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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DESEAN M. DOMENGEAUX, Defendant and Appellant.	B267489 (Los Angeles County Super. Ct. No. YA085423)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed as modified and remanded in part with directions.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant of attempted murder, and found true special allegations that in the commission of the offense defendant discharged a firearm causing great bodily injury. The court sentenced defendant to 48 years to life.

Defendant argues that his conviction should be reversed for two reasons. First, he contends that the court improperly denied his *Batson/Wheeler* motion. (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).) Second, defendant argues that the court improperly instructed the jury on flight. We disagree. We agree with defendant and the Attorney General, however, that defendant's abstract of judgment contains a clerical error that must be corrected. We therefore direct the trial court to correct the abstract of judgment on remand, and otherwise affirm.

PROCEDURAL HISTORY

The District Attorney of the County of Los Angeles (the People) filed an information charging defendant with attempted murder (Pen. Code, §§ 664, 187, subd. (a)[1]). The information also alleged that in the commission of the offense defendant personally used a firearm within the meaning of section 12022.53, subdivision (b); personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c); and personally and intentionally discharged a firearm causing great bodily injury within the meaning of section 12022.53, subdivision (d). The information further alleged that defendant suffered prior convictions for a strike (§§ 667, subd. (b)-(i), 1170.12(a)), and a serious felony (§ 667, subd. (a)(1)), and that he

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

had served two prior prison terms (§ 667.5, subd. (b)). The trial court granted defendant's motion to bifurcate the trial on the prior conviction allegations.

A jury convicted defendant of attempted murder and found true the allegations that defendant intentionally discharged a firearm and caused great bodily injury under section 12022.53, subdivisions (c) and (d). Defendant waived his right to a jury trial on the prior conviction allegations and admitted the prior convictions and prison terms. The court denied defendant's *Romero*[2] motion. The court sentenced defendant to the high term of nine years for attempted murder (§§ 664, 187, subd. (a)), doubled to 18 years for his previous strike (§ 1170.12, subds. (a)-(d)), an additional 25 years to life on what the court erroneously stated was the "12022.53(b)" enhancement, and a consecutive five-year enhancement pursuant to section 667, subd. (a)(1), for a total of 48 years to life.

FACTUAL BACKGROUND

A. Prosecution evidence

Victim Timberly White, age 19 at the time of the incident, testified that at the time of the shooting she and defendant had been in a romantic relationship for a "couple of months." They saw each other almost every day. White testified that defendant was part of the Rollin' 60s gang.

White testified that the day before the shooting, August 31, 2012, she, her son, and defendant spent most of the day together. White and defendant planned to go to a concert together later that evening. In the afternoon White went to get her hair done at her friend Tamiko Taylor's house. White and Taylor then went out together, and White did not go to the concert with defendant.

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[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

In the early morning hours of September 1, 2012, White was driving with Taylor as a passenger in the area of West 88th Street and Budlong in Los Angeles. White saw defendant and his cousin, James Montgomery, walking. White pulled over and got out of the car, and she and defendant began to argue. White testified that as they argued, defendant said to Montgomery, "Give me the blower." Montgomery handed defendant a gun from his waistband, which defendant placed in his own waistband. As the argument continued, defendant pulled the gun from his waistband and began to shoot White. White put her hands over her face for a moment, then turned, ran, and fell to the ground. She testified, "[A]s I laid there, he – like, he came up behind me. Like, walked up on me and shot me again in my back, my lower back." Defendant and Montgomery got in a "goldish, tannish" car. Defendant "tried to shoot out the car again," but White heard "a click – like it [the gun] jammed or ran out." Defendant and Montgomery drove away in the direction of Normandie and Manchester.

After defendant left, White got up. She moved from the street to the curb and lay down again. She called out to her friend Taylor for help, but Taylor approached her, said, "You tried to set me up," and left without calling for help. White testified that about 15 minutes later, a woman who lived nearby came out and told her help was on the way. When sheriff's deputies arrived, White gave defendant's name as the person who shot her. The deputies asked if defendant was a gang member. White testified that she could not speak at that point, so she made the gang sign for the Rollin' 60s.

Taylor testified that on the night of the shooting, she was asleep in the passenger seat of White's car and awoke to the

sound of gunshots. Taylor stated that the shooter pointed the gun at her after White was shot, but she never saw the shooter's face. Taylor said the shooter got into a black car, which conflicted with White's testimony that defendant and Montgomery left in a gold or tan car. When Taylor got out of White's car, she saw White on the ground and approached her. White told Taylor to call paramedics, but Taylor ran away because she did not have a phone, she was hallucinating because she was under the influence of drugs, and she was scared.

Witness Pearly Lovett testified that she lived on 88th Street and heard gunshots in the early morning hours of September 1, 2012. After the gunshots stopped, she looked outside and saw a woman standing near a neighbor's truck yelling, "Help me." She saw two people, a male and a female, come out of her duplex. The male was black, slender, wearing dark colors, and running fast. The "female came out and cursed out the young lady standing yelling, help me." The cursing woman said to the injured woman, "Pulling shit like this is going to get you killed," and, "You are not going to bring them down on me and get me killed too." The woman continued yelling and cursing as she walked up the street. Lovett called 911 because the woman yelling for help was bleeding badly.

Sheriff's deputy Jonathan Hill testified that he and a partner responded to the call regarding the shooting. Deputy Hill asked White what happened, and she responded, "He shot me. He shot me." When Deputy Hill asked who shot her, White responded, "Desean Domengeaux shot me." Deputy Hill asked where Domengeaux was from, and the woman "indicated with her hand, threw up a gang sign" that Deputy Hill did not recognize. Deputy Hill testified that he wrote "Rollin' 60s" on his

report after a detective, probably Detective Takashima, gave him that information. Deputy Hill also testified that when deputies searched White's car, they found Taylor's purse and identification.[3]

White had been shot seven times: Three times in her right leg, twice in her abdomen, and twice in her lower back. She was in the hospital for about six weeks following the incident due to her wounds and related surgeries.

Detective Gene Takashima, a member of the Sherriff's Department gang unit, interviewed White multiple times at the hospital. At the time Detective Takashima visited on September 4, 2012, White was heavily sedated and in intensive care. On September 4 and again on September 12, White identified defendant from a six-pack of photographs as the person who shot her.

Detective Takashima was present when defendant was arrested on September 5 at the home of Tiffany Klyce. Defendant identified Klyce as his girlfriend. A cell phone was recovered at the location where defendant was arrested. Detective Takashima testified that on the phone there were text messages from September 1 at 3:11 a.m., stating in one text, "This bitch," and in the following text, "Gave your name. Lay low." The phone's contact information indicated that the number sending the texts belonged to Klyce.

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[3] Because her identification was in the car, sheriff's deputies went to Taylor's house on September 1. Taylor testified that she did not recall what she said during this interview because she was under the influence of drugs at the time. An audio recording of Taylor's interview was played at trial, but Taylor said it did not refresh her recollection about the interview.

Prosecution witness Tam Hodgson testified about information gathered from defendant's and Montgomery's cell phones relating to the time period surrounding the shooting. Hodgson explained that cell towers have sectors that face different directions. He testified that both defendant's and Montgomery's phones were in a single area in South Central Los Angeles for most of the day on August 31, 2012. From 10:06 p.m. to 12:26 a.m. on September 1, the phones moved to the Pasadena area. Between 12:36 and 2:30 a.m., the phones registered "a whole series of calls" further north.[4] At 2:31 a.m., the phones headed south again. At 2:53 and 2:55 a.m., defendant's phone, which Hodgson called "target telephone 1," made calls from an area that encompassed the address where the shooting occurred. Hodgson said, "[T]arget telephone 1 was in the same coverage area as the scene of the shooting at the time it occurred. . . . I didn't say it was there. I can simply say it was registering on the same cell sector and face that covers the house as well in that area." At 3:01, target telephone 1 was further north and east.

B. Defense evidence

Tiffany Klyce lived at the address where the shooting occurred, near witness Pearly Lovett. She testified that she and defendant started dating in August 2012. She said the sound of gunshots woke her around 2:45 a.m. on September 1, 2012. She went outside with other neighbors to see what happened. She testified that she did not see defendant there. She heard White say that defendant shot her. She texted defendant and warned

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[4] Much of the testimony regarding phone locations involved maps and other demonstrative evidence that is not in the record on appeal.

him that White had named him as the shooter. She never discussed with defendant if he was the one who shot White.

Defendant testified on his own behalf. He said that he and White dated briefly, but he told White they should be just friends, and there was no resentment between them. Defendant testified that he was in relationships with several other women at the time, and he and White were not exclusive. Defendant testified that in an incident prior to the shooting, White followed him and Klyce from Klyce's house. He believed that White had been upset about seeing him with another woman.

Defendant testified that he was with White on August 31 during the day. He was scheduled to be at music performances at two clubs in Hollywood and Pasadena on the night of August 31, and invited White to go with him. White left to get her hair done, but she did not meet him at either club. The defense played a video showing defendant at the performance in Pasadena.

Defendant said he called Klyce on the way back from Pasadena because he planned to go to her house, and she told him that shots had been fired outside of her house. He and Montgomery exited the 110 freeway at Manchester and stopped at a drive-through restaurant before going to another friend's house. Defendant said he was never on 88th Street that night. Defendant also testified that he would not walk around Klyce's neighborhood on 88th Street because that is rival gang territory.~

Ernest Koberlein, a cell phone forensics expert, testified that a cell phone traveling south on the 110 freeway and exiting on Manchester would likely use the cell tower at 8571 Budlong. The record on appeal does not clarify whether this is the same cell tower that Tam Hodgson testified covered the area of the shooting.

Defense gang expert Robert Freeman testified about gang culture and gang discipline. Leticia Carter, Taylor's mother, testified that she picked Taylor up in the early morning of September 1, 2012. Taylor was alone, crying and shaking, and told her mother that the girl she was with had been shot.

DISCUSSION

A. Defendant's *Batson/Wheeler* challenge regarding Juror 8

Defendant argues that the trial court erred by denying his *Batson/Wheeler* motion relating to Juror 8. We find no error.

1. *Underlying proceedings*

During voir dire, prospective juror number 8 [Juror 8] said he was a manager for an airline and had never served on a jury. Juror 8 said he would not disbelieve a witness's testimony just because that witness was a gang member. While the prosecution was asking questions about the reliability of witnesses, Juror 8 stated about the defendant, "To me I would think that he would be innocent until that person or until the prosecution proved without a doubt that he was guilty." The prosecutor responded, "Without a doubt? Not beyond a reasonable doubt?" The prosecutor explained that the standard was beyond a reasonable doubt, and asked, "Do you have an expectation that . . . the prosecution would have to prove this case beyond all doubt Juror 8 responded, "Beyond, yes. I think he would be innocent all the way up until I [*sic*] was proved different." After counsel asked additional questions of other prospective jurors, the court had the following exchange with Juror 8: "[T]he standard in a criminal case is beyond a reasonable doubt, not all – not beyond every doubt at all. It has to be reasonable doubt. If I gave you that

standard, would you follow that standard?" Juror 8 responded, "Yes."

The prosecution asked the panel members whether they would evaluate law enforcement witnesses' testimony "on the same level playing field" as other witnesses' testimony. Juror 8 indicated that this might be an issue for him, and said, "Listening to a . . . law enforcement officer, if he is speaking against the gang member, to me I would think he has prejudice against a gang member, and I would have some bias against him." When the prosecutor asked why, Juror 8 responded, "Just from – I don't know. The way it seems like they kind of treat different people that is affiliated with gangs with a symbol and bring stuff like that." The prosecutor asked the prospective jurors if they would have a problem serving in a case that was based solely on circumstantial evidence. Four prospective jurors, including Juror 8, indicated that they would.

The prosecutor dismissed Juror 8 on the People's fourth peremptory challenge. The defense did not object and accepted the panel as constituted. After the People exercised three more peremptory challenges, the defense requested a sidebar. Defense counsel said to the court, "I think of the seven that he [the prosecutor] has challenge[d], he's exercised two that have been African-American. Juror number 8 was the first male African-American, and juror 7 is a female African-American. The defendant is African-American." The court responded, "Okay. Is that it?" Defense counsel added, "I think the challenges are based on race."

The court said that of the prosecution's seven peremptory challenges, "two of them have been African-American. I believe there are other African-Americans in the audience. And he

exercised challenges against a Latino male, Asian female, white female, against – juror 4 is Latin." Defense counsel responded, "No, No. He's Caucasian. I think he's Caucasian." The court continued, "It's hard to tell for folks, but he's olive skinned. I'm not sure." The prosecutor said, "May I be heard, your honor?" The court continued, "White female, juror 5. And, again, these are my best estimates. People – this is a melting pot at this point. And, okay. I'm not prepared to find a prima facie case. Do you want to respond?"

The prosecutor said, "Yes, your honor, thank you. I would like to make a record in an abundance of caution. With respect to the black male that I exercised my peremptory challenge on, that – he was seated in seat number 8. At some point when I asked him about the burden of proof, he did mention he had an expectation that the case would need to be proven beyond all doubt." He continued, "In addition, your honor, when asked about maybe gang contact in relation to law enforcement testimony, he did express some issues and reservations with that, and those are the reasons that I exercised a peremptory challenge on that prospective juror." The prosecutor also explained that he exercised a peremptory challenge to excuse prospective juror number 7, who was also African-American, because she said that her younger brother had been in custody for a murder as a juvenile, and she was an actress who had concerns "regarding possible media attention." The prosecutor also noted that three African-Americans remained on the current panel of twelve.[5]

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[5] There was some disagreement about whether prospective juror 1 was African-American. Defense counsel thought she might not be, and the court said, "I think that's debatable. Again, she does appear to be African-American or black to me."

Defense counsel disagreed with the prosecutor's statements about Juror 8's comments about the burden of proof. "While it is true he had initially said that he would expect it to be proved beyond all doubt, but then the court did a follow-up with him and advised him if I told you it was beyond a reasonable doubt, would you be able to follow that, he said most assuredly yes." Counsel continued, "And with regard to gang evidence, what he said was that he believes that police officers treat gang members differently and would be maybe – they will be prejudiced. If he heard, like, a gang expert testify, he would take their – take into account that he believes they are biased against gang members. The People aren't calling any gang cops." The prosecutor said, "Detective Takashima is a gang expert." The court said, "I don't find a prima facie case given what I've seen and heard."

2. *Analysis*

"The familiar *Batson/Wheeler* inquiry consists of three distinct steps. The opponent of the peremptory strike must first make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. If a prima facie case of discrimination has been established, the burden shifts to the proponent of the strike to justify it by offering nondiscriminatory reasons. If a valid nondiscriminatory reason has been offered, the trial court must then decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination. [Citations.]" (*People v. Zaragoza* (2016) 1 Cal.5th 21, 42.)

This case involves the first stage of the *Batson/Wheeler* analysis. "When reviewing the denial of a first stage *Batson/Wheeler* inquiry, we sustain the trial court's ruling if, upon our independent review of the record, we conclude the

totality of the relevant facts does not give rise to an inference of discriminatory purpose." (*People v. Montes* (2014) 58 Cal.4th 809, 854.) "Although the question at the first stage concerning the existence of a prima facie case depends on consideration of the entire record of voir dire as of the time the motion was made . . . certain types of evidence may prove particularly relevant. [Citations.] Among these are that a party has struck most or all of the members of the identified group from the venire, that a party has used a disproportionate number of strikes against the group, that the party has failed to engage these jurors in more than desultory voir dire, that the defendant is a member of the identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong. [Citation.] A court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record [citations] and that necessarily dispel any inference of bias. [Citations.]." (*People v. Scott* (2015) 61 Cal.4th 363, 384 (*Scott*).)

Defendant argues that "the trial court implicitly found the prosecutor's explanation of his reasons for challenging [Juror 8] to be race neutral, but that the judge's conclusion was erroneous." This argument addresses the standards of a third stage *Batson/Wheeler* analysis. Here, however, the trial court did not make any findings about the prosecution's reasons for challenging Juror 8. Instead, the court ruled on the first *Batson/Wheeler* stage, determining at the outset that defense counsel failed to make a prima facie case. "[A]n appellate court properly reviews the first-stage ruling if the trial court has determined that no prima facie case of discrimination exists, then allows or invites the prosecutor to state reasons for excusing the

juror, but refrains from ruling on the validity of those reasons." (*Scott, supra*, 61 Cal.4th at p. 386.) That is what occurred here.

The totality of the relevant facts does not give rise to an inference that the prosecutor had a discriminatory purpose when dismissing Juror 8. Defense counsel argued below that the People's challenge to Juror 8 may have been based on his race, but the court noted that the prosecution also had stricken a Latino male, an Asian female, a male that was either Latino or white, and two white females. The judge called the jury panel "a melting pot." Defendant has pointed to no additional evidence in the record about the racial makeup of the jury panel, or any other evidence that might support a prima facie argument that the prosecution had a racially discriminatory purpose for dismissing Juror 8. The totality of the circumstances therefore does not support defendant's argument that the trial court's first-stage *Batson/Wheeler* ruling was erroneous.

Defendant asks us to proceed to the third stage of a *Batson/Wheeler* analysis, arguing that we should interpret the court's second statement of "no prima facie case" as a ruling that there was no purposeful discrimination. According to defendant, the trial court "made its finding that there was no prima facie case *twice*." Because the court's second statement of its findings came after the prosecution offered its reasons for challenging Juror 8, defendant argues, "[t]he most logical manner of reading the record is to take the trial court's second ruling that appellant has not presented a prima facie case as an implicit ruling that there was no purposeful discrimination." As such, according to defendant, this case falls under the exception to the appellate review procedure under *Scott*, *supra*, according to *Scott*'s footnote 1: "We distinguish at the outset the situation here, where the

trial court made independent rulings that no prima facie case existed and that no purposeful discrimination occurred, from the situation where a trial court skips over the first stage altogether [citations] or purported to rule on the first stage only after the prosecutor had already offered a statement of reasons [citations]. When a trial court solicits an explanation of the strike without first declaring its views on the first stage, we infer an 'implied prima facie finding' of discrimination and proceed directly to review of the ultimate question of purposeful discrimination. [Citation.]" (*Scott, supra*, 61 Cal.4th at p. 387 fn. 1.)

The record does not support defendant's argument. The court clearly stated that defendant did not make a prima facie case before the prosecutor stated his reasons for dismissing Juror 8. After the court made this finding, the prosecutor made clear that he was stating his reasons for the peremptory challenges to "make a record in an abundance of caution." After the parties discussed the issues, the court reiterated its ruling that there was no prima facie finding. This was not a situation described in footnote 1 of *Scott*, where the court "skips over the first stage altogether" or "purported to rule on the first stage only after the prosecutor had already offered a statement of reasons."

In addition, that the judge allowed the prosecutor to make a record by offering reasons for his peremptory challenges does not change the nature of the court's finding or how we review it on appeal. Allowing the prosecutor to make a record of race-neutral reasons for excusing the jurors in question, even as the court finds no prima facie case of discrimination, is considered the "better practice." (*People v. Cunningham* (2015) 61 Cal.4th 609, 660.) *Scott* warned against any finding to the contrary, because to do so would discourage the creation of a meaningful

record: "[W]e have . . . repeatedly encouraged trial courts to offer prosecutors the opportunity to state their reasons so as to enable creation of an adequate record for an appellate court, should it disagree with the first-stage ruling, to determine whether any constitutional violation has been established." (*Scott, supra*, 61 Cal.4th at p. 388.) Otherwise, "prosecutors may be reluctant to state their reasons for the record if doing so would jeopardize or nullify a ruling in their favor that the defense failed to raise an inference of discrimination." (*Ibid.*) Here, the prosecutor's explanation—given to create a record after the court already ruled that there was no prima facie showing—did not undermine the court's earlier ruling, reiterated a second time, that defendant did not make a prima facie showing.

Moreover, we cannot reasonably read the court's second statement as one addressing the third stage of a *Batson*/*Wheeler* challenge (whether defendant proved the ultimate question of purposeful discrimination) instead of the first stage (whether defendant made a prima facie showing). Defendant asks us to consider the court's second statement as an "implicit ruling that there was no purposeful discrimination." However, the court clearly stated, "I don't find a prima facie case given what I've seen and heard." We will not assume that the court meant something other than what it said. We therefore find no error in the *Batson/Wheeler* ruling.

B. Flight instruction

Defendant argues that the trial court erred by giving CALCRIM No. 372 regarding flight from the scene of the crime, because "there was not substantial evidence of flight by appellant apart from his identification as the perpetrator, and identity was

of course contested at trial." We find that the instruction was supported by substantial evidence.

1. *Underlying proceedings*

As the parties were reviewing proposed jury instructions, they discussed CALCRIM No. 372 relating to a defendant's flight as evidence of consciousness of guilt. The prosecutor argued that there was evidence that the defendant fled the scene. Defense counsel objected, arguing that the flight instruction should not be given because the identity of the person who fled was contested. The court replied, "[S]he was shot by somebody. That person ran. Whether or not it's your client, that is really an issue up to the jury." The court said it would give the instruction.

The court instructed the jury with CALCRIM No. 372: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

2. *Analysis*

"It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) "A party is entitled to a requested instruction if it is supported by substantial evidence," and "instructions not supported by substantial evidence should not be given." (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050.) "Evidence is '[s]ubstantial' for this purpose if it is 'sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.'" (*Ibid.*)

"'In general, a flight instruction "is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt."' [Citations.] Evidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest 'a purpose to avoid being observed or arrested.' [Citations.] To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury could find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

Here, there was substantial evidence that defendant was the shooter and fled the scene. White testified that defendant shot her and then left in Montgomery's car. The cell phone evidence placed defendant near the scene and then in a different place shortly after. The testimony of a single witness can constitute substantial evidence requiring the court to give particular instructions. (See *People v. Gonzalez* (2016) 246 Cal.App.4th 1358, 1379.)

Moreover, a flight instruction "is proper even when identity is at issue." (*People v. Avila* (2009) 46 Cal.4th 680, 710.) "If there is evidence identifying the person who fled as the defendant, and if such evidence 'is relied upon as tending to show guilt,' then it is proper to instruct on flight. (§ 1127c.) 'The jury must know that it is entitled to infer consciousness of guilt from flight and that flight, alone, is not sufficient to establish guilt. ([ ] § 1127c.) The jury's need to know these things does not change just because identity is also an issue. Instead, such a case [only] requires the jury to proceed logically by deciding first whether the [person

who fled] was the defendant and then, if the answer is affirmative, how much weight to accord to flight in resolving the other issues bearing on guilt. The jury needs the instruction for the second step.' [Citation.]" (*People v. Mason* (1991) 52 Cal.3d 909, 943.)

The jury was correctly instructed. "By its terms, the instruction applied only to flight by a defendant." (*People v. Elliott* (2012) 53 Cal.4th 535, 584.) If the jury determined that defendant was not the shooter, the shooter's flight would not have influenced a jury finding about defendant's guilt. The jury also was properly instructed that evidence of flight, without more, was not sufficient to prove guilt. We find no error.

Even assuming that the instruction was given in error, any such error was harmless. Defendant argues that the error was prejudicial because "[t]he prosecution case was not a strong one." Defendant contends we should apply the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, because the instruction "permitt[ed] the jury to infer guilt without a rational basis [and] therefore is federal constitutional error." The Attorney General, on the other hand, argues that the lower standard from *People v. Watson* (1956) 46 Cal.2d 818, 836 applies. We need not resolve whether the *Chapman* or *Watson* standard applies. It is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the flight instruction in light of the other evidence, including White's statements just after she was shot, her interviews with deputies, her testimony at trial, and the cell phone evidence showing that defendant was near the scene of the crime at the time it happened. In addition, the shooter's flight from the scene played a minimal role in the trial, and the prosecution did not rely

heavily on it to suggest defendant's guilt. Any instructional error was therefore harmless.

C. The abstract of judgment must be corrected

The parties agree that the sentencing minutes and abstract of judgment erroneously state that defendant's sentence was enhanced pursuant to section 12022.53, subdivision (b). In fact, the jury found true the allegations under section 12022.53, subdivisions (c) and (d). The parties agree that the proper basis for defendant's enhanced sentence is subdivision (d), which states that any person who, in the commission of specified felonies, "personally and intentionally discharges a firearm and proximately causes great bodily injury . . . shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." (§ 12022.53, subd. (d).) Subdivision (d), not (b), therefore mandated the enhancement of 25 years to life. We will remand with directions to correct the abstract of judgment.

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded to the trial court with directions to amend the abstract of judgment to reflect that the basis for defendant's 25-to-life enhancement was a true finding under section 12022.53, subdivision (d). The trial court is directed to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.