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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROBERT BROWN et al., Defendants and Appellants.	B287726 (Los Angeles County Super. Ct. No. BA450278)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen Marcus, Judge. Affirmed in part, vacated in part, and remanded with directions.

Robert D. Bacon, under appointment by the Court of Appeal, for Defendant and Appellant Robert Brown.

Cannon & Harris and Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant Devonte Daquan Darden.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant Prentiss Bates.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellants Robert Brown, Prentiss Bates, and Devonte Daquan Darden of multiple offenses related to the shooting and killing of a fellow gang member. The trial court sentenced Brown and Bates each to a total term of 80 years to life in state prison, and Darden to a total term of 50 years to life in state prison. On appeal, appellants challenge their convictions and sentences, asserting evidentiary errors, instructional errors, juror misconduct, and other legal errors. Additionally, Brown and Bates argue we should remand for the trial court to exercise its discretion under Senate Bill No. 1393 (2017-2018 Reg. Sess.; SB 1393) whether to strike their enhancements for prior serious felony convictions.

Finding no infirmity in the verdict, we affirm the convictions. As to appellants' sentences, we agree that appellants' firearm enhancements under Penal Code section

12022.53, subdivision (d)[1] must be stricken due to instructional error. We also agree that the trial court erroneously applied gang enhancements under section 186, subdivision (b)(1)(C). Finally, we agree that the matter must be remanded for the court to exercise its discretion whether to strike prior serious felony conviction enhancements as to Brown and Bates.

BACKGROUND

A. *The Charges*

The Los Angeles County District Attorney charged appellants, along with co-defendants James Williams and Malcolm Cosey, with: first degree murder of Trevon Lark (count 1; § 187, subd. (a)), conspiracy to commit murder (count 2; § 182, subd. (a)(1)), and shooting at an occupied motor vehicle (count 3; § 246). Brown was further charged with possession of a firearm by felon (count 4; § 29800, subd. (a)(1)). As relevant here, as to counts 1 and 2, the information also included firearm enhancement allegations under section 12022.53, subdivisions (c) and (d) (hereafter section 12022.53(c) and section 12022.53(d), respectively). As to count 3, the information included gang enhancement allegations under section 186.22, subdivisions (b)(1)(B) & (C). As to Brown and Bates, the information included allegations of a prior conviction qualifying as a strike under

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[1] Undesignated statutory references are to the Penal Code.

section 667, subdivisions (b)-(j) and as a prior serious felony under section 667, subdivision (a)(1).

B. *Evidence at Trial*

a. *The Shooting*

Appellants, co-defendants Williams and Cosey, and victim Lark were all members of the Hoover gang. In the early hours of August 29, 2015, the group attended a party at a marijuana dispensary in Los Angeles. Also present was Hoover gang member Demarreah Gilbert.

At the party, Lark accused Brown of not "putting in work" -- not "killing enemies." After a brief exchange, Brown and Darden left the party and returned with guns. Appellants, Lark, Williams, and Cosey then got into three cars and drove out to kill rival gang members. Appellants got into a black Mercedes, Cosey and an unidentified man occupied another car, and Williams and Lark occupied a third. Brown and Darden had handguns, and Lark had an M16 rifle. Williams did not have a gun. It was unclear whether appellants knew Williams and Lark were joining them.

The three cars drove to the area of the 104th St. and Broadway St. intersection, at which point, after spotting the car containing Lark and Williams, Brown and Darden opened fire, riddling the car with bullets and hitting Lark in the chest. Williams drove back to the dispensary, where he began performing CPR on Lark. Lark died a short time later. When Gilbert, who had witnessed the scene outside

the dispensary, returned inside, he saw appellants' handguns on the floor and placed them on a shelf. He did not know if appellants had returned to the dispensary.

b. *Gilbert's Statements and Testimony*

In May 2016, police detained Gilbert for reasons unrelated to this case. Gilbert told the officers he had information about Lark's shooting, and later gave a recorded statement to Los Angeles Police Department Detective Matthew Courtney. Gilbert told Courtney about the events before and after the shooting, and described appellants leaving the party before the shooting in a *white* Mercedes. Officers released Gilbert shortly after he gave his statement to Courtney.

In September, police arrested Gilbert in connection with the shooting. Gilbert then gave another recorded statement to Courtney, hoping his cooperation would lead to his release. Instead, Gilbert remained in custody and was charged with being an accessory after the fact to Lark's murder.

In June 2017, as part of ongoing plea discussions, Gilbert provided a recorded proffer statement to prosecutors. He described events before and after the shooting in a manner generally consistent with his prior statements. Gilbert relayed his impression that Lark was just "playing" with Brown when Lark accused Brown of not "putting in work," but that Brown took the comments seriously because he was high. He claimed, for the first time, that Cosey went

out first to scout for rival gang members before the group embarked on the shooting mission. He also suggested that appellants drove in a black Mercedes, contrary to his initial statement.

Gilbert proceeded to describe events occurring in the period following the shooting. According to Gilbert, the day after the shooting, he attended a meeting intended to allow Bates to explain his actions. Bates stated he had been the driver and "didn't know that they w[ere] going to shoot." About a month after the shooting, Gilbert encountered Darden, who stated it had been a case of mistaken identity, and that he had fired only because Brown fired first. A few months after the shooting, Gilbert heard Brown tell Williams "he shot him on accident . . . . He didn't know who it was."

After his proffer statement, Gilbert and the prosecution reached a plea agreement, under which he was to testify at trial. At trial, he testified generally in accord with his prior statements. However, Gilbert disavowed his statement that Cosey went out to scout for rival gang members and admitted having lied about the color of appellants' car in his initial statement to Courtney. His recorded proffer statement was later played to the jury.

c. *Washington's Statement and Testimony*

In June 2016, Detective Courtney conducted a recorded interview of Travis Washington, a Hoover gang member who had not attended the party on the night of the shooting.

Washington explained he had been sentenced to four years in prison for robbery, but hoped to find a way to be released or have his sentence reduced. He stated that Brown told him about the shooting, including that Brown was the "primary shooter," Bates was the driver, and Darden was "also a shooter," that they drove Brown's black Mercedes during the shooting, and that they had intended to "put in work" on a rival gang. According to Washington, Brown claimed appellants had shot at Lark's car because they believed it contained rival gang members. Washington believed appellants were not aware that Lark and Williams had joined them. Washington further claimed that Bates and Darden each later gave him similar accounts of the events.

At trial, Washington denied making the recorded statement. His recorded statement was later played to the jury, over appellants' objections.[2]

d. *The Verdicts and Sentences*

The jury found appellants guilty as charged, and found true all enhancement allegations. However, the jury completely acquitted both Williams and Cosey. In a

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[2] The prosecution also introduced Facebook messages and recorded wiretapped conversations between appellants and others in which appellants made incriminating statements, and each side presented expert testimony on gangs and bullet trajectory. Because appellants do not challenge the sufficiency of the evidence, we do not describe this evidence in detail.

bifurcated proceeding, the trial court found that Bates and Brown had each suffered a prior conviction qualifying as both a strike and a prior serious felony.

The trial court sentenced Bates to a total of 80 years to life in prison as to count 1: 25 years to life for the offense, doubled to 50 for the strike, plus 25 years to life for the firearm enhancement under section 12022.53(d), plus five years for the prior serious felony under section 667, subdivision (a)(1). The court imposed the same sentence as to count 2, but stayed it under section 654. On count 3, the court imposed a concurrent sentence of 15 years in prison: five years for the offense, plus 10 years for the gang enhancement under section 186.22(b)(1)(C). As to Brown, the court imposed a similar sentence, with the addition of a concurrent sentence of seven years in prison for count 4.

The trial court sentenced Darden to a total of 50 years to life in prison for count 1: 25 to life for the offense, plus 25 to life for the firearm enhancement under section 12022.53(d). Here, too, the court imposed the same sentence as to count 2 but stayed it under section 654. As with Brown and Bates, the court imposed a concurrent sentence of 15 years in prison: five years for the offense, plus 10 years for the gang enhancement under section 186.22(b)(1)(C). This appeal followed.

DISCUSSION

A. *Challenges to the Convictions*

1. *Evidentiary Challenges*

We review state-law challenges to a trial court's evidentiary rulings for abuse of discretion. (See *People v. Goldsmith* (2014) 59 Cal.4th 258, 266.) "Specifically, we will not disturb the trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*Ibid.*) We review "the legal question whether admission of the evidence was constitutional de novo." (*People v. Mayo* (2006) 140 Cal.App.4th 535, 553.)

a. *Admission of Washington's Prior Statement*

i. *Background*

Washington did not wish to testify at trial. When asked on the stand if he promised to tell the truth, Washington responded, "No," and told the court he had "nothing to say." But after the court warned him that he would be there "for days" if he did not "go through the process," Washington agreed to take the oath.

The prosecutor began asking Washington a series of questions about Detective Courtney, who had taken his recorded statement and was in the courtroom. The prosecutor asked if Washington knew Courtney, if he had ever seen or spoken with Courtney before, or if Courtney had visited him while he was in custody and recorded a

conversation with him. To each of these questions, Washington responded, "No." As his direct examination continued, Washington similarly denied that Courtney had shown him photographs of appellants and their codefendants, which the prosecutor presented to him in court. And after confirming that he either was or had been a member of the Hoover gang and identifying his particular local "set," he denied recognizing the individuals in the photographs as Hoover members.

On cross-examination, defense counsel elicited Washington's testimony that on June 2, 2016 (the day he gave his statement), he was in jail after having been convicted of an offense and sentenced to state prison. In response to counsel's questions, Washington also denied ever having seen the defendants, and confirmed "[i]t would be a lie . . . to say that [he] talked to the detectives to avoid going to state prison." The trial court then asked Washington if there were any reason his voice would be heard in a recorded conversation with Courtney. He replied there was not.

On the following day, the parties discussed Washington's testimony and the prosecution's intent to play the tape of his recorded statement to the jury. Defense counsel objected that admitting the recorded statement would violate the defendants' federal constitutional rights under the Confrontation Clause and added that the tape was "full of hearsay." The trial court overruled the objection and permitted the introduction of Washington's recorded statement into evidence, which the prosecution later did

during Courtney's testimony. After trial, Brown raised the same objections to the admission of Washington's statement in his motion for a new trial, which the court denied.

ii. *Analysis*

Appellants contend Washington's prior statement was not subject to the inconsistent-statement exception to the hearsay rule. "'A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770.' [Citation.] 'The "fundamental requirement" of [Evidence Code] section 1235 is that the statement in fact be inconsistent with the witness's trial testimony.' [Citation.] "'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement . . . .'" [Citation.]"[3] (*People v. Cowan* (2010) 50 Cal.4th 401, 462, fn. & italics omitted.)

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[3] Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [Evidence Code] Section 770." Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The
(*Fn. continued on the next page*.)

A witness's denial that he or she made the prior statement is inconsistent with that statement for purposes of Evidence Code section 1235. (See *People v. Zapien* (1993) 4 Cal.4th 929, 952 ["The out-of-court statement of the [witness] that defendant had come to her house the morning of the murder with blood on his person . . . is inconsistent with her denial at trial that she had made such a statement"].) Similarly, if a witness's response to questioning about the statement ""amounts to deliberate evasion, inconsistency is implied."" (*People v. Homick* (2012) 55 Cal.4th 816, 859 (*Homick*).) In contrast, a witness's refusal to testify at all "provid[es] no basis for the trial court to find inconsistency in effect." (*Id.* at p. 860; accord, *People v. Rios* (1985) 163 Cal.App.3d 852, 860-861, 864 (*Rios*) [where witnesses refused to answer any substantive question, there was no testimony from which to infer or imply inconsistency].)

Appellants maintain that Washington's conduct at trial constituted a complete refusal to testify. While acknowledging he answered every question the prosecutor asked him, they contend his answers to questions about his statement were "mechanical iterations calculated to move the questioning along" and that "[n]o one could plausibly have taken [his] answers as assertions of fact . . . ." We disagree. Washington expressly denied knowing or ever meeting

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witness has not been excused from giving further testimony in the action."

Courtney, expressly denied giving a statement to Courtney, and expressly denied recognizing appellants and their codefendants as Hoover gang members. In contrast, he confirmed his own affiliation with the Hoover gang and identified the relevant local set. Rather than refuse to testify, Washington simply decided to deny his prior statement. (Cf. *Rios*, *supra*, 163 Cal.App.3d at pp. 860-861 & fn. 2, 864 [no inconsistency where witnesses stated, "'I refuse to answer . . .'" in response to every substantive question] (*id.* at p. 861, fn. 2).) In short, the trial court did not abuse its discretion in admitting the recording of Washington's statement.[4] (See *Homick*, *supra*, 55 Cal.4th at p. 859.)

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[4] Appellants argue that even if appropriate under California law, the admission of Washington's statement violated their confrontation rights under the federal Constitution because his blanket denials of the statement deprived them of a reasonable opportunity to cross-examine him. Our Supreme Court has previously rejected an identical claim. (See *People v. Dement* (2011) 53 Cal.4th 1, 23-24 [witness's denial of prior statement did not deprive defendant of opportunity for effective cross-examination], abrogated on another ground by *People v. Rangel* (2016) 62 Cal.4th 1192.)

In a footnote in his opening brief, Bates argues the prosecution failed to give Washington an opportunity to explain or deny his recorded statement as Evidence Code section 770 requires. He has forfeited this contention by failing to include it in the body of his brief. (See *Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947 ["Footnotes are not the appropriate vehicle for stating contentions on appeal"].) The contention is also

(*Fn. continued on the next page.*)

b. *Gilbert's Cross-Examination*

i. *Background*

As the only witness to events before and after the shooting, Gilbert's credibility was of central importance. During his direct examination, Gilbert admitted having lied during his proffer when he described Cosey scouting for rival gang members before the shooting. On further questioning, Gilbert confirmed he had "just made up" that part of his proffer statement, explaining that he had done so because he wanted to "get the deal."

During his cross-examination by Brown's counsel, Gilbert admitted that while he was a gang member, if a police officer asked him about crimes committed by other gang members, he would lie to the officer. Counsel also elicited that Gilbert had made a "calculated lie" to Detective Courtney when he told Courtney that appellants' car was white. Gilbert explained he had lied so he would not have to testify.

As his cross-examination continued, Gilbert testified he had recently been convicted of attempted burglary. In response to counsel's questions, Gilbert confirmed he had suffered sustained juvenile charges for robbery and grand

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meritless, given that Washington actually denied making the statement and the court asked him if there were any reason his voice would be heard in a recorded conversation with Detective Courtney.

theft. The prosecutor objected to the introduction of Gilbert's juvenile charges under Evidence Code section 352.

At a sidebar, the trial court noted that defense counsel should have first sought a ruling on the admissibility of those charges. Counsel then informed the court he also wished to question Gilbert on an unsustained juvenile charge for giving false identification information to an officer. During the discussion with the parties, the court told defense counsel, "I think you've impeached him. You did a good job." Brown's counsel noted that Gilbert had testified he had never used any other name, and asked to cross-examine him on the use of a false name, again referring to the unsustained juvenile charge. But the court refused to allow such questioning: "First of all, he wasn't convicted of that and I'm not going to let you get into the facts of that [--] using some false name [when] he wasn't convicted of it. [¶] Under 352, I find it's more prejudicial than probative, too time consuming, and would not help the jury in any way."

In his subsequent motion for a new trial, Brown claimed the court's limitation of his counsel's cross-examination of Gilbert violated his rights under both California law and the federal Constitution. As noted, the court denied the motion for a new trial.

ii. *Analysis*

Appellants claim the trial court's preclusion of cross-examination about Gilbert's unsustained juvenile charge constituted an abuse of discretion and violated their

confrontation rights under the federal Constitution. Under Evidence Code section 352, trial courts have discretion to exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Because "[m]isconduct involving moral turpitude may suggest a willingness to lie" (*People v. Wheeler* (1992) 4 Cal.4th 284, 295), "[a] witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352" (*People v. Clark* (2011) 52 Cal.4th 856, 931 (*Clark*), fn. omitted.) "'[T]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad." (*Id.* at p. 931.)

Our Supreme Court has recognized that misconduct other than a prior conviction "generally is less probative of immoral character or dishonesty and may involve problems involving proof, unfair surprise, and the evaluation of moral turpitude." (*Clark*, *supra*, 52 Cal.4th at pp. 931-932.) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue

arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion." (*Id.* at p. 932.)

Appellants argue Gilbert's unsustained juvenile charge was powerful and direct evidence of his willingness to lie. They assert that "[a] defendant's right to attack the credibility of a prosecution witness is so fundamental that it should not be abridged by concern about the consumption of time unless the evidence is cumulative." Yet the evidence appellants sought to introduce was indeed cumulative of Gilbert's admitted willingness to lie.

On direct examination, Gilbert admitted he had "just made up the part" about Cosey's pre-shooting scouting trip in his proffer statement because he wanted to "get the deal." On cross-examination, Gilbert admitted that while he was a gang member, if a police officer asked him about crimes committed by other gang members, he would lie to the officer. He also admitted to making a "calculated lie" to police about the color of appellants' car in order to avoid testifying. As for his criminal history, Gilbert admitted he had suffered a conviction for attempted robbery and sustained juvenile charges for robbery and grand theft.

The jury was thus well aware of Gilbert's willingness to lie, including to authorities. As the trial court noted, Brown's counsel had already thoroughly impeached Gilbert's credibility. Evidence of an unsustained juvenile charge would have been of trivial additional value, and the court did not abuse its discretion in determining that cross-examination regarding this charge would consume

time and effort substantially in excess of any probative value.[5] (See *Clark*, *supra*, 52 Cal.4th at pp. 931-932; *People v. Leonard* (2014) 228 Cal.App.4th 465, 497 [trial court did not abuse its discretion in excluding evidence of only "slight" probative value].)

Nor have appellants established a Confrontation Clause violation. "Although the right of confrontation includes the right to cross-examine adverse witnesses on matters reflecting on their credibility, 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination.' [Citation.] In particular, notwithstanding the confrontation clause, a trial court may restrict cross-examination of an adverse witness on the grounds stated in Evidence Code section 352. [Citation.] A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the

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[5] Bates contends the trial court erroneously believed that conduct not resulting in a conviction or juvenile adjudication could never be used to show moral turpitude. In fact, the court did *not* hold that evidence of Gilbert's unsustained juvenile charge was inadmissible as a matter of law. Rather, the court properly considered that the charge was unsustained in evaluating its probative value under Evidence Code section 352. (See *Clark*, *supra*, 52 Cal.4th at pp. 931-932 [misconduct other than a prior conviction is generally less probative of dishonesty].)

excluded cross-examination been permitted." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624 (*Quartermain*).)

Here, evidence that Gilbert, who had admitted to lying to law enforcement authorities about material details in this case, may have lied to an officer on an unrelated matter, would not have given a reasonable jury a significantly different impression of his credibility. (See *Quartermain*, *supra*, 16 Cal.4th at p. 634 [where witness's credibility was "extensively impeached," additional evidence of similar dishonest conduct would not have changed a reasonable jury's impression of his credibility].) Accordingly, the trial court did not err in limiting counsel's cross-examination.

2. *Claims of Instructional Error*

In challenging their convictions, appellants claim the trial court erred in refusing to give the jury an instruction on voluntary intoxication and a special cautionary instruction about witnesses who give information to authorities while in custody. "We review assertions of instructional error de novo." (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 751 (*Selivanov*).) We discuss each of appellants' challenges in turn.

a. *Voluntary Intoxication Instruction*

i. *Background*

Darden and Brown contend the trial court erred in refusing to instruct the jury on voluntary intoxication. In one of his police statements, Gilbert stated people in Brown's

group arrived at the party "already hyped, hyped up the whole night" and "everybody kept saying they were high." During his proffer interview, Gilbert opined that Lark was just "playing" with Brown when Lark accused Brown of not "putting in work," but that Brown took the comments seriously because he was high -- Gilbert thought Brown had used cocaine. Washington also referenced drug use in his statement to police, stating Bates had told him "they were turned up [with] ecstasy pills" before the shooting.

During trial, Darden's counsel asked the court to give CALJIC No. 4.21.1, which instructs the jury to consider a defendant's intoxication in deciding whether he formed the requisite specific intent for the charged crimes. Though counsel did not elaborate, it appears his position was that this instruction would be relevant to the murder charge, which required proof of a specific intent to kill. (E.g., *People v. Nelson* (2016) 1 Cal.5th 513, 544.) The court declined to give the requested instruction, concluding there was no substantial evidence to support that Darden was unable to form the specific intent to kill.

ii. *Analysis*

A defendant is entitled to a voluntary intoxication instruction "'only when there is substantial evidence of the defendant's voluntary intoxication and [that] the intoxication affected the defendant's "actual formation of specific intent."'" (*People v. Verdugo* (2010) 50 Cal.4th 263, 295 (*Verdugo*).) Evidence that the defendant was intoxicated

is not enough. (See *ibid.*; see also *People v. Olivas* (2016) 248 Cal.App.4th 758, 772 (*Olivas*) [evidence that defendant may have been drunk at time of offenses was insufficient to entitle him to instruction because he "offered no evidence at trial to demonstrate how [his] intoxication might have resulted in his inability to formulate the specific intent necessary"].) Thus, for example, in *People v. Marshall*, (1996) 13 Cal.4th 799, 848 (*Marshall*), our Supreme Court concluded that a defendant who had drunk "an unspecified number of alcoholic drinks" before committing multiple murders was not entitled to a voluntary intoxication instruction because "evidence of the effect of defendant's alcohol consumption on his state of mind [wa]s lacking." According to the Court, testimony that the defendant seemed "'dazed'" and that his blood-alcohol level "suggested some impairment" was insufficient to support that he "was unable to premeditate or form an intent to kill." (*Ibid.*)

To establish their entitlement to a voluntary intoxication instruction, Darden and Brown point to Gilbert's opinion that Brown took Lark's comments seriously in part because Brown was high, and his statement that everybody kept saying "they" were high. They further point to Washington's statement that according to Bates, "they" had taken ecstasy pills before the shooting.

This evidence did not entitle Darden or Brown to a voluntary intoxication instruction. While there was some evidence to support that Brown and others in the group were intoxicated, no evidence tended to show that their

intoxication prevented them from forming the specific intent to kill. Darden and Brown contend that "no one would know the men were high if they were not affected or impaired" and thus that it is reasonable to infer "the visible signs of impairment . . . were significant enough to draw notice" from the others at the party. But the possibility that the men were noticeably intoxicated is insufficient to support a conclusion that their drug use prevented them from forming the requisite specific intent. (See *Marshall*, *supra*, 13 Cal.4th at p. 848.) Accordingly, the trial court did not err in declining to instruct the jury on voluntary intoxication. (See *Verdugo*, *supra*, 50 Cal.4th at p. 295; *Olivas*, *supra*, 248 Cal.App.4th at p. 772.)

b. *Cautionary Instruction on Witnesses Who Provide Information while in Custody*

i. *Background*

At trial, Brown's counsel requested that the trial court give a special cautionary instruction regarding the believability of "a witness who was in jail when he provided his information to the police or the prosecutor" and who sought or obtained a benefit in exchange for the information.[6] The

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[6] The requested instruction stated: "In determining the believability of a witness who was in jail when he provided his information to the police or the prosecutor, you may consider whether the witness was given a benefit after he provided his information, such as his release from jail or . . . receiving an
(*Fn. continued on the next page*.)

trial court declined to give the instruction, concluding that no authority required such an instruction and that the same concepts would be conveyed by CALJIC No. 2.20, which the jury was to receive. The court's instruction under CALJIC No. 2.20 stated that in determining the believability of a witness, the jury was entitled to consider "anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: [¶] . . . [¶] The existence or nonexistence of a bias, interest, or other motive; [¶] . . . [¶] The attitude of the witness toward this action or toward the giving of testimony . . . [;] [¶] . . . [¶] [Whether] the witness [was] promised leniency in exchange for his or her testimony."

ii. *Analysis*

On appeal, all three appellants contend the court erred in refusing to give the requested instruction on the testimony of witnesses who were in custody when they provided information to authorities. A trial court must instruct the jury "on general principles ""closely and openly

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agreement by the prosecutor to recommend leniency at the witness's future sentencing. [¶] In determining the believability of a witness, who was in jail when he provided his information to the police or the prosecutor, you may consider whether the witness was asking for a reduced sentence in exchange for his giving information, even though he was not successful in obtaining a reduced sentence."

connected to the facts and that are necessary for the jury's understanding of the case"" including those instructions that 'pinpoint' a defense theory." (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 498-499 (*Mora*).) The court may refuse to give such an instruction, however, "if, among other reasons, the proposed instruction is duplicative." (*Id.* at p. 499.)

The trial court correctly concluded that the requested special instruction would have been duplicative. The court instructed the jury with CALJIC No. 2.20, advising it that in determining the believability of a witness, the jury was entitled to consider, among other things, "[t]he existence or nonexistence of a bias, interest, or other motive," "[t]he attitude of the witness toward this action or toward the giving of testimony," and whether the witness was "promised leniency in exchange for his or her testimony." This instruction sufficiently covered the concepts appellants wished to convey to the jury. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1020 (*Hovarter*) [where trial court instructed jury with CALJIC No. 2.20, requested cautionary instruction on testimony of informer who seeks immunity was duplicative and thus unwarranted].)

In arguing the court was nevertheless required to give the requested instruction, appellants submit that Gilbert and Washington "were similarly situated with categories of witnesses for whom a cautionary instruction is unquestionably required, at least upon request." They point to section 1127a, which on a party's request, requires a trial

court to instruct the jury to view with caution the testimony of an "in-custody informant" -- "a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution." (§ 1127a, subds. (a) & (b).) Appellants acknowledge that Gilbert and Washington were not "in-custody informants" under this provision, in part because their testimony and statements were not based on statements any defendant made while in custody. However, citing *People v. Bivert* (2011) 52 Cal.4th 96, 120-121 (*Bivert*), they claim section 1127a "is intended to single out witnesses who claim that the defendant made statements to them about things of which the witness has no first-hand knowledge, as opposed to percipient witnesses." Appellants argue that Gilbert and Washington fit that description, and thus that the provision's rationale applied to their testimonies and statements and required the requested cautionary instruction.

We disagree. In *Bivert*, *supra*, 52 Cal.4th at pp. 120-121, our Supreme Court rejected a claim that the trial court was required to give a cautionary instruction on the testimony of in-custody percipient witnesses. The Court reasoned that the requested instruction would have "erased the distinctions recognized by the Legislature" between in-custody informant witnesses and in-custody percipient witnesses. (*Id.* at p. 121.) Examining the legislative history of section 1127a, the *Bivert* Court explained: "The

Legislature acted in response to a highly publicized case in Los Angeles in which a jailhouse informant, through nefarious means and by posing on the jailhouse telephone as an investigator, convinced law enforcement officers and investigators that he was in legitimate need of confidentially held information about an ongoing criminal case. He later used this information to testify falsely to having heard a 'confession' by the defendant in the ongoing case, and received favorable treatment in his own case in exchange for his testimony." (*Id.* at p. 120.) According to the Court, in its response, "the Legislature made a deliberate and rational distinction between in-custody percipient witnesses and in-custody informant witnesses." (*Ibid.*, italics omitted.)

While *Bivert* focused on the distinction between in-custody informants and in-custody percipient witnesses, as was relevant to that case, section 1127a similarly distinguishes between in-custody informants and inmates who testify to statements made outside of any correctional institution. Appellants cite no authority requiring Brown's requested instruction, and we find no error in the court's refusal to give it.

3. *Juror Misconduct*

a. *Background*

Appellants challenge the court's response to alleged misconduct by one of the jurors. At the beginning of trial, the court instructed the jurors to report to the bailiff any attempt to influence a juror. The court further advised them

that they were not to inform other jurors about such an incident, so as not to "spread . . . contamination."

Following trial, after the jury began deliberating, the court informed the parties that Juror No. 3, the foreperson, had reported to the bailiff that he had observed a note beside the defendants that read, "not guilty." The court then summoned Juror No. 3 and questioned him about the incident in the parties' presence. Juror No. 3 recounted that the previous day, as he walked into the courtroom after a lunch break, he saw "a sign between [Bates and Darden] with big, giant letters saying, 'not guilty.'" Based on the note's position and direction, he believed it was "for the jurors."

Juror No. 3 then reported he was the only juror who had seen the note -- he had asked the other jurors in the deliberation room because he knew they were "already a little nervous back there." When the trial court commented that he had violated its instruction not to discuss such issues with other jurors, Juror No. 3 responded he had not thought he had violated the order because the discussion occurred in the deliberation room, adding, "How was I supposed to know if they saw it or not? I'm supposed to be responsible for them." The court reiterated that Juror No. 3 had violated its instruction not to tell other jurors if "anything happened to [him]," but Juror No. 3 explained he had not realized the matter was "something."

In response to the court's questions whether he could disregard the incident and be fair and impartial, Juror No. 3

replied, "Oh, 100 percent. . . . I just wanted it on the record. That's all." When the court asked if he could make a decision based solely on the evidence presented at trial, Juror No. 3 responded, "Oh, 100 percent. 100 percent."

After the trial court excused Juror No. 3, Brown's counsel informed the court that it was Brown who had written "not guilty" on his notepad. Cosey's counsel later relayed that Brown had told her he was passing the note and showing it to the other defendants. According to counsel, Brown meant the note to be "inspirational," reflecting the defendants' hopes for acquittals.

The trial court individually polled the other jurors about the incident. Each of the jurors confirmed he or she had not seen the note but had heard about it. No juror expressed concern about the incident, and in response to the court's questions, each stated he or she could be fair and impartial, and promised to disregard the incident and make a decision based only on the evidence.

After the trial court finished questioning the jurors, Cosey's counsel asked the court to remove Juror No. 3 based on his violation of the court's instruction. The court denied the request, noting the juror's assertions that he could disregard the incident and be fair and impartial, and finding him credible. The court also noted that Juror No. 3 had promptly informed the bailiff of the incident and found that he had discussed the matter with other jurors only to investigate the matter before reporting it to the court.

Counsel for several of the defendants moved for a mistrial, noting Juror No. 3's statement that the other jurors were "'already nervous'" and arguing that the jurors took the note as an implied threat and had been intimidated by the incident. The trial court denied the mistrial motions. It noted that the jurors had answered its questions "in a very open manner," had been "very clear," and had shown no hesitation, and it therefore found the jurors credible. The court concluded all the jurors, including Juror No. 3, could perform their duties and had not been affected or prejudiced in any way.

In his subsequent motion for a new trial, Brown argued the court erred in refusing to remove Juror No. 3. As noted, the court denied this motion.

b. *Analysis*

On appeal, appellants assert the trial court erred in failing to declare a mistrial after the jurors learned about the incident, and in failing to remove Juror No. 3 for reporting the incident to the other jurors. They also claim the court should have investigated further to determine if any juror was frightened by the incident, and should have instructed the jurors that Bates was not involved in it.

When a party alleges juror misconduct, "the trial court must determine . . . whether misconduct occurred and, if it did, whether the misconduct was prejudicial." (*People v. Loot* (1998) 63 Cal.App.4th 694, 697.) If misconduct occurred, prejudice is presumed, but "[t]his presumption can

be rebutted by a showing no prejudice actually occurred or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party." (*Ibid.*) "In deciding whether misconduct was prejudicial, the trial court must determine whether there exists a substantial likelihood that some extrinsic material or information improperly influenced the vote of one or more jurors." (*People v. Dorsey* (1995) 34 Cal.App.4th 694, 704.)

"If a juror is able to set aside impressions and opinions to render a verdict based on the evidence presented in court, the juror is impartial. [Citation.] If, on the other hand, the juror forms an opinion so strong that the court is of the belief it cannot be set aside . . . the juror will be adjudged biased." (*Mora, supra,* 5 Cal.5th 442, 485.)

"A trial court has broad discretion in ruling on each of these questions and its rulings will not be disturbed absent a clear abuse of discretion." (*People v. Perez* (1992) 4 Cal.App.4th 893, 906.) "The power to judge the credibility of witnesses and to resolve conflicts in the testimony is vested in the trial court, and its findings of fact . . . must be upheld if supported by substantial evidence." (*In re Carpenter* (1995) 9 Cal.4th 634, 646 (*Carpenter*).)

We begin with appellants' contention the trial court should have either granted a mistrial or removed Juror No. 3 for misconduct in reporting the "not guilty" note to the other jurors. We need not decide whether Juror No. 3 committed

misconduct, as we conclude that any presumption of prejudice was adequately rebutted.[7]

Appellants advance two main arguments regarding prejudice from the incident. First, they contend Juror No. 3's conduct in informing the other jurors about the note, and later in rationalizing his actions rather than apologizing to the court, demonstrated he was unable or unwilling to follow the court's instructions. We disagree. During his colloquy with the trial court, Juror No. 3 assured the court "100 percent" that he could be a fair and impartial juror, disregard the incident, and base his decision solely on the evidence. The court found Juror No. 3 credible and, noting that he had promptly informed the bailiff of the incident, found he had discussed the matter with other jurors only to determine if they had seen the note so he could report his findings to the court. These findings, which we must accept (see *Carpenter*, *supra*, 9 Cal.4th at p. 646), amply support the court's exercise of discretion in retaining Juror No. 3 as a juror. (Cf. *People v. Harris* (2013) 57 Cal.4th 804, 855, 857 (*Harris*) [trial court did not abuse its discretion in retaining juror who told other jurors defendant had tried to intimidate her; juror stated she could remain fair and impartial, and there was no contrary evidence].)

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[7] The trial court did not expressly mention the presumption of prejudice in its ruling, but "we must presume the trial court knows and follows the law, until the contrary is shown." (*People v. Bush* (2016) 245 Cal.App.4th 992, 1002.) Appellants do not contend the court failed to apply the presumption.

Second, appellants claim the incident may have intimidated the jurors, as they could have taken the note as a threat by appellants that they had better acquit them. The record belies this inference. The court polled each of the jurors about the incident. Their answers reflected that the matter was discussed only briefly. Other than Juror No. 3, no juror had seen the note. No juror relayed any concern about the incident. And each confirmed he or she could be fair and impartial, would disregard the incident, and would make a decision based only on the evidence introduced at trial. The court noted the jurors had answered its questions without hesitation and in a very "open" and "clear" manner, and found them credible. On this record, the court's conclusion that the incident caused no prejudice was eminently reasonable. (Cf. *Harris*, *supra*, 57 Cal.4th at pp. 855, 857 [denial of mistrial was not abuse of discretion where "the court individually polled the jurors, and no juror indicated the incident would impair his or her ability to be fair and impartial"]; *Mora*, *supra*, 5 Cal.5th at pp. 481, 485 [no substantial likelihood juror was biased after defendant's mother told juror charges had been set up and he had rejected plea bargain; juror assured court she could set aside what she had been told].)

Given the lack of prejudice from the incident, the trial court was not required to instruct the jurors that Bates was not involved in writing or displaying the note. And given the trial court's findings regarding the jurors' demeanor and credibility in describing their knowledge of the incident and

their ability to disregard it and remain fair and impartial, the court was not required to further investigate whether the incident frightened the jurors. In short, we perceive no error in the trial court's response to the incident.[8]

B. *Sentencing Challenges*

We review legal questions underlying the trial court's sentencing decisions, including the applicability of an enhancement under undisputed facts, de novo. (See *People v. Warren* (2018) 24 Cal.App.5th 899, 908.)

1. *Firearm Enhancements under Section 12022.53(d)*

i. Background

As noted, each appellant's sentences for counts 1 and 2, the murder and conspiracy charges, included firearm enhancements of 25 years to life under section 12022.53(d). This enhancement applies to any person who "personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice," during the commission of certain felonies, including murder. (§ 12022.53(d).)

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[8] Bates and Brown argue that the combined effect of the errors they allege in challenging their convictions requires reversal. As discussed, we have found no errors to cumulate. (*Hovarter, supra,* 44 Cal.4th at p. 1030 [rejecting claim of cumulative error because the Court found no errors].)

The information's allegation under this provision did not include an assertion that Lark was not an accomplice. When the trial court instructed the jury on this enhancement using CALJIC No. 17.19.5, the pattern instruction omitted the requirement that the victim be a person "other than an accomplice."[9] The verdict forms similarly made no reference to the requirement that Lark not be an accomplice for purpose of this enhancement. As to each appellant, the jury found true the allegations related to this enhancement under both the murder charge and the conspiracy charge.

At sentencing, appellants objected to the application of the enhancement under section 12022.53(d), arguing for the first time that Lark was an accomplice as a matter of law, and thus that they were subject to the provision's accomplice exception.[10] The prosecutor conceded the enhancement

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[9] CALJIC No. 17.9.5 was designed to cover different firearm enhancement allegations under various subdivisions of section 12022.53. It contained multiple bracketed phrases, including the accomplice exception, to allow the court to modify the instruction to match the relevant enhancement and the allegations.

[10] The record does not reflect that any party asked the trial court to include the phrase "other than an accomplice" in its jury instruction, or challenged its omission from the instruction after the verdicts were returned. However, appellants' failure to raise their challenge to the instruction below does not constitute forfeiture of the claim on appeal. (See *People v. Franco* (2009) 180 Cal.App.4th 713, 719 ["The rule of forfeiture does not apply . . . if the instruction was an incorrect statement of the law [citation], or if the instructional error affected the defendant's substantial rights"].)

should not apply to the conspiracy convictions but argued it should still apply to the murder convictions because Lark could not be an accomplice to his own murder. The trial court rejected appellants' contentions (and the prosecutor's concession), concluding the evidence did not compel a finding that Lark was an accomplice in either the murder or the conspiracy offenses, and noting the jury had acquitted Williams, who drove the car in which Lark was riding. On appeal, appellants argue the court committed instructional error by omitting the accomplice exception.

ii. Analysis

We review this claim of instructional error de novo. (*Selivanov*, *supra*, 5 Cal.App.5th at p. 751.) Following *People v. Flores* (2005) 129 Cal.App.4th 174, 178,181 (*Flores*), we agree the accomplice exception should have been included in the jury instruction on the enhancement under section 12022.53(d). (See *Flores*, *supra*, at p. 178 [holding that omitting phrase "other than an accomplice" from CALJIC No. 17.19.5 in instructing on section 12022.53(d) was error, and noting Attorney General's concession of error].)

Respondent maintains the error was harmless for two reasons. First, as to the murder charge, respondent claims section 12022.53(d)'s accomplice exception does not apply when the alleged accomplice is the murder victim, contending that a victim cannot be an accomplice to his own murder. (Citing *In re Joseph G.* (1983) 34 Cal.3d 429, 433 ["most [jurisdictions], including California, attach no

criminal liability to one who makes a suicide attempt"]; CALCRIM No. 500 ["Homicide is the killing of one human being by another"].) Second, respondent argues the jury's acquittal of Williams indicates it would not have found Lark to be an accomplice. We disagree with both contentions.

In *Flores*, *supra*, 129 Cal.App.4th at page 182, the Court of Appeal rejected the claim respondent advances here, that because "one cannot be charged as an accomplice to one's own murder, the accomplice exception to the firearm enhancement does not apply when the accomplice is the murder victim." There, the defendant and a fellow gang member (Valdivia) conspired to commit a battery on a rival gang member (Morales). (*Ibid.*) While Valdivia engaged in a fistfight with Morales, the defendant shot at Morales but hit and killed Valdivia. (*Ibid.*) The prosecution charged the defendant with Valdivia's murder and included an enhancement allegation under section 12022.53(d). (*Flores*, at p. 181.) As here, the trial court failed to include the words "other than an accomplice" in its jury instruction on this enhancement. (*Id.* at pp. 177, 181.) A jury convicted the defendant and found the enhancement allegation true, and the trial court imposed the enhancement at sentencing. (*Id.* at p. 180.)

On appeal, the Attorney General conceded the instructional error but, as here, argued it was harmless because "one cannot be charged as an accomplice to one's own murder." (*Flores*, *supra*, 129 Cal.App.4th at p. 181.) Rejecting this contention, the Court of Appeal held that

when the enhancement relates to a murder charge, the defendant "is entitled to the benefit of the accomplice exception where the murder is the natural and probable consequence of the crime to which he was an accomplice." (*Ibid.*) The court explained that under the Attorney General's approach, the exception would never apply in the context of a murder charge. (*Id.* at p. 182.) Concluding that the Legislature could not have intended that result, the court clarified that the exception attaches "to the intended, not the charged crime." (*Ibid.*) Applying these principles to the facts of that case, the *Flores* court concluded that a jury could have found Valdivia to be an accomplice to an intended crime -- conspiracy to commit a battery on Morales -- the natural and probable consequence of which was Valdivia's death. (*Id.* at pp. 182-183.)

Thus, under *Flores*, the accomplice exception could have applied to appellants' murder convictions, even if Lark could not be an accomplice to his own murder. Respondent suggests *Flores* is no longer good law because under Senate Bill No. 1437, the natural and probable consequences doctrine can no longer serve as the basis for murder liability. (Citing *People v. Martinez* (2019) 31 Cal.App.5th 719, 723.) But the *Flores* court referenced the natural and probable consequence requirement only to establish that the intended crime proximately caused the victim's death. (Cf. *People v. Bland* (2002) 28 Cal.4th 313, 335 [in context of section 12022.53(d), proximate cause of death "'is an act or omission that sets in motion a chain of events that produces as a

direct, natural and probable consequence of the act or omission the . . . death and without which the . . . death would not have occurred'"].) The court did not imply that the deceased Valdivia would have been liable for his own murder.

Respondent also attempts to distinguish *Flores*: "unlike in *Flores* where if the victim had survived, then he would theoretically have been prosecuted for the attack on the rival, in this case Lark would not have been prosecuted for his own unlawful killing." However, like the victim in *Flores*, had Lark survived, he could have been prosecuted for an intended crime -- here, conspiracy to commit murder of a rival gang member.

As for respondent's argument that Williams's acquittal established that Lark was not an accomplice, this assertion overlooks that the two were not similarly situated. The evidence that Lark was an accomplice to the conspiracy to commit murder was stronger than the evidence pertaining to Williams. Lark was the one who instigated the conspiracy by accusing Brown of not "putting in work," and it was Lark who had the M16 rifle. In contrast, the prosecution presented no direct evidence of Williams's knowledge of the conspiracy prior to the shooting, and Williams did not have a gun. The jury would have been entitled to find these differences significant.[11]

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[11] In a footnote in his brief, respondent notes that in appellants' verdict forms, the jury did not indicate true findings
(*Fn. continued on the next page*.)

The failure to permit the jury to determine if Lark was an accomplice for purposes of section 12022.53(d) cannot be considered harmless error under either *Chapman v. California* (1967) 386 U.S. 18 or *People v. Watson* (1956) 46 Cal.2d 818. (See *Flores*, *supra*, 129 Cal.App.4th at p. 183 [similar error not harmless under *Chapman* or *Watson*].) Bates, Brown, and respondent agree, and Darden does not dispute, that absent harmless error, the appropriate relief is to strike the 25-years-to-life enhancements under section 12022.53(d), and substitute 20-year enhancements under section 12022.53(c), which does not include an accomplice exception, and which the information alleged and the jury found true.

2. *Gang Enhancements under Section 186.22*

As noted, each appellant was convicted of shooting at an occupied motor vehicle under section 246, and the jury found true gang allegations under section 186.22, subdivision (b)(1)(C) as to this charge. At sentencing, the trial court imposed the 10-year enhancement that provision prescribes. On appeal, appellants argue, and respondent concedes, that this enhancement was inapplicable because an offense under section 246 is not a violent felony for

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as to alleged overt acts involving Lark, including that he was armed with a rifle. We observe, however, that the verdict forms asked the jury to indicate the overt acts committed by the "defendants." Lark was not a defendant.

purposes of the enhancement. (See § 667.5, subd. (c) [listing violent felonies].) Appellants contend a 5-year gang enhancement under section 186.22, subdivision (b)(1)(B), applicable to serious felonies, should be applied instead.

Respondent argues, however, that the trial court should have imposed a 15-year gang enhancement under section 186.22, subdivision (b)(4)(B), which expressly applies to convictions under section 246. Moreover, respondent claims that term should have been doubled under section 667, subdivision (e)(1) for Brown and Bates, who had each suffered a prior serious felony conviction.

Appellants respond that the court could not have applied the 15-year enhancement under section 186.22, subdivision (b)(4)(B) because the information did not allege that enhancement. We agree. "[A] defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*People v. Mancebo* (2002) 27 Cal.4th 735, 747.) Because the information did not provide appellants fair notice that section 186.22, subdivision (b)(4)(B) might be used to increase their sentences, the trial court could not have imposed enhancements under that provision. (See *People v. Mancebo*, *supra,* at p. 747.)

Brown and Bates do not respond to the claim the trial court was required to double the enhancements applicable to them. We agree with respondent those enhancements must be doubled. (See § 667, subd. (e)(1) ["If a defendant has one

prior serious or violent felony conviction . . . that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction"]; see also *People v. Jefferson* (1999) 21 Cal.4th 86, 102 [trial court erred in not doubling gang enhancement under section 186.22 for defendants who had suffered prior serious felony convictions].)

Accordingly, appellants' sentences for count 3 must be corrected to reflect that the 10-year enhancements under section 186.22, subdivision (b)(1)(C) are stricken and substituted with 5-year enhancements under section 186.22, subdivision (b)(1)(B), doubled for Brown and Bates under section 667, subdivision (e)(1).

3. *Stay of Sentence for Shooting at an Occupied Vehicle*

The trial court sentenced each appellant to a concurrent term of 15 years in prison for shooting at an occupied vehicle under section 246, rejecting appellants' argument it was required to stay those sentences under section 654. Appellants renew this argument on appeal, contending that shooting at the vehicle and Lark's murder were both part of a single indivisible course of conduct, which cannot be punished twice under section 654.

Where, as here, the facts underlying the court's decision are undisputed, "the application of section 654 raises a question of law we review de novo." (*People v.*

Corpening (2016) 2 Cal.5th 307, 312.) Generally, "[s]ection 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citation.] If, for example, a defendant suffers two convictions, punishment for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed." (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) However, "section 654 does not apply to crimes of violence against multiple victims." (*People v. Correa* (2012) 54 Cal.4th 331, 341 (*Correa*).)

As relevant here, appellants' conduct resulted in two crimes committed against two victims: (1) the murder of Lark, and (2) shooting at a vehicle occupied by Williams. Accordingly, section 654 did not apply to appellants' sentences for shooting at an occupied vehicle under section 246, and the court did not err in refusing to stay them. (See *Correa*, *supra*, 54 Cal.4th at p. 341; *People v. Dydouangphan* (2012) 211 Cal.App.4th 772 [where defendant fired single shot at vehicle containing multiple victims, killing one, section 654 did not bar separate punishments for voluntary manslaughter and shooting at an occupied vehicle].)

4. *Prior Serious Felony Enhancements under Section 667, Subdivision (a)(1)*

As to Brown and Bates, the trial court imposed five-year enhancements under section 667, subdivision (a)(1) as to counts 1 and 2, based on a prior serious felony conviction.

On appeal, they contend, and respondent agrees, that under SB 1393, the matter must be remanded to permit the trial court to exercise its newly-enacted discretion whether to dismiss those enhancements in the interests of justice.

At the time of appellants' sentencing, section 1385, subdivision (b), prohibited trial courts from striking enhancements under section 667. (See former § 1385, subd. (b) ["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667"].) Effective January 1, 2019, SB 1393 eliminated this prohibition, permitting courts to exercise discretion to strike such enhancements. (*People v. Williams* (2019) 37 Cal.App.5th 602, 604.) SB 1393 applies retroactively to nonfinal judgments, such as in appellants'. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Under such circumstances, an appellate court must generally remand for the trial court to exercise its newly granted discretion. (See *People v. Francis* (1969) 71 Cal.2d 66, 75-78 [where statute enacted during pending appeal gave trial court discretion to impose a lesser penalty, remand was required for resentencing].) Accordingly, we remand the matter for the trial court to exercise its discretion whether to strike the relevant enhancements. We express no opinion how the court should exercise its discretion on remand.

DISPOSITION

The convictions are affirmed, the sentences are vacated, and the matter is remanded for the trial court to: (1) strike appellants' firearm enhancements under section 12022.53(d) for counts 1 and 2 and substitute enhancements under section 12022.53(c); (2) strike appellants' gang enhancements under section 186.22, subdivision (b)(1)(C) for count 3 and substitute enhancements under section 186.22, subdivision (b)(1)(B), doubled as to Brown and Bates under section 667, subdivision (e)(1); and (3) as to Brown and Bates, exercise its discretion under SB 1393 whether to strike enhancements under section 667, subdivision (a)(1). These instructions do not detract from any discretion the trial court may have at the time of resentencing to strike enhancement allegations. The trial court shall prepare amended abstracts of judgment and send certified copies to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.