Filed 12/21/18 P. v. Staton CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL STATON, Defendant and Appellant.	B267488 (Los Angeles County Super. Ct. No. BA405702)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Affirmed with directions.

Richard C. Neuhoff and Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Stephanie Miyoshi, Tita Nguyen and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Michael Staton (Staton) guilty of murder and of attempted murder and found true gun and gang allegations. On appeal, Staton contends that his *Batson/Wheeler*[1] challenge was erroneously denied, that the jury could have improperly found him guilty of attempted murder based on a misapplication of the transferred intent doctrine, and that the true findings on the gang enhancements must be reversed. We reject these contentions and affirm the judgment of conviction, but we vacate the sentence and remand for resentencing in light of Senate Bill No. 620 ((2017-2018 Reg. Sess.), Stats. 2017, ch. 682, § 2). We also remand for the trial court to hold a hearing under *People v. Franklin* (2016) 63 Cal.4th 261, 284 (*Franklin*).)

BACKGROUND

I. Factual background

A. *Fourth of July 2012 shootings*

On the Fourth of July 2012, neighbors held a block party on 97th Street between Normandie and Budlong in Los Angeles, an area claimed by the Hoover Crips. A large number of people were there, including Freddy Pickett, 12-year-old R.R., 14-year-old Unique R., and 14-year-old S.R. Gang members were among the celebrants. At 10:15 p.m., R.R. saw a man in a hoody holding a gun. S.R. saw two young Black men walk across 97th and start shooting. R.R. and Pickett were shot in their legs, but they survived. Unique R., however, died from a gunshot to her chest.

---

[1] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

B. *Statements implicating Staton in the shooting*

Just weeks after Unique R. was murdered, Kameisha Haggens texted Staton, asking, "On July 4th, didn't you bust on some Hoova niggas on 97th?" Staton replied, "yea."

Latianna Bonner also gave evidence incriminating Staton. Bonner testified that she had known Jasper Jones since seventh grade, and she had known Staton since the summer of 2012. On the evening of the shooting, Bonner saw Staton with a gun. While Staton, Jones and Bonner were at a house on 105th Street and Normandie, a man identified as Phillip Haywood got a phone call, after which he reported that Hoover gang members were at Century and Normandie. Staton, Jones and two others left in a jeep or SUV driven by Haywood. Twenty to 30 minutes later, Staton, Jones, Haywood and one other man returned. Haywood wiped off a gun and handed it to Jones. Staton said they had "let them have it," and he hoped they would tell the rest of them not to come back over here. Bonner further testified that "Criptoe [Staton] had said, 'fuck Snoovers. They won't be back.' "

The investigation having now led to Staton, police interviewed him on December 14, 2012.[2] Although initially reluctant to talk to the police and after changing his story multiple times, Staton admitted he was in a jeep driven by Haywood, who Staton knew only as Big Homie. Jones and Bryant Sessions were also in the car. After getting two guns from a hiding place, they drove around searching for enemies. When they passed 97th Street, they saw a large group of people. Staton, Sessions and Jones got out of the vehicle, and Staton and Sessions walked northbound on Normandie towards 97th Street.

---

[2] The interview was recorded and played for the jury.

At the corner of those streets, Sessions fired his gun. Staton did not fire his gun.

C. *Gang expert testimony*

Deputy Sheriff Nicholas Adragna testified for the People as a gang expert. Deputy Adragna investigates the Ten Deuce Budlong Gangster Crips (Ten Deuce) and the Underground Crips (Underground) criminal street gangs in the Compton area. Ten Deuce allied itself with the Underground gang. From 2007 to the present, the deputy has contacted and arrested people from both gangs. If any crime having a gang connection occurs in his station's area, he investigates that crime.

In Deputy Adragna's opinion, Staton is an active Ten Deuce gang member whose moniker is Criptoe. The deputy had field contacts with Staton in 2011 and 2012. Deputy Adragna also knows Jones, who is an Underground gang member. Sessions (Slim or Baby Sticks) is a Ten Deuce gang member. Haywood is either an Underground or Block Crips gang member.

According to the deputy, Ten Deuce's primary activities are "assaults, assaults with firearms, murders, attempt murders, possession of firearms, robberies, things of that nature." He similarly testified that the Underground gang's primary activities are "assaults, assaults with firearms, murders, attempt murders, robbery, burglaries, possession of firearms, things of that nature." The deputy based his opinion on his seven or eight years working in the area, investigations involving those gang members, having arrested members of the gang for some of those crimes, his field contacts with gang members, and having investigated any crime occurring in the area with a gang nexus.

The deputy also testified about predicate crimes committed by Ten Deuce and Underground gang members. In 2012, Ten

Deuce member Urban Todd pled nolo contendere to assault with a deadly weapon. In 2011, a jury found another member of the gang, Donyell Butler, guilty of attempted murder and of assault with a deadly weapon. In 2010, a jury found Underground gang member Marquell Davis guilty of first degree burglary. Also in 2010, Eugene Flowers, an Underground, pled nolo contendere to first degree burglary.

Hoover Criminals is Ten Deuce's rival. In gang culture, going into a rival's territory is an act of disrespect.

II. Procedural background

A jury found Staton guilty of first degree murder of Unique R. (Pen. Code,[3] § 187, subd. (a); count 1) and attempted murder (§§ 664, 187, subd. (a); counts 2, 3). As to all counts, the jury found true firearm (§ 12022.53, subds. (b)–(d) & (e)(1)) and gang (§ 186.22, subd. (b)(1)(C)) allegations.

On September 1, 2015, the trial court sentenced Staton on count 1 to 25 years to life plus 25 years to life for the firearm enhancement (§ 12022.53, subds. (d) & (e)(1)). On counts 2 and 3, the trial court sentenced him to life terms plus terms of 25 years to life for the firearm enhancement (§ 12022.53, subds. (d) & (e)(1)). The trial court imposed but stayed sentences on the gang enhancements as to all counts. The court ran the sentences on counts 2 and 3 concurrent to each other but consecutive to count 1. Staton's total term therefore is life plus 75 years to life.

---

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

DISCUSSION

I. *Batson/Wheeler*

Staton, his trial counsel, and Prospective Juror No. 5 were all Black. The prosecutor struck three of four Black prospective jurors, including Prospective Juror No. 5, and did not accept the panel when a Black prospective juror was on it. With this overview, Staton contends that the prosecutor's peremptory challenge to Prospective Juror No. 5 violated *Batson/Wheeler*. We disagree.

A. *Voir dire of Prospective Juror No. 5*

The trial court empanelled 55 prospective jurors. Prospective Juror No. 5 had no prior jury service and was married with four children. His oldest daughter worked for the government; a son was a chef; another son was trying to become a firefighter; and his youngest daughter worked in real estate. The prospective juror's first and second wives were teachers, and his current wife was a nurse. Now retired, he was a security guard and a real estate agent. When he was a security guard, he was authorized to carry a firearm.

After the trial court told prospective jurors that the People's theory was Staton aided and abetted the shooter, the court asked if anyone was concerned with finding a person who did not actually commit the murder guilty of murder. Prospective Juror No. 5 was "not comfortable with that because if I kind of think there may very well have been an awkward position with the gunman." Then, in response to defense counsel's question about betrayal, Prospective Juror No. 5 said he was a "trusting person", but after somebody ran him over, "an officer came and said it was my fault. He took her word for it,

and I went to the hospital. He never talked to me." "I just knew—felt like he was—by him being a bike cop, too, I knew he would see the right thing about the situation. He didn't see it that way." The juror had trusted the police officer but, felt betrayed by the officer. The prosecutor did not follow up on Prospective Juror No. 5's responses, except to confirm that he was fine with not considering punishment and agreed a police officer could be a gang expert.

The prosecutor used her fourth peremptory challenge to excuse Prospective Juror No. 5.[4]

B. *The* Batson/Wheeler *motion*

After the prosecutor excused Prospective Juror No. 61, then seated as a prospective alternate juror and who was the third Black prospective juror to be excused by the prosecutor, defense counsel made a *Batson/Wheeler* motion. Counsel noted there had only been three Black jurors for the entire panel, and while he understood why the first Black juror had been excused, he challenged the validity for excusing the second and third prospective Black jurors.

The trial court agreed there had been three Black prospective jurors excused (Nos. 5, 13 and 61) but noted that the defense had excused a fourth, Prospective Juror No. 35. The court was "not sure we're at that point where there's a prima facie case," but asked the prosecutor, "out of an abundance of caution" to state her reasons for dismissing Prospective Juror No. 61. The prosecutor explained she excused him because he feigned unavailability, behaved unusually in the courtroom,

---

[4] The prosecutor used her fifth peremptory to excuse Prospective Juror No. 13, who was also Black.

admitted to nepotism, had negative experiences with law enforcement, and suggested he would vote not guilty. The prosecutor then said she would explain her other challenges, but the trial court told her she did not have to. The court denied the motion and found that a prima facie case had not been made. The court said, "I don't think there's a prima facie case, and, if there was, I think it's clear why this counsel excused that person [Prospective Juror No. 61]. She gave all the reasons, and they are unrelated to the race."

Later, during trial, the prosecutor explained why she had excused Prospective Juror No. 5:

"This was a male African American, and he worked as a security guard and [in] real estate. He was the one with three wives if you remember. He carried a gun, and he indicated that he was not comfortable with the concept of aiding and abetting. I also saw that he gave a very friendly smile to [defense counsel], which not on its own means much of anything. He indicated on that aiding and abetting issue that it could be an awkward position with the gunman to be an aider and abettor with a gunman. He was having difficulty with the law that holds an aider and abettor equally responsible for the crime. That's one of the People's main theories of the case. [¶] He also indicated he had a problem with an officer on his I think accident. He was run over on his motorcycle, and the officer said it was [his] fault. [The police officer] never talked to [him]. This was five years ago, and he said he had been run over by somebody. There was a motorcycle officer, and he obviously had a problem with that officer."

As to Prospective Juror No. 13, she had indicated she was less likely to believe law enforcement and had not had the best experience with officers in cases affecting minorities.

The trial court had the same "recollection" of the prospective jurors' responses and found that the prosecutor's reasons were "all race neutral." The court therefore denied the *Batson/Wheeler* motion.

C. *A prima facie case was not established under* Batson/Wheeler

Using "peremptory challenges to remove prospective jurors on the sole ground of group bias violates the [state and federal constitutional] rights to trial by a jury drawn from a representative cross-section of the community." (*Wheeler*, *supra*, 22 Cal.3d at pp. 276–277.) Excluding even one prospective juror for impermissible reasons under *Batson* and *Wheeler* constitutes structural error. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157 (*Gutierrez*).) Whether a peremptory challenge has been used in an unconstitutional manner involves a three-step inquiry. First, the defendant must make a prima facie case by showing the totality of the relevant facts give rise to an inference of discriminatory purpose. (*Id.* at p. 1158.) Second, and if the defendant makes that showing, the burden shifts to the prosecutor to provide a nondiscriminatory explanation for the challenge. (*Ibid.*) Third, if a neutral explanation is tendered, the trial court must decide whether the defendant has proven purposeful discrimination and the movant must show it was more likely than not that the challenge was improperly motivated. (*Ibid.*)

Ordinarily, we review the trial court's ruling on a *Batson/Wheeler* motion for substantial evidence. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159.) " 'We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] [As] long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.' " (*People v. Lenix* (2008) 44 Cal.4th 602, 613–614.)

We begin with the first stage of the inquiry, whether Staton established a prima facie case. Where, as here, "(1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling." (*People v. Scott* (2015) 61 Cal.4th 363, 391 (*Scott*).) The trial court made a preliminary finding that a prima facie case had not been made but then asked the prosecutor to state her reasons for dismissing Prospective Juror No. 61. After hearing the prosecutor's reasons for dismissing Prospective Juror No. 61, the court then found that its preliminary ruling was correct, i.e., a prima facie case had not been made. The court also declined to hear the prosecutor's reasons for excusing Prospective Jurors Nos. 5 and 13. By this, the court found no prima facie case as to all Black prospective jurors excused by the prosecution. Therefore, because the trial court found that no prima facie case

of discrimination existed, we begin our analysis with a review of the first stage ruling.

"[T]he question at the first stage . . . depends on consideration of the entire record of voir dire at the time the motion was made." (*Scott*, *supra*, 61 Cal.4th at p. 384.) Relevant factors include that a "party has struck most or all . . . 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 . . . to which the majority of the remaining jurors belong." (*Ibid.*) "A court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record [citations] and that [clearly] dispel any inference of bias." (*Ibid.*)

Here, Staton's argument that he established a prima facie case rests solely on a statistical analysis. That is, the prosecutor challenged three of four Black prospective jurors (or 75 percent), and used 18 percent of her challenges (three of 17) against Black jurors, who comprised only eight percent of the jury pool. The " 'small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible.' " (*People v. Woodruff* (2018) 5 Cal.5th 697, 750–751; see, e.g., *People v. Clark* (2011) 52 Cal.4th 856, 905 [no prima facie case where prosecutor excused four of five Black panelists]; *People v. Hoyos* (2007) 41 Cal.4th 872, 901 [prosecutor excused three of four Hispanics]; *People v. Bell* (2007) 40 Cal.4th 582, 597–598 [prosecutor excused two of three Black panelists]; *People v. Farnam* (2002) 28 Cal.4th 107, 136 [no prima facie case where four of first five challenges

were to Black prospective jurors and very small minority of jurors on panel were Black].)

Also, the record clearly establishes nondiscriminatory reasons for excusing the three Black prospective jurors. (*Scott*, *supra*, 61 Cal.4th at p. 385.) Primarily, the excused panelists all had negative prior experiences with law enforcement, which is a nondiscriminatory reason for a challenge. (See, e.g., *People v. Montes* (2014) 58 Cal.4th 809, 855; *People v. Winbush* (2017) 2 Cal.5th 402, 435–436; *People v. Lenix*, *supra*, 44 Cal.4th at p. 628.) Prospective Juror No. 61 described prior negative experiences with law enforcement in which the police were "real nasty" to him and threatened to fight him. He also admitted that his uncle, who was a clerk at a courthouse, got "ticket[s]" "transferred" for him. Prospective Juror No. 13 similarly hadn't "had the best experience with police officers" and felt there was bias in cases involving minorities. Indeed, defense counsel acknowledged that the prosecutor's challenge to a Black panelist, Prospective Juror No. 13, was proper. Finally, Prospective Juror No. 5 had a prior negative experience with law enforcement in which the officer disbelieved the juror. Moreover, the juror was uncomfortable with the concept of aiding and abetting, which was the main theory of liability in the case.

Our review of the record shows there were nondiscriminatory reasons for the prosecutor's peremptory challenge to Prospective Juror No. 5 that are apparent and clearly established, dispelling any inference of bias.

II. Transferred intent

Next, Staton contends there is a reasonable probability the jury erroneously relied on transferred intent to convict him of the attempted murder counts. We disagree.

The prosecution's primary theories of the case were Staton aided and abetted the murder and attempted murders or he conspired to commit those crimes.[5] The trial court accordingly instructed the jury on those theories. (CALCRIM Nos. 400, 401, 416, 417.) Further, after instructing the jury on murder and first degree murder, the court instructed the jury on transferred intent under CALCRIM No. 562: "If the defendant intended to kill one person but, by mistake or accident, killed someone else instead, then the crime, if any, is the same as if the intended person had been killed."

Staton correctly points out that the transferred intent doctrine does not apply to attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313.) Transferred intent applies when unintended victims are killed, but it does not apply when unintended victims are only injured. (*Id.* at pp. 326–327.) Here, there was no evidence that anyone, including R.R. and Pickett, who were injured but not killed were anything but unintended victims. Still, nothing in the trial court's instruction on transferred intent would have led the jury to think that the doctrine applied to the attempted murder counts. The instruction clearly refers to a victim who has been "killed." It further refers to *killing* someone other than the intended person. The instruction thus unambiguously refers to a victim who has been killed, and there is no reasonable probability the jury would have understood it applied to the attempted murder counts. This is all the more likely based on the way in which the court instructed the jury. The court first instructed the jury on murder

---

[5] Stating that nobody thought Unique R. was the "intended victim specifically," the prosecutor did not ask for a "kill zone" instruction.

and then immediately instructed on transferred intent. The court *then* instructed the jury on attempted murder. A reasonable jury, considering the instructions as a whole, would not conclude it could find Staton guilty of attempted murder under the transferred intent doctrine. (*People v. O'Malley* (2016) 62 Cal.4th 944, 991; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1395–1396.)

Nor do we agree that statements the prosecutor made in closing would have caused the jury to think that transferred intent applied to the attempted murder counts. The prosecutor said, "[T]he law says that if you fire into a really big crowd of people, can you really prove the specific intent to kill that one person say out of 50 . . . that was picked? Most of the time the person who was hit in a really large crowd may not be the person who the people intended to shoot. So the law says, if you're shooting at a crowd of people and you're trying to kill any member, any one member, any two members, any three members of that crowd, and you have the specific intent to kill members of that crowd, that . . . satisfies the specific intent required for attempted murder. [¶] . . . We don't need to show that this defendant or the people that committed the crime with him had the specific intent to kill . . . Pickett or . . . [R.]R. The question is, did [Staton] and his group of people that committed the crime with him have the specific intent to kill members of that group, of that crowd on 97th? If you find that, based on their actions and their words, like, 'We gonna get them,' that there was that specific intent to kill to murder and two people were hit, then the specific intent requirement is met for those charges."

By this, the prosecutor was not referring to transferred intent, but was likely referring to concurrent intent. *People v.*

Bland, *supra*, 28 Cal.4th at page 329 explained, "although the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what it termed the 'kill zone.' " To the extent this is what the prosecutor was referring to, no sua sponte instruction was necessary. Concurrent intent is not a legal doctrine requiring special jury instructions; "it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Id.* at p. 331, fn. 6; *People v. Stone* (2009) 46 Cal.4th 131, 137.)

To the extent the prosecutor's statements could be interpreted to refer to transferred intent, the jury still would not have believed it could find Staton guilty of attempted murder based on transferred intent. Rather, the jury was instructed on attempted murder with CALCRIM No. 600,[6] and Staton raises no issue as to that instruction. And, as we have said, the

---

[6] "To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but ineffective step toward killing another person; and 2. The defendant intended to kill that person. [¶] A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt." (Capitalization and italics omitted.)

transferred intent instruction clearly applied only to a killing, not to an attempted one. Also, the jury was told to follow the law as instructed, and if "you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." We presume the jury followed the trial court's instructions. (*People v. Homick* (2012) 55 Cal.4th 816, 867.)

III. The gang enhancements

Staton posits two reasons why the jury's true findings on the gang allegations must be reversed: first, the jury was misinstructed on the primary activities prong of the enhancement and, second, there was no evidence that Staton was aware of facts that made Ten Deuce and the Underground criminal street gangs.

A. *Misinstruction on primary activities*

A " 'criminal street gang' [is] any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its *primary activities the commission of one or more* [*statutorily enumerated offenses*], . . . and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f), italics added; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 319–320, 323.) As to the primary activities prong of the enhancement, Deputy Adragna testified that the Ten Deuce gang's primary activities are "assaults, assaults with firearms, murders, attempt murders, *possession of firearms*, robberies, things of that nature." (Italics added.) He similarly testified that the Underground gang's primary activities are "assaults, assaults with firearms, murders, attempt murders, robbery, burglaries, *possession of firearms*, things of that nature." (Italics added.) In accordance

with his testimony, the trial court instructed the jury that a "criminal street gang is any ongoing organization, association or group of three or more persons, whether formal or informal . . . that has, as one or more of its primary activities, the commission of assault with a deadly weapon, murder, robbery, attempted murder and *possession of firearms*." (Italics added.)

Mere possession of firearms, however, is not a statutorily enumerated offense in subdivision (e) of section 186.22 that constitutes a primary activity. (§ 186.22, subd. (e)(23), (31), (32), (33).) The instruction therefore was erroneous.

Nonetheless, the error was harmless beyond a reasonable doubt. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at pp. 324–327.) To establish a gang's primary activities, the trier of fact may consider past offenses as well as the present, charged offenses. (*Id.* at p. 323.) The offenses must be one of the group's " 'chief' " or " 'principal' " occupations, which necessarily excludes "the occasional commission of those crimes by the group's members." (*Ibid.*; see *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611 [isolated criminal conduct insufficient].)

Here, the evidence overwhelmingly established that Ten Deuce and Underground committed the other properly delineated primary activities: assault with a deadly weapon, murder, robbery, and attempted murder. Deputy Adragna was intimately familiar with these gangs, having followed their activities since 2007. And, at the time of trial, he was specifically assigned to monitor them and he was charged with reviewing any case in his area having a gang nexus. He also testified that the Ten Deuce and Underground gangs commit those primary activities more than occasionally. There was also evidence that two Ten Deuce gang members committed the statutory crimes, i.e., assault with

a deadly weapon (Todd) and attempted murder (Butler). There was similar evidence that two Underground gang members, Davis and Flowers, committed the statutory crime of burglary. Staton was on trial for and ultimately convicted of murder and two counts of attempted murder, and there was evidence that he committed those crimes with Jones, an Underground gang member; Sessions, a Ten Deuce gang member; and Haywood, who is either an Underground or Block Crips gang member. Thus, Deputy Adragna's testimony did not focus on firearm possession and instead focused on the primary activities of murder, attempted murder, assault with a deadly weapon, and burglary. That evidence was sufficient to establish the primary activities prong of the gang allegation. (See *People v. Fiu* (2008) 165 Cal.App.4th 360, 388 [misinstruction on what crimes constitute pattern of criminal activity was harmless]; *People v. Bragg*, *supra*, 161 Cal.App.4th at pp. 1400–1401.)

B. *Staton's knowledge of the gang's criminal conduct*

Staton next argues that the true findings on the gang enhancements must be reversed because there was no evidence he "*was aware* of facts that made the Ten Deuce . . . and the Underground" criminal street gangs within the meaning of section 186.22, subdivision (b).

To support his argument, Staton relies on *People v. Loeun* (1997) 17 Cal.4th 1. *Loeun* considered whether a " 'pattern of criminal gang activity' " could be established by evidence of the charged offense and proof of another offense committed on the same occasion by a fellow gang member. (*Id.* at pp. 4–5.) The defendant argued that even if the charged crime could constitute a predicate offense, there had to be evidence of at least one prior offense committed on a separate occasion, otherwise he "could not

'know' that commission of the current offense would provide the second of the 'two or more' predicate offenses necessary to establish a 'pattern of criminal gang activity.' " (*Id.* at p. 10.) The court rejected this argument, particularly defendant's related attempt to analogize to statutes that infringe on association rights. Rather, the gang statute does not criminalize group membership. It punishes conduct, not association. (*Id.* at p. 11.) Moreover, section 186.22, subdivision (b)(1) applies only to felonious conduct committed for the benefit of, at the direction of, or in association with a group that meets the specific statutory conditions of a criminal street gang, with the " ' "specific intent to promote, further, or assist in any criminal conduct by gang members." ' " (*Ibid.*) *Loeun* thus stated, "We do not understand the due process clause to impose requirements of knowledge or specific intent beyond these." (*Ibid.*)

Based on that last sentence, Staton states that the specific intent requirement "obviously" comes from the " 'specific intent to promote' " language in section 186.22, subdivision (b), and the knowledge requirement therefore has to come from the " 'for the benefit' " language. We need not take long in refuting this reading of *People v. Loeun*, *supra*, 17 Cal.4th 1 except to say that *Loeun* was not addressing what, if anything, a defendant must know about his or her gang's primary activities.

In any event, there was overwhelming evidence Staton knew about his gang's and the Underground gang's criminal activities. (See, e.g., *People v. Carr* (2010) 190 Cal.App.4th 475, 488–490.) Staton admitted to Deputy Adragna in 2011 and 2012 that he (Staton) was a Ten Deuce gang member. Other evidence established that Staton bragged about at least one of his gang's primary activities—murder. A photograph, entitled WHKOOP

(Hoover Killer Opportunity Essentially), of Jones with Staton wearing gang attire and throwing hand signs meaning "fuck Hoover" was admitted. Other photos of Staton entitled "snoovakillaonverkillamont" and "snuvakilla" were admitted.[7] That Staton was at the block party armed with a gun and in the company of fellow gang members further confirmed he knew his gang was engaged in criminal activities.

IV. *Franklin* hearing

Staton, who was 18 years old when he committed these crimes, will be entitled to a youth offender parole hearing during the 25th year of his incarceration. (§§ 3051, subd. (b)(3), 4801, subd. (c).) To assist with that future hearing, Staton, at the time of sentencing in this case, should have been given a "sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) That information includes "any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing" and that "demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Ibid.*) " 'The goal of [the] proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the

---

[7] "Snoova" and "snuva" are derogatory terms for Hoovers.

eyes of the law.' " (*Franklin*, at p. 284; *People v. Rodriguez* (2018) 4 Cal.5th 1123, 1131–1132; § 3051, subd. (f)(1) & (2).) The People concede that remand is necessary to give Staton a sufficient opportunity to make a record for his future youth offender parole hearing.

V. Senate Bill No. 620

When Staton was originally sentenced in September 2015, the trial court lacked discretion to strike the enhancements found true under section 12022.53. However, he is now entitled to the benefit of an amendment to that section giving trial courts discretion to strike an enhancement. (§ 12022.53, subd. (h).) The People concede that the matter must be remanded so that the trial court can exercise its newly granted discretion under section 12022.53, subdivision (h). (See generally *People v. Chavez* (2018) 22 Cal.App.5th 663, 708–714; *People v. Arredondo* (2018) 21 Cal.App.5th 493; *People v. Woods* (2018) 19 Cal.App.5th 1080.) We express no opinion about how the court should exercise its discretion on remand.

DISPOSITION

The sentence is vacated. The trial court is directed to reconsider Michael Staton's sentence and also hold a *Franklin* hearing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J. LAVIN, J.