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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. DONNIE LEE WALTON, JR., Defendant and Appellant.	B276265 (Los Angeles County Super. Ct. No. YA092263)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan B. Honeycutt, Judge. Affirmed as modified.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Joseph P. Lee and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Donnie Lee Walton, Jr. was convicted of two counts of murder and two counts of being a felon in possession of a firearm. On appeal, he contends the prosecutor used an impermissibly suggestive pretrial photographic identification procedure that tainted his in-court identification of defendant; testimony from the prosecution's gang expert improperly included case-specific testimonial hearsay; the prosecution's gang expert improperly testified about defendant's guilt, motive, and intent; the trial court imposed unauthorized sentences on defendant's murder convictions when it sentenced him to six terms of life without the possibility of parole; and the trial court should have stayed the imposition of sentence on the Penal Code[1] section 12022.53, subdivisions (b) and (c) enhancements under section 12022.53, subdivision (f) rather than under section 654.

We asked the parties to provide supplemental briefs to address whether the trial court erred in imposing a total of three five-year terms for defendant's three prior convictions within the meaning section 667, subdivision (a), rather than three such terms on each of defendant's murder convictions.

We hold the trial court should have stayed imposition of the sentence on the section 12022.53, subdivisions (b) and (c) enhancements under section 12022.53, subdivision (f), rather than under section 654, and should have imposed three five-year terms under section 667, subdivision (a) for each of defendant's murder convictions. Accordingly, we modify the judgment and affirm.

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1 All statutory citations are to the Penal Code, unless otherwise noted.

PROCEDURAL BACKGROUND

A jury convicted defendant of the first degree murders of Darnell Charles and Tyrone Robinson (§ 187, subd. (a)) and two counts of possession of a firearm by a felon (§ 29800, subd. (a)(1)). With respect to the murders, the jury found true the special circumstance allegations that defendant committed multiple murders (§ 190.2, subd. (a)(3)) and intentionally killed his victims while an active participant in a criminal street gang to further the activities of the gang (§ 190.2, subd. (a)(22)). The jury further found true allegations that defendant personally used and personally and intentionally discharged a firearm causing death as to the murder counts (§ 12022.53, subds. (b)-(d)) and committed the murders for the benefit of, at the direction of, and/or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(4)). With respect to the crimes of possession of a firearm by a felon, the jury found true the allegation that defendant committed those offenses for the benefit of, at the direction of, and/or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(a).) The trial court found true the allegations defendant had three prior convictions within the meaning of the Three Strikes law (§ 1170.12, subd. (b)) and section 667, subdivision (a)(1). The trial court sentenced defendant to six terms of life without the possibility of parole plus 65 years to life.

FACTUAL BACKGROUND

I. Gang Rivalry

Before February 9, 2013, the Denver Lane Bloods and Inglewood Family Bloods were friendly. On February 9, the two gangs had a party at the Normandie Casino. A fight broke out between them. About four hours later, Traybonne Odom, a member of the Denver Lane Bloods who had attended the party, was murdered.

On February 12, 2013, Inglewood Family Bloods member Clarence ("Big Klayron") Gant, Sr., was murdered. Gant, Sr.'s, murder started a war between the Inglewood Family Bloods and the Denver Lane Bloods.

A. Charles Murder

About 3:20 p.m. on February 13, 2013, John Williams was driving on Imperial approaching Menlo Street when a man on a bicycle swerved into his lane about 15 feet ahead. As Williams braked, a man ran into the street and fatally shot the bicyclist in the back three times with a handgun. The shooter was wearing a black security uniform with a white t-shirt underneath. He appeared to be from 5'10" to 6'1" tall with a medium build. His hair was in a short afro style and he wore glasses.

Williams watched the shooter trot to a champagne-colored Camry idling at the curb. The car pulled away and its horn was honked several times, "almost like a partying on the horn."

On September 9, 2013, detectives showed Williams a six-pack photographic lineup. Williams eliminated four photographs and then "debated" between photographs 3 and 4, but believed the person in photograph 3—defendant—looked more like the shooter based on his eyes, nose, eyebrows, and "facial

structure"—"the eyes and nose really stand out." None of the persons in the photographs wore glasses.

B. Robinson Murder

About 9:00 p.m. on February 15, 2013, Leon Hale was with Robinson at a commercial intersection near Vermont and Imperial, just north of the 105 freeway. Robinson, a "wannabe" gang member was wearing red, a color generally associated with Bloods gangs. The two sat on a wall outside a fast food restaurant. About 9:49 p.m., a man walked up and asked Hale, "Where you from?" Hale responded, "I'm from Texas." The man then asked Robinson where he was from; but before Robinson could reply, the man pulled out a gun and shot him. As Robinson lay on the ground, the shooter stood over him and fired at least once more. The shooter walked away and got into a nearby black Yukon.

Charles Jeffries was stopped at the intersection of Vermont and Imperial when he saw two men "square off." One man fired two shots at the other. A car or van pulled up and the shooter jumped in. Jeffries followed the vehicle and obtained its license plate number—5MTX189. He returned to the scene of the shooting and gave the number to a Los Angeles County Sheriff's deputy.

Dale Dreher also witnessed the shooting from his car. He saw the shooter jump into a dark green Yukon. He called 911 and reported the shooting and the Yukon's license plate number—5MTX189.

Robinson died from multiple gunshot wounds. Bullets and bullet fragments were recovered from Robinson's body.

The surveillance video from the nearby liquor store depicted a Black male walking southbound on Vermont and then crossing the street. Another Black male was near the fast food restaurant. The first man raised his hand and the other man fell to the ground. The first man quickly walked north on Vermont and got into a black SUV waiting at the curb.

Investigating officers located a second surveillance video. Former Inglewood Police Department Officer Brendan Wilkes, who had known defendant for about 20 years, viewed it and identified defendant as the shooter.

TRIAL EVIDENCE

I. Eyewitnesses to Charles Murder

The morning Williams appeared in court, but before he testified, the prosecutor showed him three photographs of defendant, taken in 2012, 2014, and 2016 (Exhibit No. 9). Williams selected the photograph from 2012—the only photograph with defendant in glasses—as most resembling the shooter on February 13, 2013. Over a defense objection, the prosecution repeated the exercise for the jury. Williams based his selection on "the hair, the eyes definitely, and the glasses, nose structure, light-skinned." He remembered the shooter's glasses were "extremely thick" and magnified his eyes. Defendant's photograph from 2016 did not at all resemble the shooter, as his hair was different and he had a full beard.

On cross-examination, defense counsel asked Williams multiple times if he was identifying defendant as the shooter. Williams responded the defendant looked "very similar" to the shooter. Williams focused on "[t]hose eyes, the bulging eyes looking, the eyebrows, and his nose structure looking right at me

right now." Williams eventually testified, "I'm not going to say for a fact" that defendant was the shooter.

Another eyewitness testified the shooter was a Black male, from 5'10" to 6'1" tall, with a light complexion. A third eyewitness described the shooter as a tall, slim, light-skinned, Black male.

II. Aja Najee

Aja Najee had known defendant for over 10 years and they had a child together. She broke up with defendant in 2008, and had last seen him in 2014. Najee viewed a series of still photographs from one of the surveillance videos and testified they depicted defendant. She also testified defendant currently looked different than he had ever looked in the past. Najee viewed the exhibit with the three photographs of defendant from 2012, 2014, and 2016. She identified the 2012 photograph as the one depicting defendant as he normally looked.

III. Clarence Gant, Jr.

On September 10, 2014, Detective Troy Ewing interviewed Clarence Gant, Jr. Defendant borrowed his father's Yukon after his father's murder, as well as Gant, Jr.'s, cell phone. Defendant said, "'Let me use your phone. You stay with your momma. I don't want you to be part of nothing.'"

After the interview, Detective Ewing placed Gant, Jr., in a live lineup. Gant, Jr., was then put in a cell with two undercover law enforcement officials. Gant, Jr., told the men Detective Ewing "showed me a picture of the big homie . . . at the gas station where the little shit, shit happened" and "blood on camera and all that." Gant, Jr.'s, reference to "blood" was to defendant.

Gant, Jr., said, "[The] picture they got is the car pulling up at the gas station and Nutty Boy getting out the car, they got Nutty Boy getting out the car . . . ."

Later, Gant, Jr., said he had been shown a picture of the "[b]ig homie that they talking about" getting out of the truck and walking away. He said, "they got a picture of him at the gas station, right across the street from where the [expletive] got murdered at." Referring to video footage, Gant, Jr. said, "You can only see the passenger. And Nutty Boy in the passenger, like, looking this way, and then you see him getting out the car and they got him in the front seat, and then they got him gettin' out the car like, they don't show what door he got out of though."

IV. Forensic Evidence

On February 18, 2013, law enforcement recovered a dark-colored SUV, license plate number 5MTX189, from Gant, Sr.'s, backyard.[2] Defendant was a potential contributor to DNA recovered from the steering wheel and driver's side door handle. His fingerprint and palm print were found on the driver's side rear passenger door.

Five bullet fragments recovered from Robinson's body were compared to bullets recovered from Charles's body. Forensics experts determined both victims were shot by the same firearm. The firearm was not recovered.

V. Cellular Telephone Evidence

A crime analyst used the February 2013 records for defendant's and Gant, Jr.'s, cell phones to map the cell towers

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[2] The prosecutor appears to have misspoken when he once referred to the license plate number as 5MXT189.

associated with calls made by the phones. On February 13, 2017, between 3:07 and 3:23 p.m., four calls were made from defendant's cell phone that connected to a cell tower a few blocks from the location of Charles's murder. On February 15, 2013, calls from Gant, Jr.'s, cell phone at 9:48 and 9:49 p.m. used the cell tower just north of the 105 freeway near Normandie Avenue.

VI. Gang Evidence

City of Inglewood Police Department Officer Samuel Bailey testified as the prosecution's expert on the Inglewood Family Bloods gang. He identified the gang's territory, membership, common signs and symbols, and primary criminal activities.

To establish the two predicate offenses for the gang allegations, the prosecution offered into evidence certified court records for Leon Tippitt and Ray Coffee, each of whom had been convicted for being a felon in possession of a firearm. The certified records did not indicate the crimes were committed for the benefit or at the direction of or in association with a criminal street gang. Officer Bailey was familiar with Tippitt's case due to his work on a probation search in the matter. He believed Tippitt was a member of the Inglewood Family Bloods at the time of those offenses based on personal contact through his work on the gang team and on patrol. Officer Bailey was also familiar with Coffee's case because he had stopped Coffee a month and a half before trial to check if Coffee was still on probation in that matter. He opined Coffee was a member of the Inglewood Family Bloods at the time of that conviction.

According to Officer Bailey, a "rivalry" developed between the Denver Lane Bloods and Inglewood Family Bloods following the Normandie Casino fight. Later that night or early the next

morning, a prominent Denver Lane Bloods member was killed. The Denver Lane Bloods held the Inglewood Family Bloods responsible; and within a week, there were nine shootings between the gangs, with five fatalities, including Gant, Sr., a prominent Inglewood Family Blood.

Gant, Jr., was a member of the Inglewood Family Bloods gang. His gang monitor was "Little Klayron."

Officer Bailey had known defendant since the 1990's. Defendant's father owned a vehicle tow and impound yard that had a contract with the Compton Police Department, then Officer Bailey's employer. Defendant worked at the yard and Officer Bailey saw him on multiple occasions in connection with an impounded vehicle.

Based on his six years with the Inglewood Police Department's gang unit, known internally as the "anti-crime team," Officer Bailey testified defendant was a "full fledge[d] member" of the Inglewood Family Bloods. Defendant had been the subject of criminal investigations and the victim of several violent attacks by rivals of the Inglewood Family Bloods.

Also, junior members of the gang often mentioned defendant as an "O.G." or "original gangster." Officer Bailey witnessed how junior members reacted to defendant when he was around and would "kind of give way." Such behavior showed "respect" in the gang culture. Officer Bailey could not remember when he saw those junior members and defendant together, however. Gang members from defendant's "peer group" referred to him as "their direct homeboy." Other law enforcement agencies "tell us that same information." Also, defendant was shown in a photograph taken on March 25, 2011, making a gang sign with his hands.

The prosecutor gave Officer Bailey a detailed hypothetical that tracked the prosecution's case, beginning with a fight between the Inglewood Family Bloods and Denver Lane Bloods, followed by the murder of a prominent Inglewood Family Blood member, with an equally prominent Inglewood Family Blood member then killing two members of the rival gang. It was the gang expert's opinion the last two described murders were committed at the direction of, for the benefit of, or in association with the Inglewood Family Bloods gang.

Moreover, because Gant, Sr., was a prominent Inglewood Family Blood, his murder would be avenged by a similarly well-placed Inglewood Family Blood member. Officer Bailey opined there was a "very short list of people" who could have been involved in "that mission": defendant and Gant, Jr. For another gang member to retaliate for Gant, Sr.'s, killing without checking with defendant or Gant, Jr., "would almost be jumping the line." The reputation of a gang member like defendant would be lessened if he did not personally retaliate or help orchestrate the retaliation for the murder of a "peer" gang member and instead permitted a younger gang member to carry out the retaliation.

As to the second murder, in gang culture, the question, "Where are you from?" was an inquiry intended to determine a person's gang membership—to find a rival gang member to confront. According to Officer Bailey, "this act of retaliation"—i.e., the second murder—benefitted the gang because it instilled fear in a rival gang that it could be struck at any time of day or night, even in its own neighborhood. Also, the murder conveyed to the rival gang, "So, since you struck at us, we're going to strike back. It's going to cost you to be in war with us. You're not just going to hit us and we not react to it." Finally, the murder

provided a "sense of revenge" for the death of an influential gang member.

On cross-examination, defense counsel asked Officer Bailey whether an answer defendant filed in a civil gang injunction case on August 2, 2012, where he renounced any ties to the Inglewood Family Bloods, changed the officer's mind about defendant's continuing gang membership. Officer Bailey testified law enforcement considered a person no longer a member of a gang if the person was not involved in "activity," was not involved with active gang members, and was not the subject of any criminal investigations. He added other members of defendant's gang said defendant continued to have contact with the gang "all the way up to his murder."

On redirect, Officer Bailey testified he was aware of a gang-related incident involving defendant in 2014.[3] Members of the Inglewood Police Department's gang detail attempted to contact defendant and he fled into the Market Street Bar and Grill, a hangout for the Inglewood Family Bloods gang. The officers pursued defendant and took him into custody. Defendant was armed with a firearm, a fact inconsistent with someone who had renounced his gang membership.

DISCUSSION

I. No Unduly Suggestive Pretrial Photographic Identification Procedure

Defendant contends the trial court erred in allowing the prosecutor to introduce evidence of an impermissibly suggestive

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3 On voir dire outside the jury's presence, Officer Bailey testified he was familiar with the arrest and had watched a videotape of it.

pretrial photographic identification procedure that tainted Williams's in-court identification of defendant as Charles's shooter. The argument fails. Williams never made an in-court identification of defendant as the killer. In compliance with the trial court's evidentiary ruling, the prosecutor did not ask witness Williams to identify defendant as the shooter. Defense counsel, on the other hand, pressed the issue: "Q: Now, are you—just so I'm clear now, are you saying here under oath that this gentleman is the person you saw out there that night—that day doing the shooting? [¶] A: It looks very similar to the man." There was some back and forth and defense counsel asked the question again: "Q: All right. Now you're going to say for fact he is [the shooter]? [¶] A: Am I going to say for a fact he is now? [¶] Q: Yeah. [¶] A: I'm not going to say for a fact he is now."

As mentioned, defense counsel objected to the prosecutor's showing Williams the three photographs of defendant taken in different years. The trial court ruled Williams could not be asked to identify the shooter from the three photographs, but he could be asked which of the photographs looked most like the shooter. The trial court observed the prosecutor was entitled to show defendant's appearance in court was different than it had been several years earlier. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1001 (*Cunningham*); *People v. Ashmus* (1991) 54 Cal.3d 932, 974.)

The burden is on defendant to demonstrate that an identification procedure is unduly suggestive or unreliable. (*Cunningham, supra,* 25 Cal.4th at p. 989.) We conduct a de novo review of a pretrial identification procedure to determine whether it was "unduly suggestive." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 943.)

The three-photograph exhibit of defendant was neither an "identification procedure" nor unduly suggestive. Defendant was the subject of all three photographs. Witness Najee, the mother of defendant's child, testified he usually looked like the 2012 photograph. Williams testified the shooter, whom he could not identify in the courtroom, most resembled the man in the 2012 photograph. The trial court did not err in admitting the exhibit with the three photographs of defendant. (*Cunningham, supra,* 25 Cal.4th at pp. 989-990.)

II. Gang Expert's Testimony

Shortly after defendant's trial, the California Supreme Court issued its decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). Under *Sanchez*, an expert witness may not "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) As another Division of this court has held, "*Sanchez* 'jettisoned' the former 'not-admitted-for-its-truth' rationale underlying the admission of expert basis testimony, and occasioned a 'paradigm shift' in the law." (*People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1246.)

Defendant contends on appeal that reversal is compelled because Officer Bailey's testimony concerning Coffee's conviction as one of the predicate offenses for the gang allegations and defendant's membership in the Inglewood Family Bloods constituted case-specific and testimonial hearsay in violation of

Sanchez.[4] With one exception, we do not agree. As to the exception, the error was harmless.

The prosecution had the burden to establish that Inglewood Family Bloods is a criminal street gang within the meaning of section 186.22, subdivision (b)(1). This required proof that Inglewood Family Bloods "(1) . . . is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity.' [Citation.] 'A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons.'" (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 581.)

Defendant challenges the third factor and asserts Officer Bailey's hearsay testimony concerning Coffee's membership in Inglewood Family Bloods and reliance on the certified copy of the record of Coffee's felony conviction ran afoul of *Sanchez*. But testimony concerning Coffee's status as a gang member did not relate to the events or participants in the case against defendant. This testimony was not "case-specific," as that phrase is used in *Sanchez, supra,* 63 Cal.4th at page 676.

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[4] Defendant had no basis to object to the officer's testimony at trial, pre-*Sanchez*. The issue was not forfeited. (*People v. Welch* (1993) 5 Cal.4th 228, 237.)

Defendant's gang status is a case-specific fact under *Sanchez.* Officer Bailey's opinion that defendant was an active member of the Inglewood Family Bloods gang at the time of the offenses was based on evidence that falls into three categories:

(1) Personal knowledge: Officer Bailey had known defendant since the 1990's, when he was an officer with the Compton Police Department and had contacts with him through defendant's father's tow yard. During his six years with the Inglewood Police Department gang unit, Officer Bailey knew defendant had been the subject of criminal investigations and the victim of attacks by Inglewood Family Bloods rivals.

(2) A photograph and videotape: Officer Bailey identified defendant making a gang sign in a 2011 photograph and viewed a 2014 videotape of defendant's arrest in an unrelated gang incident.

(3) Hearsay statements: Inglewood Family Blood members told Officer Bailey defendant was an "O.G." or "original gangster" and an active gang member, even after defendant renounced his active status as part of the civil gang injunction proceedings. Law enforcement personnel from other agencies told Bailey defendant was a gang member.

The first category of evidence supporting Officer Bailey's opinion about defendant's gang status—Officer Bailey's testimony about matters within his personal knowledge—is not hearsay. (*Sanchez, supra,* 63 Cal.4th at p. 685 [expert witnesses "can rely on information within their personal knowledge"].) The second category—the officer's testimony about what was shown in a photograph or videotape—also is not hearsay. (See *People v. Cooper* (2007) 148 Cal.App.4th 731, 746 ["Photographs and videotapes are demonstrative evidence, depicting what the

camera sees. [Citations.] They are not testimonial and they are not hearsay, that is, 'evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated . . . .' (Evid. Code, § 1200.)"].)

The third category—statements from gang members and other law enforcement agencies concerning defendant's gang status—is the type of case-specific hearsay proscribed by *Sanchez*. Admission of that evidence was error. The error, however, was harmless beyond a reasonable doubt. (See *Sanchez, supra,* 63 Cal.4th at pp. 698-699; *Chapman v. California* (1967) 386 U.S. 18, 24.)

In *Sanchez*, the Supreme Court concluded that without the gang expert's case-specific hearsay testimony, there would have been insufficient evidence the defendant acted for the benefit of a gang. (*Sanchez, supra,* 63 Cal.4th at pp. 698-699.) Even if the trial court excluded the third category of evidence, testimony falling under the first two categories was properly admitted. We are convinced beyond a reasonable doubt the jury would have returned the same finding that defendant was a member of the Inglewood Family Bloods.

III. Gang Hypothetical

Defense counsel did not object when Officer Bailey, in response to the prosecutor's hypothetical question, testified the murders were committed by the Inglewood Family Bloods in retaliation for Gant, Sr.'s, murder and defendant was one of two persons on the "short list" of gang members to avenge the death. On appeal, defendant claims this testimony invaded the province of the jury by suggesting defendant's guilt, motive, and intent in

violation of *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*).[5] Defendant's failure to object in the trial court, however, forfeits the claim on appeal. (*People v. Stevens* (2015) 62 Cal.4th 325, 333; *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193.)

Even if defendant had not forfeited review of this issue, the trial court did not err in permitting Officer Bailey's testimony. In *Killebrew*, a gang expert testified "when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Killebrew, supra,* 103 Cal.App.4th at p. 652, fn. omitted.) On appeal, the defendant argued "these opinions on the subjective knowledge and intent of each occupant in the car were improperly admitted." (*Ibid.*) The Court of Appeal held a gang expert's testimony about a defendant's subjective knowledge and intent was inadmissible. (*Id.* at pp. 647, 658.)

In *Vang, supra,* 52 Cal.4th 1038, the Supreme Court held *Killebrew*, to the extent it "purported to condemn the use of hypothetical questions, . . . overlooked the critical difference between an expert's expressing an opinion in response to a hypothetical question and the expert's expressing an opinion about the defendants themselves. *Killebrew* stated that the expert in that case 'simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reversed to the trier of fact.' (*Killebrew, supra,* 103 Cal.App.4th at p. 658.) But, to the extent the testimony responds to hypothetical questions, as in this case . . . such testimony does no such thing." (*Vang, supra,* 52 Cal.4th at p. 1049.)

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5 *Killebrew* was disapproved in part in *People v. Vang* (2011) 52 Cal.4th 1038, 1047-1049 (*Vang*), *post.*

Officer Bailey's testimony that defendant was one of two persons who would have been on the "short list" of gang members to avenge Gant, Sr.'s, death addressed defendant's and Gant, Jr.'s, status within the gang and did not address defendant's knowledge or intent. Accordingly, the testimony was admissible.

IV. Defendant's Six Terms of Life Without the Possibility of Parole

Pursuant to the Three Strikes Law, the trial court tripled the two consecutive terms of life without the possibility of parole (LWOP) imposed for these two murder convictions. (§ 1170.12, subd. (c)(2)(A).)[6] Citing Court of Appeal decisions from other appellate districts,[7] defendant urges us not to follow

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6 Section 1170.12, subdivision (c)(2)(A) provides: "Except as provided in subparagraph (C), if a defendant has two or more prior serious and/or violent felony convictions, as defined in subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of:

"(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior serious and/or violent felony convictions, or

"(ii) twenty-five years or

"(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046."

7 *People v. Smithson* (2000) 79 Cal.App.4th 480 and *People v. Coyle* (2009) 178 Cal.App.4th 209, 219 are decisions from the

People v. Hardy (1999) 73 Cal.App.4th 1429 (*Hardy*), and instead to reverse and remand for resentencing. We decline to do so.

In *Hardy,* the defendant was convicted of first degree murder and several other offenses and admitted one prior robbery conviction. She was sentenced to LWOP and the trial court imposed a second consecutive LWOP under the Three Strikes Law. Division Two of this Appellate District affirmed. The *Hardy* court recognized sections 667, subdivision (e)(1) and 1170.12, subdivision (c)(1) do not expressly address LWOP terms (*Hardy, supra,* 73 Cal.App.4th. at p. 1433), but held they applied to LWOP sentences because the purpose of the Three Strikes law is to ensure longer prison terms for defendants with prior strike convictions. (*Id.* at pp. 1433-1434.) The *Hardy* analysis applies here, where defendant has three prior strike convictions, thus tripling each LWOP term for the Charles and Robinson murders.

While we are not bound by *Hardy, supra,* 73 Cal.App.4th 1429, this Division has followed it for more than 18 years, and the Supreme Court has yet to weigh in on this issue. The trial court did not err in tripling defendant's two LWOP terms.

V. Section 654 Stay

The trial court imposed consecutive sentence enhancement terms of 25-years-to-life under section 12022.53, subdivision (d) for defendant's murder convictions. It stayed the section 12022.53, subdivision (b) and (c) enhancement terms for those convictions under section 654. Defendant contends the trial court

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Third Appellate District. Division One of the Fourth Appellate District decided *People v. Mason* (2014) 232 Cal.App.4th 355.

instead should have stayed those terms under section 12022.53, subdivision (f).[8] The Attorney General agrees, as do we.

In *People v. Palacios* (2007) 41 Cal.4th 720 (*Palacios*), the Supreme Court held, "We are persuaded that, in enacting section 12022.53, the Legislature made clear that it intended to create a sentencing scheme unfettered by section 654." (*Id.* at pp. 727-728.) Although *Palacios* concerned the application of section 654 to the imposition of multiple sentences under the same 12022.53 subdivision—subdivision (d)—for the same act and not to the imposition of multiple sentence under different subdivisions—i.e., subdivisions (b), (c), and (d)—its broad language nevertheless suggests we should rely on section 12022.53, subdivision (f) to stay the subdivision (b) and (c) enhancements and not section 654.

VI. Section 667, Subdivision (a)(1) Enhancements

The trial court found true the allegation defendant had three prior convictions within the meaning of section 667, subdivision (a)(1). As to the Charles murder, in addition to the three life terms without the possibility of parole under the Three Strikes law, the trial court sentenced defendant to three five-year terms under section 667, subdivision (a)(1). As to the Robinson murder, the trial court also sentenced defendant under the Three Strikes law to three life terms without the possibility of parole,

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[8] Section 12022.53, subdivision (f) provides, in relevant part, "Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment."

but did not impose any term under section 667, subdivision (a)(1). We asked the parties to brief whether the trial court erred in failing to impose sentence under section 667, subdivision (a)(1) for Robinson's murder. We agree with the Attorney General that it was error.

Section 667, subdivision (a)(1) provides in relevant part, "any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

In *People v. Williams* (2004) 34 Cal.4th 397, 405, the Supreme Court held "under the Three Strikes law, section 667 [, subdivision (a)(1)] enhancements are to be applied individually to each count of a third strike sentence." Because defendant was sentenced under the Three Strikes law for both murder convictions, the trial court erred in failing to impose sentence under section 667, subdivision (a)(1) on to defendant's conviction for murdering Robinson.

Defendant contends imposing the section 667, subdivision (a)(1) enhancements under the Three Strikes law would be error because his life without the possibility of parole sentences are not subject to the Three Strikes law. We rejected that argument above.

DISPOSITION

We modify the judgment by ordering the section 12022.53, subdivision (b) and (c) terms for defendant's murder convictions stayed under section 12022.53, subdivision (f), rather than under section 654 and imposing three five-year terms under section 667, subdivision (a)(1) on each of defendant's murder convictions. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DUNNING, J.*

I concur:

KRIEGLER, Acting P. J.

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

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BAKER, J., Concurring

I join all but Parts V and VI of the discussion in the majority opinion (and the corresponding introductory and dispositional language). Although I do not join Parts V and VI, stare decisis considerations—as applied to the particular issue on which the result in those two Parts depends—persuade me that concurring in the result is appropriate.

People v. Hardy (1999) 73 Cal.App.4th 1429 holds that the Three Strikes law requires doubling a term of life without possibility of parole (*id.* at p. 1434). But two more recent and better-reasoned Court of Appeal decisions hold to the contrary. (*People v. Mason* (2014) 232 Cal.App.4th 355, 367-369; *People v. Smithson* (2000) 79 Cal.App.4th 480, 503-504 (*Smithson*)). Ordinarily, this sort of split in appellate authority would be resolved by our Supreme Court.

In the 15-plus years since *Smithson*, however, our Supreme Court has not granted review to decide the issue, presumably because it is one that is not likely to have any practical impact on the sentence a defendant will actually serve. Long ago, our Supreme Court provided general guidance to trial courts concerning what to do when confronted with an unresolved split in Court of Appeal decisions: none of the decisions is binding, and a trial court must choose among them based, presumably, on its

evaluation of which embodies its best view of the law. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 456 [rule requiring a court exercising inferior jurisdiction to follow the decisions of a court exercising a higher jurisdiction "has no application where there is more than one appellate court decision, and such appellate decisions are in conflict. In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions"] (*Auto Equity Sales*); see also *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4 [a superior court is not obligated to follow an opinion from its own appellate district, although a court will ordinarily do so as a "practical matter"].)

In two prior cases, this division has reversed (over my dissent) trial court judges that declined to double life without possibility of parole sentences. I believe that was legally incorrect, but it was also jurisprudentially gratuitous. In light of the unusual, longstanding split of authority among the Courts of Appeal and the negligible practical impact that will flow from deciding whether to double or triple life without parole sentences, I see no reason to reverse a trial court's *Auto Equity Sales* choice among the competing appellate opinions. Rather, unless and until the Supreme Court acts, I believe the better course is to respect a trial judge's good faith effort to apply diverging case law and simply affirm the sentence that results from such an effort, which is what I agree to do here.

BAKER, J.