardrop tattoo on one or both defendants meant in gang language that they had murdered

someone. We review the denial of a mistrial motion for abuse of discretion. (*People v. Bolden* (2002) 29 Cal.4th 515, 555 (*Bolden*).) While we find the comment unquestionably inflammatory and inappropriate, we conclude the trial court acted within its discretion in finding the jury venire was not so tainted that a mistrial was warranted.

A. Procedural Background

Voir dire in this case occurred over four days and spanned over 400 pages of the reporter's transcript. The comment at issue was made by Prospective Juror 4 early in that process.
For proper context, we recite the relevant voir dire proceedings in some detail.

Prospective Juror 4 told the court he had been selling video surveillance and video security products for eight years and had "regularly work[ed] with various branches of law enforcement, including a number of police departments nationwide, Department of State, Homeland Security, and some other agencies." He designed video surveillance systems for prisons and police stations, and as part of that, he "learn[s] what their objectives are" and "design[s] a custom surveillance system for them and I help with the overall integration, as well as constant support and addition of new products."

The court asked if his relationship with these law enforcement agencies would cause him to have difficulty being fair, and he responded, "Yes," explaining, "I know of certain, let's say for example, gang affiliations or gang tattoos. I know that, you know, certain tattoos—"

The court stopped him there and said: "We'll get to that in a minute, but you know being in a gang in and of itself is not against the law. I mean, you will be required if you're asked to

sit on this jury to determine, first of all, whether a crime was committed by these two defendants. And then and only then do you move on to decide whether the crime was committed on behalf of their gang, not just that they're in a gang. And I'm not saying whether they are or not. I don't know.

"I got this case yesterday or two days ago when you guys walked in the door, so I'm not—I'm not much more familiar with it than you are, but there is a—there is a progression of the evidence or a progress in your task as a jury to first start out from a position of presuming the defendants innocent of any criminal conduct, and then listening to the People's case and determining whether the People have proved the defendants guilty beyond a reasonable doubt of the charged offense.

"And then you, at the end, can consider if they're gang members and whether this particular crime was committed in furtherance of their gang. So, do you think you could look at it in a systematic way in that regard?"

Prospective Juror 4 responded: "I could, but it also comes down to the bias that I have regarding, you know, gang members and gang activity. Not saying that the defendants are part of a gang, but based on my knowledge of gang affiliation, it's going to make it very hard for me to look at the evidence systematically." The court moved on.

A short time later and before the court allowed the parties to question prospective jurors, the court told the panel: "You've all heard what the charges are, attempted murder. There's an allegation that the crime was committed in association with or for the benefit of a street gang. I expect there will be evidence in the case that somehow the defendants are affiliated with a gang, not necessarily, but probably being in a gang is not in and of itself

against the law. I know most people have negative associations with gangs or a lot of people do. I've tried a lot of these cases. I know that from my experience in talking to potential jurors, but what's important for me to emphasize is that evidence that they are associated with a gang in and of itself is not evidence that they committed the crime.

"You must first determine whether there is any evidence that these defendants committed the charged crime and then and only then do you go on to consider whether they did so in connection with a gang or for the benefit of a gang.

"Do any of you think that simply because there is this gang allegation in the case that you would not be able to be a fair juror? Anybody who hasn't already spoken to us about that subject? Anybody who thinks they would not be able to set that aside?

"Okay. Do any of you believe that it would difficult for some other reason to follow the law that presumes the defendants are innocent? In other words, as I told you several times, the defendants under the law are currently presumed innocent. If somebody asked you to vote right now, which is kind of a dumb hypothetical because you haven't heard any evidence, but the answer would have to be you vote not guilty because you haven't heard any evidence about the crime. You've heard the crime, the charges read, but that's not evidence. The only thing that's evidence is what comes from the witness stand and is produced during the trial.

"So, right now you've heard no evidence. You've heard some serious charges. You've heard this allegation about a gang, but right now these defendants start out being innocent. Is there anybody who thinks that you cannot follow the law that currently

presumes the defendants innocent? All right. Thanks. I don't see any hands raised."

The court allowed Jordan's counsel to begin questioning the panel, and Jordan's counsel immediately asked Prospective Juror 4, "would you tell us again why you would have a hard time being fair?" Prospective Juror 4's response is the comment at issue here: "Well, in that one of the defendants has a tattoo of a teardrop, which in gang language signifies that you killed somebody. And this is an attempted murder case, so it's kind of hard to, you know, based on that presumption that he's killed somebody, but he's on trial for an attempted murder case, for me to be, you know, completely unbiased about this."

Jordan's counsel responded, "Well, you know, you might have heard that and you have to go by what you hear from the witness stand, but I got to tell you, if you're going to talk to about [*sic*] what we heard or haven't heard, I never heard that, that a teardrop means you killed somebody."

The court interjected, "Let's not have a discussion about—let's not get into a debate about what it means unless you want to go to sidebar." Jordan's counsel asked Prospective Juror 4 if he would have difficulty being fair, and he said he would. Jordan's counsel then moved on to question other prospective jurors.

Cash's counsel began her questioning by stating, "You heard your honor, the judge, say that it is not a crime to be in a gang, okay? Now, no one's here asking anybody to like gangs or anything like that, but knowing that it's not a crime to be in a gang, does anyone here by a show of hands feel like it should be?"

Apparently several jurors raised their hands. Cash's counsel continued, "Prospective Juror Number 4, 7, and 8. Anyone else? And 25. Okay. But you do understand that it is

not against the law to be in a gang, correct, Prospective Juror Number 4?" Prospective Juror 4 responded, "Yes."

Cash's counsel then stated, "My question to you is, because there is a gang allegation, I know this has been asked, but I just want to get some clarification from everyone, will you be able to put—first, make a decision about the charged offense and not consider any of the gang allegations when making your decision?

"For example, I actually have a friend. She basically told me, I was talking to her about a case, not this one, but another case, and she basically told me that if she were a juror on a case where there was a gang allegation and even if the case wasn't proven to her beyond a reasonable doubt, that she would still convict the person if she thought that person was in a gang. So, I asked her well, why would you do that because then you're not following the law and someone's being unfairly judged? Her response was because if it's a gang member, they probably have done something or will do something, so I'm just going to get him off of the street." Cash's counsel went on to question prospective jurors as to whether they "agree with that kind of mentality."

Outside the presence of the prospective jurors, Jordan's counsel moved for a mistrial based on Prospective Juror 4's tattoo comment, noting both defendants had teardrop tattoos. The court was "alarmed" by the comment but did not intercede because it was worried Prospective Juror 4 "was going to go into why he believes that to be true and was just going to buttress his opinion." Cash's counsel joined the motion because when Prospective Juror 4 made the comment, "the entire courtroom got quiet just in that image and that idea."

The prosecutor opposed, noting Prospective Juror 4 "has not put himself out as an expert. He sells electronics and surveillance equipment. I mean, he may have an agenda here to not serve on jury duty, but I think he merely mentioned that. The court stopped that line of questioning and there was no further statements by any other jurors that they were affected by that particular statement.

"And in fact, while the jurors, when they asked about whether or not what led to the gang evidence would affect them, some jurors said, no. They can be fair. I think, given the posture of the rest of the panel, there's some people that believe they can be fair; that they can put aside the gang evidence and judge the evidence by what's being presented and find the defendant's guilty of the substantive crime first and then followup with the gang allegation. [¶] So, I don't think at this point it rises to a level of mistrial and I'll submit on that."

The court denied the motion, explaining: "Well, I believe there will be testimony in the trial about if the defendants have tattoos and there will be testimony about their other tattoos. There will be no testimony about any significance of a teardrop.

"I believe that the court can instruct any jurors who remain from this group and there may not be a lot of them, to tell you the truth, that any statements made by anybody other than those on the witness stand, remind them that that's not in evidence. The People—there are all kinds of folklore about all kinds of different things relating to gangs.

"I think there is a substantial likelihood that, you know, this can be dealt with in an appropriate way through instruction and weeding out of what will be potentially with these juries 60 peremptory challenges. I'm not encouraged to use them all and

get rid of these jurors for that reason, believe me, but I—I believe that there's some who say they can't be fair because of the gang evidence and those, I'm sure, will either be struck for cause or struck by peremtories. And the rest of the people, I think who can be fair and impartial will remain, notwithstanding they will be able to set it aside. I understand the motion, but it's respectfully denied."

Returning to questioning the jury panel, the prosecutor said Cash's counsel "raised an important subject. She asked, does anyone here think that simply being in a gang should be illegal. I'm going to tell you, as the prosecutor, as a deputy District Attorney in this case, it's not illegal to be a gang member, okay? What that means is this, if in this case the only thing I prove in this case is that both Mr. Jordan and Mr. Cash are gang members and nothing else, you find them not guilty, okay? That's the law. So, I don't want any confusion about this at all." The prosecutor then asked Prospective Juror 4 if he understood that, and he said he did.

Once questioning concluded, the court immediately dismissed Prospective Juror 4 for cause. According to Jordan, the jury that was eventually impaneled potentially contained four jurors who were present for Prospective Juror 4's teardrop comment.[7] Defendants' teardrop tattoos were never mentioned during trial.

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[7] Jordan analyzed the two volumes of augmented reporter's transcript for the voir dire proceedings in order to reach this conclusion. We will assume for the sake of our opinion that he is correct.

Following trial, Cash moved for a new trial in part based on Prospective Juror 4's comment. The court denied the motion, stating: "As for the court's decision not to further question the jurors specifically on the tattoo, I made a decision myself not to pursue that issue because:

"Number one, that that juror certainly was not an expert. He had no expertise to testify. He wasn't testifying. What he said was not evidence. I did not want to draw further attention to it.

"I will state, for the record, that Mr. Cash, you have a very dark complexion and until that juror said anything, I didn't see, and I'm much closer to you where I sit, I didn't see that you had a tattoo on your face at all. So, I thought it better not to draw a particular attention to it.

"Every single juror that was questioned, however, was asked whether he or she could be fair and impartial. If somebody believed that you were a gang member and, therefore, they could not be fair to you, I guarantee you, they would have said so. Because these people, my experience is, jurors tend to, if anything, exaggerate the basis for them to not be able to be a fair juror.

"I think since that juror was promptly dismissed and there was no further discussion by any juror or counsel and specifically the gang expert about the tattoo, I think there's no basis to believe that it had any influence at all on any jurors. There's no evidence that the jurors heard him. There's no evidence that the jurors knew what he was talking about. There was no evidence that the jurors paid any attention to it. There is just no evidence that anybody else was prejudiced in a way that would have made a difference in your case."

B. Analysis

"A motion for mistrial is directed to the sound discretion of the trial court. We have explained that '[a] mistrial should be granted if the court is apprised of prejudice 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.' " (*People v. Jenkins* (2000) 22 Cal.4th 900, 985–986 (*Jenkins*).)

With regard to comments by prospective jurors, " 'the trial judge is in a better position to gauge the level of bias and prejudice created by juror comments [during voir dire].' It is within the trial court's discretion to determine that a prospective juror's statement was not prejudicial and thereby deny a defendant's motion to dismiss the jury panel." (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 41; see *People v. Medina* (1990) 51 Cal.3d 870, 889 ["[T]he trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required."].)

Prospective Juror 4's teardrop tattoo comment was unquestionably inappropriate. But when viewed in context, the trial court acted within its discretion in concluding the comment was not so prejudicial that a mistrial was warranted. The comment was isolated and unsolicited, and it came from a prospective juror who had already said he was biased against gang members, undercutting his credibility. Although Prospective Juror 4 had worked with law enforcement in supplying surveillance equipment, he did not hold himself out as an expert on gangs and no reasonable prospective juror would

have viewed him as one. Jordan's counsel also rebutted the comment by saying he had never heard that about a teardrop tattoo. The court stopped the line of questioning and moved on, which was reasonably calculated to avoid emphasizing the comment. (See *Jenkins, supra,* 22 Cal.4th at p. 985 [court acted within its discretion "in determining that more pointed questions regarding alleged threats against the court would serve to alarm the prospective jurors rather than to uncover prejudice or allay fears"].) And the court, Cash's counsel, and the prosecutor all emphasized that being in a gang was not a crime in itself, and Prospective Juror 4 agreed with that point. Finally, Prospective Juror 4 was stricken for cause, so he did not serve on the jury. In these circumstances, the court acted within its discretion in finding the jury panel was not incurably prejudiced.

Cash cites two federal cases, but they involved arguably more inflammatory comments than those here. (See *Mach v. Stewart* (9th Cir. 1998) 137 F.3d 630, 632–633 [jury venire tainted for defendant charged with molesting an eight-year-old girl when prospective juror who was a children's social worker with expertise in child psychology said four times she was aware of no case of a child lying about sexual assault]; *United States v. Bland* (9th Cir. 1990) 908 F.2d 471, 473 [prosecution tainted jury venire with irrelevant detail that warrant for defendant's arrest was based on his "molestation and torture and murder of a seven-year-old girl"].) The decision here was entrusted to the trial court's "considerable discretion." (*Jenkins, supra,* 22 Cal.4th at p. 986.) It fell within those bounds.

IX. The Court's Refusal to Give Cash's Requested Accident Instruction Did Not Result in Prejudice

Cash argues the trial court erred in denying his request to give the accident instruction in CALCRIM No. 3404. For general and specific intent crimes, CALCRIM No. 3404 states: "[The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of _____ <*insert crime[s]*> unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.]" (CALCRIM No. 3404.)

Cash's counsel argued the instruction was warranted because "the facts in this case are that putting—putting driving on a dark street he was making a turn into an intersection and collided with the vehicle. Given that the People are charging [t]he premeditated, willful attempt[ed] murder in this case, intent is an issue and I think given the circumstances of the collision, that the court give an accident instruction."

The court disagreed, explaining: "My problem with giving the accident instruction is that this is—an accident is a defense. [¶] And there has been no evidence of the defense. There's really very little evidence, no evidence at all, as to the state of mind of the driver of the car. I think it's more appropriate to just argue that there's a failure of proof, rather than to say there was an accident, because there's no affirmative evidence that it was an accident. There's really—frankly, there's no evidence that you—in the record that you could even argue by inference that it was an accident. It might have been an accident, but there's no evidence to suggest it was an accident.

"So, I think from the defense standpoint, the more appropriate—well, from the court's standpoint, the more appropriate state of the instructions is just to leave in that the People have to prove on count 3 as it does on counts 1 and 2 that the defendants aimed the car at Mr. — [¶] . . . [¶] Campbell. And they did so with willfulness, and premeditation and deliberation. And if there's insufficient evidence of that, then it's a not guilty, but I think to give the accident instruction, there has to be evidence in the record from which to argue that it was an accident. And I actually think on the state of this record, there is none."

Cash's counsel responded, "Well, just for the record, your honor, I believe circumstantially intent can be inferred as far as the circumstances of the collision. The end of a dark street, narrow street. It happened at an intersection. There was no—basically, the vehicle and the bike rider blew a stop sign, so I would just argue that I could—" The court interjected, "I don't know if there's evidence that the bike ran a stop sign." Cash's counsel noted the defense was "hopefully going to get into that later today."

The prosecutor argued, "I believe there has not been evidence brought up that this was an accident. I think contrary to that, Mr. Campbell said the vehicle may have even sped up prior to colliding with him and [the] vehicle did not stop after the collision and I'll submit."

The court concluded, "I'm inclined not to give the accident instruction. If there is evidence produced this morning from additional witnesses, I'll consider it. I'll reconsider my decision."

Following this discussion, Officer Yolanda Valento testified for the People. She was an investigating officer and had interviewed Campbell. On cross-examination by Cash's counsel, she testified the intersection where Campbell was hit had four-way stop signs, but Campbell "never indicated to [her] that he stopped at a stop sign" "as he was turning onto Denver where he was struck." She was shown a series of photographs of the intersection where Cash struck Campbell and testified it was "dimly lit and from what we just went over, it doesn't [look] like there are specific street lamps positioned on the corner of the intersection."

Though denominated a "defense," the concept of accident in CALCRIM No. 3404 " 'amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime.' " (*People v. Anderson* (2011) 51 Cal.4th 989, 998 (*Anderson*).) Thus, it is a pinpoint instruction that need only be given upon request by a defendant in order to "rebut the mental element of the crime or crimes with which the defendant was charged." (*Ibid.*; see *People v. Jennings* (2010) 50 Cal.4th 616, 674.) If the defendant requests this pinpoint instruction as Cash did here, the trial court need only give it when substantial evidence supports the theory. (*Bolden, supra,* 29 Cal.4th at p. 558; see *People v. Jennings, supra,* at p. 675 [accident instruction required when " 'there is evidence supportive of the theory' "].)

We need not decide whether the evidence sufficiently supported giving CALCRIM No. 3404 upon Cash's request because he suffered no prejudice under any standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of more favorable outcome]; *Chapman v. California* (1967) 386 U.S. 18, 24 [harmless beyond reasonable doubt].) The jury was properly

instructed on the People's burden of proof beyond a reasonable doubt, and as discussed above, the jury was properly instructed on the intent to kill requirement for attempted murder. Moreover, Cash's counsel squarely presented the accident defense to the jury in closing, arguing Cash was panicking as he drove away from the Prince Market and the dark conditions at the intersection demonstrated the collision was an accident and not the "intentional killing of a person." The jury clearly rejected his theory not only when it implicitly found he intended to kill Campbell by finding him guilty of attempted murder, but also when it expressly found he acted willfully, deliberately, and with premeditation. (See *People v. Jones* (1991) 234 Cal.App.3d 1303, 1315 [attempted murder verdict and premeditation finding demonstrated "beyond credible argument" that jury rejected accident defense, so failure to give accident instruction harmless beyond reasonable doubt], disapproved on another ground by *Anderson, supra,* 52 Cal.4th at p. 998, fn. 3.) The jury would not have rendered a more favorable verdict had it been given CALCRIM No. 3404, so reversal is not warranted.

X. The Court Properly Excluded Officer Valento's Opinion on Whether the Collision with Campbell Was an Accident

As noted above, Officer Valento interviewed Campbell after the incident. On cross-examination, Cash's counsel questioned Officer Valento about the collision with Campbell on his bicycle. Counsel asked, "You actually had the opinion that it was a random act, right, an accident?" The court sustained the prosecutor's relevance objection, and Officer Valento did not answer.

Cash claims the trial court erred in excluding Officer Valento's response to this question. We review the court's evidentiary ruling for abuse of discretion. (*Brady, supra,* 50 Cal.4th at p. 558.) We find none. Officer Valento's opinion about whether the collision was random or accidental would have been speculative and irrelevant. She was not a percipient witness because she was not present when the collision occurred, nor was she established as an expert witness in accident reconstruction. Her opinion therefore would not have assisted the jury, so the court acted within its discretion in excluding it.[8]

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[8] We need not address respondent's alternative argument that Cash's claim fails under Evidence Code section 354 because he did not make an offer of proof as to the relevance of Officer Valento's opinion. (Evid. Code, § 354, subd. (a) [we may not reverse based on erroneous exclusion of evidence unless "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means"].) We do note, however, that respondent fails to cite an exception to this rule within Evidence Code section 354 for evidence "sought by questions asked during cross-examination or recross-examination," so long as those questions fall within the scope of direct examination. (*Id.*, § 354, subd. (c); *People v. Hardy* (2018) 5 Cal.5th 56, 103 (*Hardy*).) We also note that the case on which respondent relies for the offer of proof requirement – *People v. Vines* (2011) 51 Cal.4th 830, 868–869 – was recently disapproved on this point in *Hardy*. (*Hardy, supra,* at p. 104 [disapproving *Vines* to the extent it "suggest[s] that a party must make an offer of proof to challenge on appeal a court's ruling limiting cross-examination"].)

XI. No Cumulative Error Warrants Reversal

We have assumed only one error that was not prejudicial, so we reject Cash's argument that cumulative error violated his fair trial and due process rights or warrants reversal.

XII. Resentencing is Warranted Pursuant to SB 620

On January 1, 2018, SB 620 (2017–2018 Reg. Sess.) took effect, which amended section 12022.53, subdivision (h) to remove the prohibition against striking the gun use enhancements under this and other statutes. The amendment grants the trial court discretion to strike or dismiss an enhancement imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.) Defendants' sentences included enhancements pursuant to section 12022.53, and they argue remand is appropriate for resentencing in light of SB 620. Respondent agrees, as do we.

The discretion to strike a firearm enhancement under section 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) Here, there is no dispute defendants' appeal was not final when SB 620 went into effect on January 1, 2018. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305–306 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 ["[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired"]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 ["[t]he rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].) Accordingly, we remand to allow

the trial court the opportunity to exercise its newly granted discretion under subdivision (h) of section 12022.53. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 257.)

On remand, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subdivision (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443–1446.) "In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration." (Cal. Rules of Court, rule 4.428(b).) If the trial court exercises its discretion to strike only the punishment, the gun enhancement will remain in the defendant's criminal record, and may affect the award of custody credits. Specifically, subdivision (c)(22) of section 667.5 provides that a violent felony is "[a]ny violation of Section 12022.53." As a violent felony, the defendant would be entitled to a maximum of 15 percent conduct credits. (§ 2933.1, subd. (a).)

Moreover, if the court strikes the section 12022.53 enhancement, it is required to imposed a penalty of life imprisonment with a minimum term of no less than 15 years under section 186.22, subdivision (b)(5). (See *People v. Brookfield* (2009) 47 Cal.4th 583, 591; *People v. Jones* (2009) 47 Cal.4th 566, 576.)

DISPOSITION

The matter is remanded to the trial court to exercise its sentencing discretion under section 12022.53, subdivision (h). The judgment is otherwise affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

ROGAN, J.*

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