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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GUSTAVO ARMANDO LUNA, JR. Defendant and Appellant.	B269629 (Los Angeles County Super. Ct. No. BA427561)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund Willcox Clarke, Jr., Judge. Affirmed and remanded with directions.

Laura S. Kelly, 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, Assistant Attorney General, Mary Sanchez and Esther P. Kim, Deputy Attorneys General for Plaintiff and Respondent.

On appeal, it is undisputed that defendant Gustavo Armando Luna, Jr. shot and killed a rival gang member, Christopher Hernandez. Hernandez's family saw the shooting, which occurred just after Hernandez's sister's middle school graduation. Defendant was convicted of first degree murder.

Defendant argues that the following error requires automatic reversal of his conviction: (1) the trial court's comments on reasonable doubt during jury selection, which defendant contends lowered the burden of proof; and (2) the trial court's denial of defendant's peremptory challenge when the trial court granted the prosecution's *Batson/Wheeler* motion.[1] We conclude there was no structural error. Under the totality of the circumstances, the trial court's comments could not reasonably have been understood to lower the prosecution's burden of proof. Second, although the trial court failed to set forth explicitly his reasoning for denying the peremptory challenge, as a matter governed by state law, any such error does not result in structural error and was not prejudicial here. (*People v. Singh* (2015) 234 Cal.App.4th 1319, 1330-1332 (*Singh*.)

None of defendant's other challenges warrants reversal of his conviction. We remand the matter only for resentencing because of changes in the law postdating the trial in this matter. The parties agree that defendant was not afforded an opportunity to present mitigating evidence under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). Additionally, the law governing the firearm enhancement now affords a trial court discretion

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[1] This motion asserts discrimination in exercising a peremptory challenge prohibited by *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258.

whether to impose or strike that enhancement in a case that is not yet final, such as here.

FACTUAL AND PROCEDURAL BACKGROUND

We separate our factual presentation: First we discuss background facts regarding the charge, and second, we set forth in separate sections of our discussion, the facts relevant to each of defendant's contentions of error.

Nineteen-year-old Christopher Hernandez was shot multiple times and died of his gunshot wounds. Several eyewitnesses identified defendant as the shooter. Defendant shot Hernandez from a black car, and defendant owned the black car involved in the shooting. An expended casing was found in the rear of defendant's car, and his fingerprint was found on a can in the center console.

Hernandez was a member of the Rebels 13 gang. Although the issue was contested, there was evidence that defendant was a member of the rival La Mirada Locos gang. A prosecution gang expert opined that the murder was committed for the benefit of, at the direction of, or in association with, the La Mirada Locos gang.

Jurors asked no questions. Defendant was convicted of first degree murder. A gang enhancement and firearm enhancement were found true. Defendant was sentenced to prison for 50 years to life, consisting of a mandatory 25 years-to-life sentence for the murder (Pen. Code,[2] § 190, subd. (a)) and a then-mandatory 25 years-to-life sentence for the firearm enhancement (§ 12022.53, subd. (d)).

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[2] Undesignated statutory citations are to the Penal Code.

DISCUSSION

Defendant claims numerous errors occurred during jury selection and that they individually and cumulatively warrant reversal of his conviction. He also argues the trial court improperly rebuked defense counsel in front of jurors during the cross-examination of a prosecution expert witness. Finally, he argues that the matter must be remanded for resentencing in light of *Franklin* and recent legislation regarding the firearm enhancement.

A. The Trial Court's Explanation of Reasonable Doubt During Jury Selection Did Not Alter the Prosecution's Burden of Proof

Defendant's principal argument is that the trial court's definition of reasonable doubt during jury selection impermissibly lowered the prosecution's burden of proof and resulted in structural error. We conclude that the trial court's instructions did not alter the prosecution's burden of proof.

1. Factual background

Prior to jury selection, defense counsel requested that the trial court inform potential jurors of the burden of proof in a criminal case. The trial court did so multiple times during jury selection. The first time, the trial court indicated that a defendant is presumed innocent[3] and that "proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. But the prosecution need not

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[3] Specifically, the trial court underscored, "[t]he point is that he doesn't have an obligation to disprove anything, and the law favors him."

prove the case beyond all possible or imaginary doubt, because everything in life is subject to possible or imaginary doubt."

The trial court's second reference during jury selection to the reasonable doubt standard, which incurred with no objection, is the subject of the instant appeal. The trial court told potential jurors: "The standard of proof for every element in the case is proof beyond a reasonable doubt. You must have an abiding conviction that the charge is true. But you don't have to be convinced beyond all possible doubt, or all imaginary doubt, because everything in life is subject to those. I think the language may sound foreign to you, but I think the concept is not. I think in your hearts and in your minds you will know whether you have a reasonable doubt or not, because it is in the hearts and minds of the jury that reasonable doubt is found or not found. It's not a measurement, it's not a percentage, it's not a physical thing." Shortly afterwards, the court told jurors "[e]vidence is the only basis to decide the case."

When a new group of potential jurors was called, the court reminded them of the presumption of innocence and "[t]he requirement that proof be beyond a reasonable doubt." In questioning the jurors, defense counsel told them: "[T]he standard is guilt beyond a reasonable doubt. That's the highest standard in life, whether it's a misdemeanor, whether it's a felony, whether it's a murder—whatever it is. In a criminal case it's guilt beyond a reasonable doubt. . . . meaning you have to have an abiding conviction of the truth of the charge."

Prior to jury deliberations, the court properly instructed jurors on the presumption of innocence and the meaning of reasonable doubt.

2. The issue is preserved even though trial counsel did not object

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) An instruction on reasonable doubt that lowers the prosecution's burden of proof results in structural error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281; *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1179.)

"The standard of proof beyond a reasonable doubt . . . 'plays a vital role in the American scheme of criminal procedure,' because it operates to give 'concrete substance' to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." (*Jackson v. Virginia* (1979) 443 U.S. 307, 315.) Our Supreme Court has explained that "[i]t is a fundamental precept of our criminal justice system that before a jury may convict a defendant of a criminal offense, it must find the prosecution has proved all elements of the offense beyond a reasonable doubt." (*People v. Aranda* (2012) 55 Cal.4th 342, 349.) "[T]he reasonable doubt instruction more than any other is central in preventing the conviction of the innocent." (*People v. Brigham* (1979) 25 Cal.3d 283, 290.)

For purposes of this appeal, we assume that the challenged statements made during jury selection were tantamount to a jury instruction. Our assumption is consistent with *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1171-1172 in which this division assumed that the definition of reasonable doubt given during jury selection was equivalent to a jury instruction.

Section 1259 permits appellate review of any instruction that affects a defendant's substantial rights. The reasonable doubt instruction affects a criminal defendant's substantial rights (*People v. Johnson, supra,* 115 Cal.App.4th at p. 1172) and is fundamental to criminal justice (*People v. Aranda*, *supra*, 55 Cal.4th at p. 349). We thus consider whether the trial court's instructions during voir dire violated due process.

3. There is no reasonable likelihood the jurors applied the court's instruction in a way that violates the Constitution

The court's definition of reasonable doubt during jury selection " 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) We must determine " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Ibid.*)

Defendant's argument that jurors would have understood they should rely only on their hearts and minds rather than the evidence in the case is unpersuasive. We first observe the challenged instruction was not given to the empaneled jurors, but to potential jurors "who at the time did not know whether they would ultimately serve in the case." (*People v. Elguera* (1992) 8 Cal.App.4th 1214, 1222.)

More significantly, just before jury deliberations, jurors were instructed: "You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, *based only on the evidence* that has been presented to you in this trial. [¶] Do not let bias, sympathy, prejudice, or public opinion influence your decision." (Italics added.)

The court also instructed jurors as follows: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The *evidence* need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] *In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty*." (Italics added.) As the italicized language indicates, the trial court directed jurors to focus on the evidence and measure the evidence against the reasonable doubt yardstick.

In addition to the quoted definition of reasonable doubt, jurors were provided written instructions with the standard definition of reasonable doubt in CALCRIM No. 220.[4]

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[4] CALCRIM No. 220 provides: "The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because [he has] been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is

The prosecutor did not capitalize on the "hearts and mind" language. No party referred to it during closing argument. The totality of circumstances therefore does not support defendant's argument that the court's single reference to the hearts and minds of jurors during jury selection impermissibly lowered the prosecution's burden of proof.

This case is distinguishable from *People v. Johnson* (2004) 119 Cal.App.4th 976 (*Johnson*). In *Johnson*, the appellate court found that the trial court "lowered the prosecution's burden of proof below the due process requirement of proof beyond a reasonable doubt." (*Id*. at p. 985.) In *Johnson*, the trial court told jurors that they could find the defendant guilty even if they had " 'some doubt' " about his guilt "and characterized a juror who renders a guilty verdict with 'no doubt' as 'brain dead.' " (*Id*. at p. 980.) Additionally, the "court equated proof beyond a reasonable doubt to everyday decision-making in a juror's life" such as getting married, starting a family, or going to college. (*Id*. at pp. 979-980.) The trial court stated that determining

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presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, [he is] entitled to an acquittal and you must find [him] not guilty."

whether the defendant was guilty was "the kind of thing, the secular things, that you decide every day in your life.' " (*Id*. at p. 983.) "When you get out of bed, you make those same decisions.' " (*Ibid*.) The prosecutor further emphasized the trial court's statements by arguing to jurors that the reasonable doubt standard applied to everyday decisions and repeated the "brain dead" language used by the trial court. (*Ibid*.)

The *Johnson* facts are absent here. The trial court did not equate the beyond a reasonable doubt standard with a lower standard such as one employed in everyday decision making. Importantly, the court did not equate "beyond a reasonable doubt" with "some doubt." Nor did the prosecutor in this case repeat the "hearts and mind" language in contrast to the prosecutor in *Johnson*, who argued that a juror returning a guilty verdict without " 'some doubt' " was " 'brain dead.' " (*Johnson, supra*, 119 Cal.App.4th at p. 983.)

Defendant's reliance on *United States v. Hernandez* (3rd Cir. 1999) 176 F.3d 719 (*Hernandez*) is also misplaced. First, *Hernandez* is not binding. (*People v. Williams* (1997) 16 Cal.4th 153, 190 [federal circuit court decision not binding].) Nor is *Hernandez* factually apposite. In *Hernandez*, the majority concluded that the following statements to jurors after the jury was empaneled, but before they heard evidence, impermissibly lowered the burden of proof: "How do you decide what is proof beyond a reasonable doubt? There is no specific definition. I'm sorry to tell you, but there are none. It's what you in your own heart and your own soul and your own spirit and your own judgment determine is proof beyond a reasonable doubt." (*Id*. at p. 729.) The trial court further told jurors: "It's what you feel inside as you listen to the evidence . . . ." (*Ibid*.) The

Hernandez court explained the "instruction suggested that jurors could convict the defendant based upon what they believed in their own heart, soul and spirit whether or not that belief was based upon a reasoned conclusion that the evidence established Hernandez' guilt beyond a reasonable doubt." (*Id*. at p. 731.) The appellate court further reasoned that the instruction allowed jurors to use an individual standard "rather than an objective heightened standard of proof applicable to each juror." (*Ibid*.)

In contrast, here the trial court's instructions did not allow jurors to convict defendant based on a subjective belief ungrounded in an evaluation of the evidence. Shortly after the challenged statement regarding reasonable doubt, the trial court emphasized that "evidence is the only basis to decide the case." Prior to their deliberations, jurors here were instructed to consider all the evidence impartially. In further contrast to *Hernandez*, the trial court's instruction did not permit jurors to base their decision on each juror's subjective feelings.

Our conclusion that no structural error occurred is consistent with *Victor v. Nebraska* (1994) 511 U.S. 1. *Victor* requires that " 'taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.' " (*Id*. at p. 5.) Further, it is insufficient to show that jurors could have misunderstood the instruction. (*Id*. at p. 6.) There must be a "reasonable likelihood that the jury *did* so apply it." (*Ibid*.) Here, taking the instructions as a whole and in context, there was no such "reasonable likelihood."[5]

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[5] Defendant identifies no other prejudice.

B. Defendant Demonstrates No Prejudicial Error in the Trial's Court's Retention of Juror No. 3386 Over Defendant's Objection

A *Batson/Wheeler* motion asserts that the exercise of a peremptory challenge was the product of purposeful discrimination on the basis of race or another prohibited ground. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez*).) The trial court granted the prosecutor's *Batson/Wheeler* motion and prohibited defense counsel from using a peremptory challenge to excuse Juror No. 3386. The trial court found a prima facie case of discrimination and no racially neutral explanation. Defendant argues that he should have been permitted to excuse the juror. The Attorney General argues that the trial court correctly concluded defense counsel failed to offer race neutral reasons for excusing the juror. As we explain, our Supreme Court's recent decision in *Gutierrez, supra*, 2 Cal.5th 1150, requires certain express findings that were absent here. We conclude, however, that any such error was not prejudicial.

1. Factual background

Prior to requesting the court to excuse Juror No. 3386, who was white, defense counsel exercised peremptory challenges against Prospective Juror Nos. 2235, 4134, 2623, and 4238, all of whom were white. Prospective Juror No. 2235 lived in Venice and experienced recent threats and yard invasions. He did not know if the vandalism was committed by gang members. He described himself as a victim of substantial racial violence when he was growing up in Guam and Hawaii and believed there was substantial gang activity in Hawaii.

Prospective Juror No. 4134 expressed concern that gangs were not merely "social groups." He agreed that even a member of a criminal street gang was presumed innocent. Defense counsel described him as "odd."

With respect to Prospective Juror No. 2623, counsel explained: "I gave my client the choice if he wanted that guy. He didn't like him. [Prospective Juror No.] 2623." Counsel later stated: "Also a studio executive. He would be impatient. I thought he would be kind of conservative. I noticed he had some weird movements with his wrists all the time." The trial court did not notice any unusual wrist movements.

With respect to Prospective Juror No. 4238, defense counsel explained: "[H]e sat on a jury before and reached a verdict. I prefer jurors who have no jury experience." The trial court found that neither Prospective Juror Nos. 2623 nor 4238 "stood out much."

Juror No. 3386 previously had served on a jury in a criminal matter, and the jurors reached a verdict. Her place of employment had been tagged with gang graffiti, but she explained that the tagging would not prejudice her. She indicated she favored restrictions on firearms, as did other potential jurors. Defense counsel did not ask her any questions during jury selection. Following a motion by the prosecutor, the court expressed concern that defense counsel had dismissed Prospective Juror Nos. 2623 and 4238 and Juror No. 3386, all of whom were white.

Defense counsel explained that he wanted to excuse Juror No. 3386 because she "lives in Burbank. Her business was tagged with gang graffiti. And also . . . her position was there

should be more restrictions on weapons." The crime here did not occur in Burbank.

The court found a prima facie showing that white jurors were excused based on their race. The court then indicated it heard no "category neutral basis" for excusing Juror No. 3386 and precluded defendant from excusing that juror. Defendant had unused peremptory challenges by the time the jury was empaneled.

2. Although the trial court made no explicit finding of purposeful discrimination, the error was not prejudicial

A defendant's discriminatory exercise of a peremptory challenge violates equal protection. (*People v. Lenix* (2008) 44 Cal.4th 602, 612; *Georgia v. McCollum* (1992) 505 U.S. 42, 59.) The trial court employs the following three-step process in evaluating whether the peremptory challenge was based on the juror's race: (1) was there a prima facie showing that the advocate exercised a peremptory challenge based on race; (2) if so, the burden shifts to the advocate to provide a race neutral reason; (3) the court then determines whether there was purposeful discrimination. (*People v. Lenix, supra*, 44 Cal.4th at p. 612; see *Gutierrez, supra,* 2 Cal.5th at p. 1158.) The third step "focuses on the subjective genuineness of the reason, not the objective reasonableness." (*Gutierrez, supra*, 2 Cal.5th at p. 1158.)

"We review a trial court's determination regarding the sufficiency of tendered justifications with ' "great restraint." ' [Citation.] We presume an advocate's use of peremptory challenges occurs in a constitutional manner. [Citation.] When a reviewing court addresses the trial court's ruling on a

Batson/Wheeler motion, it ordinarily reviews the issue for substantial evidence. [Citation.] A trial court's conclusions are entitled to deference only when the court made a 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.' [Citation.] What courts should not do is substitute their own reasoning for the rationale given by [counsel], even if they can imagine a valid reason that would not be shown to be pretextual. . . . If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." (*Gutierrez, supra,* 2 Cal.5th at p. 1159.) Because the trial court requested defense counsel's reasons for the peremptory challenge of Juror No. 3386, the question of whether the prosecutor established a prima facie case is moot. (*People v. Lenix*, *supra*, 44 Cal.4th 602, 613, fn. 8; *Hernandez v. New York* (1991) 500 U.S. 352, 359.)

The reasons provided by defense counsel, although ultimately rejected by the court, were unrelated to race. They concerned the tagging of her employer's place of business and her belief that firearms should be illegal. Thus, contrary to the Attorney General's argument, defense counsel provided race neutral reasons for excusing Juror No. 3386. Stated otherwise, there was no discriminatory intent inherent in the explanation. (*Gutierrez, supra*, 2 Cal.5th at p. 1158.)

The third step required the trial court to assess the credibility of defense counsel's explanation. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1168.) Defendant argues that the trial court failed to find purposeful discrimination and instead conflated steps two and three. The record arguably supports defendant's contention because the trial court did not make explicit findings that defense

counsel engaged in purposeful discrimination. The absence of such a finding does not mandate reversal because we conclude that defendant has not demonstrated prejudice.

Erroneous denial of a peremptory challenge is not structural error. (*Singh*, *supra*, 234 Cal.App.4th at p. 1331.) Such error "does not result in any fundamental unfairness, or interference with the reliability of the jury's factfinding function." (*Ibid*.) An error is " 'structural' and thus subject to automatic reversal, only in a 'very limited class of cases.' " (*Neder v. U.S.* (1999) 527 U.S. 1, 8.) Structural errors involve the complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. (*Ibid*.)

Defendant has not demonstrated structural error. As explained in *Singh*, "an error in overruling a peremptory does not result in any fundamental unfairness, or interference with the reliability of the jury's factfinding function . . . ." (*Singh, supra*, 234 Cal.App.4th at p. 1331.) Although the purposeful exclusion of members of a racial group from a grand jury constitutes structural error because it " 'strikes at the fundamental values of our judicial system' " (*Vasquez v. Hillery* (1986) 474 U.S. 254, 262), the erroneous denial of a peremptory challenge does not similarly result in the systematic exclusion of a racial group. "States may withhold peremptory challenges 'altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.' " (*Rivera v. Illinois* (2009) 556 U.S. 148, 152.)

"Just as state law controls the existence and exercise of peremptory challenges, so state law determines the consequence of an erroneous denial of such a challenge." (*Rivera v. Illinois,*

supra, 556 U.S. at p. 152.) Defendant's argument that we should not apply California law and instead apply the law of a different state is not compelled by any authority he cites.

Defendant does not argue that he suffered any prejudice from the denial of the peremptory challenge. He argues that "[i]t is essentially impossible for a defendant to demonstrate prejudice from a reverse-*Batson/Wheeler* error." The difficulty in establishing prejudice does not relieve defendant from demonstrating prejudice. "[A] rule of reversal per se would have the result of 'discourag[ing] trial courts and prosecutors from policing a criminal defendant's discriminatory use of peremptory challenges.' " (*Singh*, *supra*, 234 Cal.App.4th at p. 1331.) Because defendant does not argue, and the record does not suggest, that the trial court's failure to make the required findings contributed to the verdict, we have no basis for reversal.[6]

C. No Other Alleged Error During Jury Selection Requires Reversal of Defendant's Conviction

Defendant's remaining challenges to jury selection identify no prejudicial error. Specifically, defendant argues that the court erred in (1) conducting *Batson/Wheeler* hearings outside of

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[6] The *Singh* court contrasted "ordinary" *Wheeler* with a successful prosecution *Wheeler* challenge: "Ordinary *Wheeler* error also puts the judicial system in the untoward place of countenancing invidious discrimination, even if there were no prejudice to the particular defendant. In the context of a successful prosecution *Wheeler* challenge, if an objectionable juror in fact acted in any manner during deliberations that is *inconsistent* with an unbiased fact finder, a defendant can seek redress on that basis." (*Singh*, *supra*, 234 Cal.App.4th at p. 1331.)

defendant's presence; (2) scolding potential jurors during voir dire; and (3) denying four challenges to potential jurors for cause.

First, assuming that the court erred in holding hearings on *Batson/Wheeler* motions in chambers outside of defendant's presence, defendant was not prejudiced. The only prejudice defendant identifies was his inability to explain his reasons for telling his counsel to dismiss Prospective Juror No. 2623. Prospective Juror No. 2623 did not sit on the jury, and it follows that defendant was not prejudiced from his inability to explain his rationale because of the chambers venue of the discussion. Further, even if the court considered the excusal of Prospective Juror No. 2623 when it precluded defense counsel from dismissing Juror No. 3368, as set forth above, defendant has failed to demonstrate prejudice from empaneling Juror No. 3368.

Defendant also cannot demonstrate prejudice from his claim that the trial court was "hypervigilant" and "scolding" in its questioning of potential jurors during jury selection. Defendant emphasizes the court's questioning of Prospective Juror Nos. 2891 and 0511. Prospective Juror No. 2891 stated that if "the trial goes on for a long time, I could get impatient" and "don't believe that I could give a fair verdict." In response, the court stated: "You have the right to a fast trial, is that what you're saying? You're only willing to serve if we present this like a half hour T.V. show for you?" Prospective Juror No. 2891 responded: "I mean, I get impatient," and the court stated: "Yes. I get impatient too, can you tell? Your duty as a citizen is to serve on jury duty. There is no right in this state, or the U.S., to come in and say you get to pick how long your duty is to serve. [¶] Are you seriously telling me that you think you, as a juror, have the right to come in and say I can only sit on a case that's short

enough where I don't get impatient?" When the juror explained that he knew it was wrong, but might vote with the majority to end jury duty, the court stated: "You certainly know it's wrong. You know that this is not a way to get out of jury duty, to tell this kind of story. So I'm just going to assume that you were in a weak moment here when you [said] this. I just am unwilling to believe that this is true."

Prospective Juror No. 0511 described a gang member urinating on her and vandalizing windows at her workplace. She also believed that a gang member broke into her house. The juror indicated these incidents might prevent her from giving defendant a fair trial. The court stated: "Okay. If I let everyone go home, no one will ever get convicted, and no one who is innocent will ever get their trial done. So, yes, I understand, and, yes, I hear the emotion in your voice, but it's the responsibility of the citizens of this country to step forward, serving as jurors, so that criminal justice can be had." The court asked: "Are you going to be fair to him, or are you going to say, no, my life is so screwed up, or bothered, or distressed, I'm not going to be fair to him?" Defendant points out that the court questioned other potential jurors' ability to be fair.

Although we do not condone the tone or content of the trial court's questioning, none of the challenged conduct involved an empaneled juror. Defendant demonstrates no harm from the alleged improper colloquies with the potential jurors. Although he argues that other potential jurors may have been unwilling to answer questions truthfully, his speculation is not supported by the record. Nor was the court's alleged "hypervigilence" comparable to *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642 or *People v. Mello* (2002) 97 Cal.App.4th 511, in which it was

undisputed that the trial court told jurors during voir dire to lie under oath if the potential juror harbored a racial bias against the defendant. (*Abbaszadeh* at pp. 645-647.) Here, potential jurors were not told to lie, and the record does not suggest they would have concealed bias because of the court's questioning.

Defendant cannot demonstrate prejudice from his argument that the trial court should have granted his requests to dismiss four potential jurors for cause. Prospective Juror No. 4771, who was married to someone in law enforcement, indicated that she had more confidence in police than in other witnesses. Although she initially stated she was prejudiced in favor of law enforcement, she ultimately acknowledged she would base her determinations on "everything." As previously described, Prospective Juror No. 2891 reported that he might become impatient and vote with the majority. Prospective Juror No. 5575 stated that she was mugged by gang members. She agreed that this incident would not encourage her to "lower the standards" for defendant. Although initially she questioned her ability to be fair, she ultimately agreed that a defendant should not be found guilty of a crime merely because the defendant is a gang member. Prospective Juror No. 6044 expressed concern about being fair to someone in a criminal street gang based on general media accounts.

Defendant used his peremptory challenges to dismiss the four potential jurors and still had additional peremptory challenges when the jury was empaneled. In the words of our high court: "We find that defendant cured any error that occurred when the trial court denied his for-cause challenges because he removed those jurors with . . . peremptory challenges. . . . Because no incompetent juror who should

have been dismissed for cause sat on his case . . . defendant is not entitled to reversal of the trial court's judgment." (*People v. Black* (2014) 58 Cal.4th 912, 914.) " ' "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean" ' a constitutional violation occurred." (*Id.* at p. 917.)

D. Defendant Demonstrates No Error Relating to the Trial Court's Comments on Defense Counsel's Cross-Examination of the Prosecution's Gang Expert, and Curtailment of that Examination

Defendant argues that the trial court improperly vouched for the prosecution's gang expert, introduced matters not in evidence, and undermined the presumption of innocence when it criticized defense counsel's comparison of gangs to the Los Angeles Police Department. Defendant further argues that the court improperly curtailed defense counsel's cross-examination of the gang expert. Defendant bases all of his arguments on a single, brief colloquy, which we summarize prior to explaining why his argument is not well-founded.

1. Factual background

During cross-examination of the prosecution's gang expert, defense counsel tried to suggest that the Los Angeles Police Department fit the description of a criminal street gang. After the expert described the criteria for a criminal street gang, defense counsel asked: "Now, that's sort of what—a description of what the L.A.P.D. is like, they all wear a certain type of clothes; correct?" The court stated: "Are you really going to go there with these questions?" Defense counsel withdrew his

question. The trial court requested counsel not "disparage nine hundred people by comparing them to a criminal street gang." Jurors were then excused and, outside the presence of the jury, the trial court chastised defense counsel for implying that the Los Angeles Police Department "fit the criteria of a criminal street gang." The trial court stated: "To me it is unjustified. It is beneath you to do what you just did." When the jurors returned to the courtroom, the trial court admonished them to "please disregard the last line of questioning. I have found it inappropriate. I've explained to [defense counsel] that I don't think it's appropriate under any circumstance to compare any law enforcement agency to criminal street gangs."

2. Defendant forfeited the argument and demonstrates no prejudicial error

Defendant forfeited his argument by failing to object to the trial court's comments. (*People v. Houston* (2012) 54 Cal.4th 1186, 1220.) Generally, a timely objection permits a trial court to evaluate an objection and correct any error. (See *People v. Collins* (2010) 49 Cal.4th 175, 203.) Moreover, defendant has failed to demonstrate that the trial court's comments require reversal whether measured by the *Watson* or *Chapman* standard of review.[7] First, defense counsel's questioning comparing the Los Angeles Police Department to a criminal street gang merely because police officers wear uniforms was a non sequitur and irrelevant. Second, the record does not support defendant's argument that the trial court vouched for the

[7] *People v. Watson* (1956) 46 Cal.2d 818; *Chapman v. California* (1967) 386 U.S. 18.

gang expert, presented facts not in evidence, undermined the presumption of innocence, or limited cross-examination.

The court used harsh terms to underscore the irrelevance of defense counsel's questioning. It did nothing more. Its comments did not touch on the presumption of innocence. Defendant's argument that his cross-examination was improperly limited lacks merit because a defendant is not entitled to ask irrelevant questions. " '[T]he trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance.' " (*People v. Chatman* (2006) 38 Cal.4th 344, 372.)

Additionally, defendant does not show he was denied a fair trial. " '[O]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.' " (*People v. Snow* (2003) 30 Cal.4th 43, 78.) "When 'the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge . . . it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary.' " (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233.) That did not occur in this case; the isolated comment in the course of a lengthy trial did not deny defendant a fair trial. (*People v. Snow*, *supra*, 30 Cal.4th at pp. 81-82.)

As defendant acknowledges, the trial court instructed jurors as follows: "[I]f in the course of seeing this trial over these

days you think you may know how I feel about something, you think I know you know how I feel about a witness, you think I know you know how I feel about one of [the] lawyers per chance, you will disregard that, please, because I'm not in the jury room. I'm not supposed to be in the jury room. Nothing that I feel or say should be in that jury room. That's your place and your decision." The court further instructed jurors: "It is not my role to tell you what your verdict should be. Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be." These instructions further undermine defendant's claim that he was denied a fair trial.

E. Resentencing Is Required

In supplemental briefs, the parties agree that the case must be remanded to afford defendant an opportunity to present evidence relevant to youth offender parole hearings. They dispute whether remand is necessary for the trial court to exercise its newly-obtained discretion on striking a firearm enhancement. We conclude that the trial court should consider both issues on remand.

1. Mitigating evidence

It is undisputed that remand is necessary to afford defendant the opportunity to present mitigating evidence, if any, relevant to a future youth offender parole hearing. Section 3051, governing parole hearings for youthful offenders, was amended effective January 1, 2018 to apply to persons 25 years old or younger at the time of the offense, which includes defendant. (§ 3051, subd. (a)(1).) Because at the time of his sentencing, the statute did not apply to him, defendant lacked the opportunity to

make a record relevant to a future youth offender parole hearing. (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

In *Franklin*, our high court remanded the case to the trial court to ensure defendant had the opportunity to present youth-related mitigating factors, an opportunity which rendered moot his Eighth Amendment challenge to his sentence. (*Franklin*, *supra*, 63 Cal.4th at p. 286.) The court explained: "The goal of any such 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 eyes of the law.' " (*Id*. at p. 284.) Judicial changes in the law generally are retroactive, and it is undisputed that *Franklin* should be applied to defendant. (*People v. Birks* (1998) 19 Cal.4th 108, 136.) Remand is necessary for the parties to develop an appropriate record.

2. Firearm enhancement

When the trial court sentenced defendant, it was required to apply a 25-years-to-life firearm enhancement under section 12022.53, subdivision (d). Effective January 1, 2018, the statute now affords a court discretion to strike or dismiss the gun discharge/use enhancement. (Stats. 2017, ch. 682, § 2.) The statute applies retroactively to defendant because his conviction was not final as of the effective day of the amendment, and he may benefit from the potential reduced sentence. (See *People v. Robbins* (2018) 19 Cal.App.5th 660, 678.)

"Defendants are entitled to sentencing made in the exercise of the 'informed discretion' of the sentencing court." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) "A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*Ibid.*) Thus, where a trial court imposes a sentence in the belief that it lacks discretion to strike an enhancement, remand is necessary to permit the trial court to exercise its discretion. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

The Attorney General relies on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 to argue this case is an exception to the general rule requiring remand. The Attorney General maintains that under the reasoning of *People v. Gutierrez*, we can and should deny remand because it would serve no purpose in light of the trial court's comments at the resentencing hearing.

The defendant in *People v. Gutierrez* sought a remand following the California Supreme Court's decision in *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 clarifying that trial courts have discretion under the Three Strikes law to strike prior convictions in the interests of justice. The *People v. Gutierrez* court explained that remand would serve no purpose because "the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence. It stated that imposing the maximum sentence was appropriate. It increased appellant's sentence beyond what it believed was required by the three strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements." (*People v. Gutierrez,*

supra, 48 Cal.App.4th at p. 1896.) Thus, in that case, the trial court had considered, at least hypothetically, whether it would exercise its discretion.

This case is distinguishable from *People v. Gutierrez*. Although the trial court stated that it would be "inclined to" impose the same sentence if it had discretion, the court lacked a complete record when it made that statement. Specifically, the court was not aware of any mitigating evidence defendant may present in the *Franklin* hearing. Such evidence may be relevant to whether the firearm enhancement should be stricken especially given that defendant has *no* prior criminal convictions. Further, the fact that the court was "inclined" to impose the same sentence does not conclusively demonstrate the court would have imposed the same sentence if it knew it had discretion. Upon remand, the trial court should exercise its discretion under section 12022.53, subdivision (h).[8]

[8] We find no cumulative error warranting reversal.

DISPOSITION

The judgment is affirmed. The case is remanded to the trial court for resentencing. The trial court is directed to hold a hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 and to exercise its discretion under section 12022.53, subdivision (h).

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P.J.

JOHNSON, J.