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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KENTRAL BRIM et al.,

Defendants and Appellants.

2d Crim. No. B275782
(Super. Ct. No. TA137685)
(Los Angeles County)

Kentral Brim appeals his conviction, by jury, of possession of a firearm by a felon. (Pen. Code, § 29800, subd. (a)(1).)¹ Legend Brooks and Semaj Foreman appeal their convictions, by the same jury, of assault with a semiautomatic firearm. (§ 245, subd. (b).) Brooks was also convicted of possession of a firearm by a felon. (§ 29800, subd. (a)(1).) The jury acquitted Brim on the assault charge. It further found that Brim and Brooks had prior felony convictions (§ 667.5, subd. (b)), that Brooks and

¹ All statutory references are to the Penal Code unless otherwise stated.

Foreman committed the assault for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(B)), and that Brooks and Foreman personally used handguns in the assault (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)), causing it to be a serious and violent felony (§§ 1192.7, subd. (c)(8), 667.5, subd. (c)(8)). The trial court sentenced Brim to a total term in state prison of four years. It sentenced Brooks to a total term in state prison of 16 years eight months, and Foreman to a total term of 15 years.

Appellant Brim contends there is no substantial evidence he actually or constructively possessed any of the firearms recovered from his vehicle. Appellant Brooks contends: the trial court prejudicially erred when it permitted the prosecution to amend the indictment and when it permitted the jury to consider the new charge without an arraignment. Brooks further contends the prosecutor committed misconduct in his closing argument and that the trial court prejudicially erred when it inquired into the thought processes of the jurors during deliberations. Finally, Brooks contends he is entitled to a remand for resentencing in light of a recent amendment to section 12022.5 that gives the trial court discretion to strike a firearm use enhancement.

Appellant Brim joins in the contention that the trial court interfered with the jury's deliberations. Appellant Foreman joins Brooks' contentions that the trial court erred when it permitted the prosecution to amend the information and when it inquired into the jury's deliberations. He further contends the trial court erred when it failed to instruct the jury, with CALCRIM No. 3500, that it had to agree unanimously on a single victim of the assault charged in count 4. Foreman further contends there was

no substantial evidence he personally used a firearm during the assault.

As to appellants Brooks and Foreman we remand the matter for reconsideration of the § 12022.5 enhancements. In all other respects, we affirm.

Facts

At about 1:14 a.m. on June 14, 2014, about 20 people were socializing in a parking area at the Imperial Courts housing project in Los Angeles when two men walked toward the parking area and fired about 20 shots from handguns into the crowd. The crowd scattered as the two men ran away. These events were captured by the video surveillance system installed at the housing project, but the video does not clearly show the shooters' facial features.

After hearing a radio call reporting the incident, Los Angeles Police Officers Perez and Stronjy drove their unmarked patrol car through neighboring streets, looking for anything out of the ordinary. Between six and ten minutes after the shooting was reported, Perez noticed a Nissan Xterra SUV on Santa Ana Blvd., near Wilmington Ave. with no headlights on. The SUV was attempting to make a three-point turn. Once it executed the turn, the SUV drove away quickly and erratically, weaving from side to side across a lane divider, with its brake lights flashing intermittently. It then turned north on Grape Street without slowing down. The SUV drove a few more blocks before stopping in a driveway near 107th Street and Grape Street. The patrol car parked behind the SUV, blocking it. Appellant Brim was the driver, appellant Brooks was in the front passenger seat, and appellant Foreman was in the back seat. Officer Perez noted that all three were breathing heavily and two of them were sweating.

Additional officers arrived and appellants got out of the SUV. Officer Perez looked inside the SUV through the open door and saw a gun between the front passenger seat and the center console area. He noted that the slide on the gun was locked open, as it would be if all the cartridges had been fired. Another officer, Herbert Ybanez, recognized the gun as a black Glock .40 caliber. Officer Perez entered the SUV to conduct a further search for weapons. He found a second gun, wrapped in a sweater, on the center console. This gun was a 1911-Model .45 caliber handgun attached to a 50-cartridge drum style magazine.

After appellants had been detained, Officer Perez returned to the police station to review security camera video footage of the shooting. He then returned to the location shown in the video to search for cartridge casings. There, he found 15 .40 caliber casings and five .45 caliber casings, lying in close proximity, in a line on the ground. Perez found the casings about 90 minutes after he first made contact with appellants. An LAPD criminalist later determined these casings were fired from the weapons found in the SUV.

All three appellants had prior contacts with the LAPD in which they claimed membership in the Grape Street Crips. Each appellant also has multiple tattoos referencing Grape Street Crips.

According to the prosecution's gang expert, the Grape Street Crips "claim" territory from 92nd Street to Santa Ana Blvd., between Alameda Street and Graham Avenue. The Jordan Downs housing development is inside Grape Street Crips' territory. Imperial Courts, the housing development where the shooting occurred, is located in territory claimed by PJ Watts, another Crips-affiliated gang. PJ Watts claims territory from

113th Street to the Imperial Highway, between Mona Blvd. and Wilmington Ave. Although both Grape Street and PJ Watts are Crips gangs, they are also rivals.

Discussion

Interference With Jury Deliberations. During deliberations, one of the jurors sent a note to the trial court reading, “We, 11 of us, have a big problem with a juror.” After conferring with trial counsel, the trial court decided to question the jury about the note. None of the defense counsel objected. When the entire jury returned to the courtroom, the foreperson explained that one juror “ha[d] his own opinion” and was “not following the court’s instructions.” According to the foreperson, this juror did not “seem to be following what the law states what the evidence is.” The jurors were all expressing their opinions and everyone was participating in the deliberations, but one juror seemed to have already made up his or her mind. The juror was not refusing to deliberate but was not looking at the evidence. The foreperson believed this juror was “not being fair to either side. . . . They’ve made up their mind.”

The judge asked the jurors to consider continuing their deliberations, since the foreman sent the note after only about two hours. The judge reminded the jurors that everyone should voice his or her own opinion and that they could ask questions about the evidence, have testimony read back, or watch the videos that were in evidence. When the trial court asked whether there was anything the court could do to assist the jury, the foreperson said, “No[,]” and complained again that one juror was unwilling to follow the law.

After conferring with counsel, the trial court decided to question each juror individually. Before each interview, the trial

court admonished the juror to only discuss what had been happening in the deliberations, and to avoid talking about the voting on guilt or innocence. At the end of each interview, the trial court sent the juror back to the jury room with instructions not to share their discussion with the others.

“Majority” jurors described their situation in very similar terms: one juror, eventually identified as Juror No. 12, was not refusing to speak or to listen to others, but had already made up his mind about the case. His decision was based on what some jurors described as a conspiracy theory that seemed to have no basis in the evidence. The dissenting juror described the prosecution’s case as a fraud, a set up, and a hoax. He believed the guns were planted in the SUV. Discussing the evidence seemed pointless because he had already made up his mind. Some jurors suggested the dissenter was mentally ill; others thought he just had a different view of the evidence.

Juror No. 12 told the trial court that he was trying to be a responsible juror, but he found the prosecution’s evidence “highly dubious” and “fabricated.” He believed the police officers were lying and that Officer Perez planted the guns in the car. Juror No. 12 stated he would be willing to reach a guilty verdict if he had seen compelling evidence of guilt and that he could reach a guilty verdict based on the testimony of a single witness. Juror No. 12 denied having made up his mind before he heard the evidence. He stated that he would return to deliberations but would not change his opinion that Officer Perez fabricated evidence and framed appellants. Juror No. 12 also stated that his fellow jurors were not listening to him and thought he was a conspiracy theorist. He believed, however, that he could deliberate fairly.

Shortly after sending Juror No. 12 back to the jury room, the trial court sent the jurors home for the weekend. When court reconvened on Monday, Juror No. 12 asked the trial court to “admonish the jury that our first duty is to answer the question, has the prosecution proven its case beyond a reasonable doubt.” After conferring with counsel, the trial court gave the jury a written note stating, “Please continue to deliberate. . . . [I]f there’s anything the court can do to assist the jury . . . please advise.” The jury deliberated for the rest of that afternoon. The next morning, it returned its verdict.

Appellants contend the trial court erred when it inquired into the thought process of the jury during deliberations. Its questions were intrusive, violated the privacy of the jurors and intimidated the holdout of Juror No. 12 into changing his vote. Respondent contends appellants invited any error and forfeited these arguments because they did not object to the trial court’s procedure, and that the trial court’s questioning was proper.

“A claim of prejudicial misconduct is waived when the defendant fails to object to a juror’s continued service and fails to seek a mistrial based upon prejudice. [Citation.]” (*People v. Russell* (2010) 50 Cal.4th 1228, 1250.) The same rule applies where, as here, defendants fail to object that the trial court has intruded into the jury’s deliberative process. The trial court asked all counsel whether they objected to its questioning jurors and asked counsel whether they wanted to question of any jurors. Defense counsel did not object to the trial court’s procedure in general, or to any of its specific questions. Counsel never informed the trial court that they considered its questions too detailed, coercive, intrusive or invasive of the jury’s thought processes. Nor did defense counsel raise this issue in their

motions for new trial. As a consequence, appellants forfeited this issue because they did not object to the trial court's course of action. (*People v. Holloway* (2004) 33 Cal.4th 96, 124.)

Had the contention not been forfeited, we would reject it because the trial court did not abuse its discretion. A juror who refuses to deliberate is "unable to perform his or her duty" and may be discharged. (Pen. Code, § 1089; *People v. Cleveland* (2001) 25 Cal.4th 466, 475, 485 (*Cleveland*).) We review for abuse of discretion the trial court's decision whether and how to inquire into an allegation of juror misconduct or failure to deliberate. (*People v. Ray* (1996) 13 Cal.4th 313, 343.) "If there is any substantial evidence supporting the trial court's ruling, we will uphold it. [Citation.] We also have stated, however, that a juror's inability to perform as a juror "must appear in the record as a demonstrable reality." [Citation.] [Citation.]" (*Cleveland, supra*, at p. 474.) In addition, the court "must not presume the worst of a juror. [Citations.]" (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729.)

The trial court must exercise caution "in determining whether a juror has refused to deliberate." (*Cleveland, supra*, 25 Cal.4th at p. 475.) "The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (*Id.* at p. 476.) The trial court must take care not to undermine the sanctity of jury deliberations and to avoid coercing minority jurors. (*Id.* at p. 483.) "[W]hen inquiring into asserted misconduct of a member of a deliberating jury, the court should take care that any inquiry 'minimize pressure on legitimate minority jurors' [citation], and the court should not conduct an inquiry that could 'risk[] pressuring the dissenting

juror to conform her vote to that of the majority.’ [Citation.]”
(*People v. Engelman* (2002) 28 Cal.4th 436, 446.)

Here, the trial court conducted a reasonable inquiry into Juror No. 12’s ability and willingness to deliberate after the jury foreperson raised concerns about his participation. In initially addressing the jury’s complaint, the trial court reminded the entire panel that “it’s okay” for each juror “to have their own opinion.” During its discussions with the individual jurors, the trial court told each juror that it did not want to know about how they were voting or leaning. Instead, it wanted to know only how the jurors were communicating with each other and whether everyone was participating. Its questions focused on whether the jurors were talking to each other about the evidence and the law, not whether they were correct in their analysis or assigning the proper weight to the evidence. The trial court followed the same practices in its discussion with Juror No. 12. Its questions were focused on the Juror No. 12’s ability to deliberate with the others, rather than whether his understanding of the evidence was correct. Neither the trial court nor counsel revealed to the jurors’ their own opinions about the jurors’ statements or about the case.

While the questioning of jurors was time consuming and detailed, it was also tailored to the proper purpose of determining whether Juror No. 12 refused to deliberate. The inquiry was within the trial court’s sound discretion.

Unanimity Instruction. Appellant Foreman contends the trial court erred when it failed to instruct the jury that it was required to reach a unanimous verdict on the identity of the victim of the assault charged in count 4. There was no error.

“In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously

the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] [Citation.] However, [t]he unanimity instruction is not required when the acts are so closely connected in time as to form part of one transaction. [Citations.] This branch of the “continuous conduct” exception [citation] applies if the defendant tenders the same defense or defenses to each act and if there is no reasonable basis for the jury to distinguish between them. [Citations.] [Citations.] This exception “is meant to apply not to all crimes occurring during a single transaction but only to those ‘where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or reject the victim’s testimony in toto.’ [Citation.]” [Citation.] [Citation.]” (*People v. Phong Bui* (2011) 192 Cal.App.4th 1002, 1010-1011.)

Here, the surveillance camera footage established that two men fired multiple gunshots toward a crowd of people and then ran away. The individual gunshots are so closely connected in time as to form a single criminal transaction or course of conduct. (*People v. Crandell* (1988) 46 Cal.3d 833, 875.) As a consequence, no unanimity instruction was required. (*People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135; *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292 [“A unanimity instruction is not required if the evidence shows . . . multiple acts in a continuous course of conduct”].)

People v. McNeill (1980) 112 Cal.App.3d 330, on which appellant relies, is distinguishable. There, McNeill fired “a series of rapid shots” from a handgun at four individuals. (*Id.* at p.

334.) The information alleged a single count of assault with a deadly weapon, naming each of those individuals as a victim. McNeill’s conviction was reversed because the Court of Appeal concluded the information erroneously alleged multiple offenses in one count. According to the court, “Assaults upon separate victims, even though perpetrated by a single individual during an indivisible course of conduct, each comprise a separate, punishable offense. [Citations.] The accusatory pleading was thus defective in alleging multiple offenses in one count” (*Ibid.*) The pleading defect at issue in *McNeil* is not present here. Instead, the information against appellants alleges one count of assault with a deadly weapon against a single, unnamed victim. No unanimity instruction was required.

Substantial Evidence of Personal Firearm Use. The jury found appellant Foreman guilty of assault with a semiautomatic firearm. (§ 245, subd. (b).) It further found that Foreman personally used a firearm in the commission of this offense. (§§ 1203.06, subd. (a)(1), § 12022.5, subd. (a).) Foreman contends the finding that he personally used a firearm is not supported by substantial evidence because there is no evidence from which the jury could reasonably infer which of the three defendants were the shooters shown in the surveillance video.

“Whether a defendant used a firearm in the commission of an enumerated offense is for the trier of fact to decide. [Citation.] We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.] Thus, we presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.’ [Citation.]” (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) The question is whether, “after viewing the evidence

in the light most favorable to the prosecution, *any* rational trier of fact could have found the elements of the underlying enhancement beyond a reasonable doubt.” (*People v. Alvarez* (1996) 14 Cal.4th 155, 225.)

“The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant’s guilt beyond a reasonable doubt. “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” [Citations.]” [Citation.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 (*Rodriguez*).)

The evidence here was sufficient to support the jury’s finding that appellant Foreman personally used a firearm in the assault. Surveillance video showed two men firing guns toward a crowd in an Imperial Courts parking lot at 1:14 a.m. The crowd scatters and runs for cover. Five or ten minutes later, an LAPD officer noticed an SUV driving near the scene with its headlights turned off. Appellant Brim was driving the SUV; appellant Foreman was the backseat passenger and appellant Brooks was the front seat passenger. Two handguns were found inside the SUV. Ballistics later determined they were the guns used in the shooting. Foreman was an admitted member of a gang that has a rivalry with the dominant gang in Imperial Courts. Photographs taken after the arrest show Foreman wearing bright white

sneakers, unlike appellants Brim and Brooks. One of the shooters in the surveillance video appears to be wearing white sneakers. The prosecution's gang expert testified that it is typical for gang members to use a getaway driver who does not personally fire a weapon. A jury could reasonably infer that Foreman was one of the shooters shown in the surveillance video.

Substantial Evidence of Constructive Firearm Possession.

Appellant Brim, the driver of the SUV, was acquitted of the assault charge but convicted of count 2, possession of a firearm by a person who has been convicted of a felony. He contends there is no substantial evidence he possessed either of the firearms recovered from his vehicle. He is incorrect.

We review this contention using the substantial evidence standard we have just described. Possession of a firearm by a felon is a general intent crime, meaning the prosecution need only prove the defendant intended to possess the firearm. There is no requirement that the prosecution prove any additional criminal intent regarding its use. (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 130.) The possession may be actual (i.e., physical possession on one's person) or constructive. Constructive possession means that the defendant knowingly exercised a right to control the firearm, either directly or through another person. (*People v. White* (2014) 223 Cal.App.4th 512, 524 (*White*).) "But mere proximity to the weapon, standing alone, is not sufficient evidence of possession." (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417.) A finding of constructive possession may be based on reasonable inferences drawn from circumstantial evidence. (See, e.g., *People v. Singh* (2004) 119 Cal.App.4th 905, 911 [reasonable to infer appellant possessed firearm found partially concealed by a pillow on the bed on which

appellant was sitting at the time of his arrest]; *People v. Low* (1983) 148 Cal.App.3d 89, 92 [reasonable to infer driver of car knew a loaded handgun was located under driver's seat].)

Here, appellant Brim was stopped while driving his SUV near the scene of the shooting. He had been driving erratically and the SUV's headlights were off. The two guns used in the shooting were found, partially concealed, in and near the center console of the SUV. Brim and the other two appellants were admitted members of the same gang; the shooting occurred at an apartment complex dominated by a rival gang. The prosecution's gang expert testified that gang members often commit shootings while on foot, and then meet up with a getaway driver to escape from the scene. A jury could reasonably infer from this evidence that Brim knew the guns were in his SUV and had the ability to control them either directly or through his passengers and fellow gang members. (*White, supra*, 223 Cal.App.4th at p. 524.)

Appellant provides us with numerous, fact-based arguments for why the jury should have found he did not possess the firearms. Each of these arguments invites us to reweigh the evidence, to draw inferences from it that the jury did not draw and to make credibility determinations that are different from those made by the jury. Consequently, we must reject each of these arguments. "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "““““If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not

warrant a reversal of the judgment.” [Citations.]” [Citation.]”
(*Rodriguez, supra*, 20 Cal.4th at p. 11.)

Brim’s challenges to the evidence and to the credibility of the LAPD witnesses were presented at trial. The jury considered those challenges and rejected them. We may not reverse a judgment for lack of substantial evidence unless it appears that “upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Amended Information. Count 1 of the information and of the first amended information charged appellants with the attempted willful, deliberate, and premeditated murder of Karon Conner, a person who was shot in the leg during the incident. The jury heard medical testimony concerning Conner’s injury, but Conner himself could not be located and did not testify at trial.

After resting its case in chief, the prosecution moved to amend count 1 of the information by naming “John Doe” as the victim of the attempted murder and by adding count 4, to allege the offense of assault with a semiautomatic firearm. (§ 245, subd. (b).) The trial court denied the motion with respect to the attempted murder count, but granted the motion with respect to the assault count. It also instructed the jury to disregard all the evidence it heard regarding Conner’s injuries.

Appellant Brooks contends the trial court abused its discretion when it granted the motion to amend the information by adding count 4. There was no abuse.

Due process requires that an accused be given notice of the specific charges alleged against the accused, so that he or she has a reasonable opportunity to prepare a defense and to not be taken

by surprise by evidence offered at trial. (*People v. Jones* (1990) 51 Cal.3d 294, 317; *People v. Thomas* (1987) 43 Cal.3d 818, 823.) Thus, sections 739 and 1009 permit the amendment of an information to add charges or enhancements only where the new charges or enhancements are supported by the evidence taken at the preliminary hearing. (*People v. Superior Court (Mendella)* (1983) 33 Cal.3d 754, 764.) A defendant “may not be prosecuted for an offense not shown by the evidence at the preliminary hearing or arising out of the transaction upon which the commitment was based.” (*People v. Burnett* (1999) 71 Cal.App.4th 151, 165-166.)

As our Supreme Court explained in *People v. Superior Court (Mendella)*, *supra*, 33 Cal.3d 754, “Under section 739, [the] law is settled that unless the magistrate makes factual findings to the contrary, the prosecution may amend the information after the preliminary hearing to charge any offense shown by the evidence adduced at the preliminary hearing provided the new crime is transactionally related to the crimes for which the defendant has previously been held to answer.’ [Citations.] ‘Under the case law interpreting section 1009, the test applied is whether or not the amendment changes the offense charged to one not shown by the evidence taken at the preliminary examination. [Citation.]’ [Citation.] As long as the above standards are met, there is no bar to adding to the information enhancement allegations that were not charged in the complaint.” (*Id.*; see also *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1531.)

Leave to amend must be denied by the trial court where the amendment would prejudice the substantial rights of the accused. (*People v. Birks* (1998) 19 Cal.4th 108, 129.) There is no

such prejudice, however, where the amendment charges an offense shown by the evidence adduced at the preliminary hearing and transactionally related to the offenses previously alleged. (*People v. Superior Court (Mendella)*, *supra*, 33 Cal.3d at p. 764.) The question of whether an amendment should be permitted is within the sound discretion of the trial court whose determination will not be disturbed on appeal in the absence of a clear abuse. (*People v. Winters* (1990) 221 Cal.App.3d 997, 1005.)

Here, the evidence at the preliminary hearing and at trial included the surveillance video of the shooting and of bystanders in the parking lot ducking and running for cover. In addition, Officer Ybanez described the circumstances of appellants' arrest, the search of the vehicle in which they had been riding and the discovery of the guns used in the shooting. This evidence supports the charge that appellants violated section 245, subdivision (b) by firing semiautomatic firearms toward the buildings and parking lot at Imperial Courts. As a consequence, the trial court acted within its discretion when it allowed the amendment.

Appellant Brooks concedes the evidence at the preliminary hearing would have been supported an assault charge, but contends the evidence at trial did not support the charge because Conner did not testify. As a result, there was no evidence that the shooters were shooting at or near any person. But no such evidence was required because an assault charge does not require proof of a specific intent to harm a particular person, proof of actual injury, or proof that force was actually applied. (*In re Tameka C.* (2000) 22 Cal.4th 190, 198.) "Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and

directly result in the application of physical force against another.” (*People v. Williams* (2001) 26 Cal.4th 779, 790.)

Finally, the amendment did not prejudice appellants’ substantial rights. Because the assault charge was based on evidence admitted at the preliminary hearing, appellants had adequate notice of the charge, ““and that is all the Constitution requires.”” (*People v. Brown* (1973) 35 Cal.App.3d 317, 322-323.)

Arraignment on Amended Information. Brooks contends the trial court lacked jurisdiction to convict him on the assault charge because he was not arraigned on that charge after the trial court granted the motion to amend. We are not persuaded.

““No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard on in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.” [Citation.] ‘[T]he role of the accusatory pleading is to provide notice to the defendant of the charges that he or she can anticipate being proved at trial. . . .’” (*People v. Hamernik* (2016) 1 Cal.App.5th 412, 425-426.) “Where an information is amended, regular and orderly procedure requires the defendant be rearraigned and required to plead thereto before trial. In early years this was mandatory [citations], but the rule has been relaxed that if the defendant makes no demand or objection and is convicted upon a trial without having entered a plea the objection that there was no plea is waived and is unavailable to him. [Citation.]” (*People v. Walker* (1959) 170 Cal.App.2d 159, 164.)

Although appellants opposed the prosecution’s motion to amend the information, they did not request a rearraignment after the motion was granted and the assault charge was added.

After the amendment was granted, appellants were tried as though they had all pleaded not guilty. Appellants waived any right they may have had to rearraignment by failing to request it and, in any event, were not prejudiced by the trial court's failure to rearraign them.

Prosecutorial Misconduct. Appellant Brooks contends the prosecutor committed misconduct in his rebuttal closing argument because the argument disparaged defense counsel, improperly vouched for the government's case, and implied that Karon Conner had not appeared in court because the defendants or other members of their gang either killed him or intimidated him.

The prosecutor began his rebuttal argument by telling the jury, "the one thing that I hope, as a prosecutor . . . is that you see the truth, that you see reality. Because this case is not about good lawyering. It's not trying to obscure what happened through argument. It's about looking at evidence in a real situation and recognizing what actually happened. Not listening to lawyers try to deflect what we're here to do and say the police, they're wrong. . . . [¶] . . . This case is about a shooting in Watts, California between two rival gangs." During his rebuttal argument, the prosecutor mentioned several more times that the case was about "reality," rather than "fancy lawyering" or "intellectualism" or "irresponsible commentary and obscuring the truth."

This line of argument culminated in the prosecutor urging the jury to reject the defense attorneys' attempts to point out inconsistencies in the evidence. He contended the defense lawyers were trying "to manufacture and create these inconsistencies," and argued the jury should not "fall for this idea

that there's somehow some kind of inconsistencies that the defense is trying to create. [¶] The defense tries to argue things outside of the law. Mr. Ross [appellant Brooks' trial counsel] specifically tried to argue to you something that the instructions directly on point say that you are not to speculate or guess. But again, I guess the instructions and the law doesn't matter. But they do, ladies and gentlemen. You were specifically instructed you can't speculate or guess about assault with a deadly weapon or assault with a firearm versus attempted murder. But since he said it, since he violated a specific instruction that you guys will get and have gotten." Defense counsel, Mr. Ross, objected and the trial court admonished the jury that the arguments of counsel are not evidence.

During his closing argument, counsel for appellant Foreman argued the prosecution's case was weak because the attempted murder charge had been abandoned after Karon Conner failed to appear in court. In rebuttal, the prosecutor addressed Karon Conner's failure to appear at trial by saying, "[Y]es Karon Conner was mentioned [but] was not in the trial. And I think you can do the math, ladies and gentlemen. . . . These are gang cases, ladies and gentlemen." At that point, defense counsel moved for a mistrial on the ground that the prosecutor had strongly implied that gang members either killed or threatened Conner, to keep him from testifying. The trial court denied the motion and declined to instruct the jurors any further on the prosecutor's argument.

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

trial with such unfairness as to make the conviction a denial of due process.” . . . [Citation.]’ [Citation.]” (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]’ [Citation.]” (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

The prosecutor has wide latitude to make vigorous arguments, as long as those arguments amount to fair comment on the evidence, including reasonable inferences or deductions to be drawn from the evidence. (*People v. Williams* (1997) 16 Cal.4th 153, 221.) He or she may also employ colorful language to criticize counsel’s tactical approach. (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) However, “[p]ersonal attacks on the integrity of opposing counsel can constitute misconduct. [Citation.] ‘It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense [citations], or to imply that counsel is free to deceive the jury [citation]. . . .’ [Citation.]” (*People v. Winbush* (2017) 2 Cal.5th 402, 484 (*Winbush*).)

“When attacking the prosecutor’s remarks to the jury, the defendant must show that, ‘[i]n the context of the whole argument and the instructions’ [citation], there was ‘a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]’ [Citations.]” (*People v. Centeno* (2014) 60 Cal.4th 659, 667 (*Centeno*).)

We conclude no misconduct occurred here because the prosecutor did not claim that defense counsel were free to deceive the jury or were presenting a fabricated defense. (*Winbush, supra*, 2 Cal.5th at p. 484.) Instead, the prosecutor argued the defendants were relying on “fancy lawyering” and overstating minor discrepancies to create doubt where there should be none. This falls within the wide latitude granted for vigorous argument or criticism of counsel’s tactical approach.

Nor can we agree that the prosecutor improperly vouched for his case. Vouching occurs when counsel gives his or her personal opinion about the strength of a case, “based solely on [his or her] experience or on other facts outside the record.” (*People v. Huggins* (2006) 38 Cal.4th 175, 207.) Here, the prosecutor stated that, “as a[n] attorney for the State of California and the People,” it was his job to help the jury “see the truth, that you see reality.” This is similar to a prosecutor asking the jury to credit the prosecution’s version of events, rather than explanations offered by the defense. It did not refer to facts outside the record or suggest that the jury accept his arguments based on his status as an attorney for the State. There was no improper vouching.

Appellant contends the prosecutor improperly referred to matters outside the record when he addressed Karon Conner’s failure to testify. The prosecutor said, “[Y]es Karon Conner was mentioned [but] was not in the trial. And I think you can do the math, ladies and gentlemen. We already heard from [the gang expert]. These are gang cases, ladies and gentlemen.”

According to appellant, this comment invited the jury to assume Conner had been intimidated or killed by appellants, or members of their gang, to prevent his testimony. We are not

convinced. The comment was a reasonable response to Foreman's closing argument, which suggested Conner's failure to testify showed the weakness of the government's case. Second, the statement did not refer to matters outside the record. There was evidence that appellants were members of the same gang and that a rival gang dominated Imperial Courts. The evidence also showed that none of the eye witnesses at Imperial Courts were willing to assist law enforcement immediately after the shooting.

A prosecutor may properly express his opinion concerning inferences that may reasonably be drawn from the evidence. (*People v. Sims* (1993) 5 Cal.4th 405, 463 (*Sims*).) In addition, "we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' [Citations.]" (*Centeno, supra*, 60 Cal.4th at p. 667.) Here, a reasonable juror could "do the math," and conclude that Conner, like his neighbors, declined to cooperate with law enforcement, even if he was never threatened or harmed by appellants or other rival gang members. The comment was an expression of opinion about inferences the jury could draw from the evidence, rather than a reference to the existence of facts outside the record. (*Sims, supra*, at p. 463; *People v. Wharton* (1991) 53 Cal.3d 522, 567.) As a consequence, it did not amount to prejudicial misconduct.

Cumulative Error. Appellant Brooks contends that the combined effect of these alleged errors denied him a fair trial. As we have found no error, "there is nothing to cumulate and hence there can be no cumulative prejudice." (*People v. Grimes* (2016) 1 Cal.5th 698, 737.)

Remand for Resentencing. Appellant Brooks' sentence includes a four-year enhancement term imposed for his personal

use of a firearm. (§ 12022.5, subd. (a).) At the time of his sentencing, subdivision (c) of section 12022.5 prohibited the trial court from striking a firearm-use enhancement. Effective January 1, 2018, the statute provides that the trial 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.” (§ 12022.5, subd. (c).) Appellant Brooks contends he is entitled to a remand for resentencing under the amended statute. Respondent contends a remand is unnecessary because the record demonstrates the trial court would decline to strike the enhancement.

The amended statute applies retroactively to defendants, like appellant Brooks, whose judgments were not final as of January 1, 2018. A remand for resentencing is, however, unnecessary where “the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*).)

At sentencing, the prosecutor urged the trial court to impose the upper terms for both of appellant’s substantive offenses and each of the enhancements. The defense attorney argued that the lower terms would be more appropriate. The trial court chose to impose the mid-terms for the substantive offenses and the firearm use enhancements, resulting in a total term of 16 years, 8 months. It noted, “The court does not believe this is a seven-year sentence, but the court also does not believe that it’s a 25-year sentence.” It believed the term imposed was fair “to the people” and “I think that’s fair to Mr. Brooks. And

basically I think that really will ensure that Mr. Brooks will basically still have a productive, fulfilling life.”

The trial court thus considered and declined to impose the lower enhancement term of three years when it had discretion to do so. This may show that that is as far as the trial court would go. But not necessarily. Our recent opinion in *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111, compels limited reversal and remand for the trial court to exercise § 1385 discretion as to both Brooks and Foreman firearm enhancement findings.

Conclusion

The matter is remanded for the trial court to reconsider the § 12022.5 enhancements in light of the change in the law, in all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

I concur:

GILBERT, P. J.

TANGEMAN, J., Concurring:

I concur in all of the majority opinion except for the discussion on pages 8 to 9, beginning with “Had the contention not been forfeited, we would reject it . . .” and ending with “The inquiry was within the trial court’s sound discretion.”

In my opinion, the trial court erred when it asked Juror No. 12 “What makes you say [the charges are] fabricated?” “Are you saying the whole case is faulty?” “What do you base that on, that [Officer Perez] dropped [the guns] there?” and “[W]hy do you believe you listen to [the other jurors] but none of them listen to you?” “You think maybe it wasn’t they didn’t listen to you, they just disagree with you?”

These questions, among others by the court and counsel, were an impermissibly ““intrusive inquiry into the sanctity of jurors’ thought processes.” [Citation.]” (*People v. Nelson* (2016) 1 Cal.5th 513, 568, quoting *In re Hamilton* (1999) 20 Cal.4th 273, 294 & fn. 17.) By asking whether Juror No. 12 was basing his position on anything other than the evidence, and suggesting that the other jurors had listened to but disagreed with him, the court created an undue risk of effecting the deliberations. This was error. “““As a general rule, no one—including the judge presiding at a trial—has a “right to know” how a jury, or any individual juror has deliberated or how a decision was reached by a jury or juror.”” [Citation.]” (*People v. Nelson*, at p. 570.) But because counsel for appellants not only failed to object but actively participated in the extended questioning of Juror No. 12, I agree that the error was waived or forfeited.

NOT TO BE PUBLISHED.

TANGEMAN, J.

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