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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL FIMBRES,

Defendant and Appellant.

B279962

(Los Angeles County
Super. Ct. No. BA430666)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed and remanded with directions.

Judith Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

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

INTRODUCTION

A jury convicted Michael Fimbres of murdering Frank Taylor. The trial court sentenced Fimbres to a prison term of 50 years to life. Fimbres appeals, arguing his trial counsel provided ineffective assistance and the evidence was insufficient to support the jury's finding the murder was premeditated. We remand for the trial court to hold a new sentencing hearing under amended Penal Code section 12022.53, subdivision (h), and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Stolen Drugs*

Taylor, known as Diablo, and Monica Andrade were in a dating relationship. They were homeless and lived in a tent near a street corner. Andrade was one month pregnant with Taylor's child.

Taylor and Andrade both used methamphetamine regularly, and Taylor also used heroin. They socialized with Fimbres, whom they knew as Rock from the criminal street gang White Fence, at his house on Maple Avenue, where Fimbres sold methamphetamine and heroin. Fimbres knew that Taylor, when he walked home from Fimbres's house, took the same route every day.

On July 1, 2014 Taylor and Andrade went to get a pizza. They had an argument, and Andrade walked away. Andrade went to Fimbres's house on Maple Avenue and found him there. Fimbres, who had a .38 revolver in his waistband, told Andrade that Taylor had stolen some of his drugs. Fimbres said he knew

it was Taylor, he “was going to do what he was going to do,” and, because Andrade was pregnant and “a good person,” he was not going to kill Taylor for stealing the drugs but would “probably fuck him up a little.” Fimbres gave Andrade some money to buy breakfast. Andrade called Taylor on his cell phone to warn him about Fimbres’s threat.

B. *Disrespect*

Daisy Cordero was seven months pregnant on July 1, 2014. She called Fimbres, whom she considered a friend and “a good all around guy,” and asked him to take her to the market to buy groceries. Fimbres picked Cordero up in his truck.

On the way to the market they stopped at Fimbres’s house to get his cell phone. As they drove in the alley behind the house, they saw Taylor waiting for Fimbres by the garage door. According to Cordero, Taylor was “all aggressive and angry,” “huffing and puffing,” “hyped up,” “wild and disgruntled,” and “pacing back and forth” around Fimbres’s truck, “like he had something in his pockets or in his waistband and he was just all angry.” She said Taylor “acted like he had something right here in his waistband or something, like he was going to reach for something,” and appeared “high on dope or something.” Cordero said Taylor “was in an aggressive mood” and “ready to pounce.”

Fimbres got out of the car, and Taylor said, “You got my girlfriend high.” Fimbres said, “I didn’t even get nobody high. What the fuck you talking about? I gave your girlfriend . . . \$8 because she said she was hungry and I know she’s pregnant.” Cordero said Fimbres gave Andrade “the last \$8 or \$10 dollars

that he had in his pocket because she said she was hungry” and Taylor had not been “feeding her.”

Taylor continued to argue and said, “You fuckin’ got my fuckin’ girlfriend high . . . and you’re a . . . fuckin’ bitch. This is my hood. This my hood, Bell Street.” Taylor also said, “This is my hood. Fuck you. Fuck your hood.” Fimbres said, “Get out of here, dude. Like, you know, what’s wrong with you? Just get out of here.” Fimbres added, “Don’t take my kindness for weakness. Like I’ve been nice to you, just get out of here.” Taylor said, “Go ahead, shoot me now. Put me out of my misery.” Fimbres said, “I don’t want to hurt you.”

Taylor left, and Fimbres went inside the house to get his cell phone. When he returned, he got back into the truck and drove with Cordero to a local dairy on Maple Avenue because “the milk is better at the dairy” than the market.

C. *Retaliation*

Fimbres and Cordero soon encountered Taylor again. As they crossed some train tracks, Cordero dropped her EBT card in the car and began looking for it.¹ When Fimbres parked his truck, they “happened to see” Taylor walking on the sidewalk and in the street. Taylor looked “greasy and dirty” and walked

¹ EBT stands for electronic benefits transfer. (*People v. Johnson* (2018) 21 Cal.App.5th 1026, 1030.) An EBT card “is a card used to issue food stamp benefits to recipients, who can then use the EBT card to make purchases using those benefits in a manner similar to using a debit card.” (*Anderson v. Dolgencorp, LLC* (M.D. Ala., Oct. 28, 2014, No. 1:14CV920-CSC) 2014 WL 5471933, at p. 2.)

rapidly up to Fimbres's truck. Fimbres got out, and the two men approached each other and exchanged words. It appeared to Cordero that Taylor might have a weapon, and she said to Fimbres she thought Taylor had a gun. Cordero thought "they were going to fight or something," so she looked down because she did not "want to see all that fighting shit" and continued to look for her EBT card on the floor of Fimbres's truck. Cordero heard Taylor make a noise that sounded like "ahhh," and she saw him fall to the ground.² Cordero did not see a gun in Fimbres's hand.

After Taylor fell, Fimbres got back into the car and drove away. He said, "Oh, my God. Oh, my God. Oh, my God." Cordero said Fimbres was "unsettled and nervous and like—like he felt like remorse, like guilt." He cried. As they drove away, Fimbres dropped a metal object out of the window that made a clinking sound as it fell. Video from surveillance cameras in the area showed Taylor's truck leaving the scene of the shooting.

A witness was sitting in front of her house near the dairy on Maple Avenue, facing the train tracks. She saw a truck stop and park next to her brother's truck on the street. Fimbres, whom the witness identified in court, got out of the truck and met Taylor, whom the witness identified in a photograph, as he was coming from the other side of the street. The two men, who seemed to know each other, met in the middle of the street. Fimbres did not look angry. Fimbres lifted his arm and shot Taylor from about six or eight feet away. The witness heard the gunshot. Taylor grabbed his chest and collapsed. Fimbres

² When asked if she was shocked, Cordero stated, "Nothing really shocks you in East L.A, honestly."

turned around, walked back to his truck, got in, and drove away. He did not seem agitated or upset. As the truck drove away, the witness saw a woman in the passenger seat.

Another witness found Taylor on the ground, taking “his last breaths.” Police investigators did not find any casings at the scene, indicating the gun that killed Taylor was a revolver. Taylor had “multiple drugs” in his system when he died, including heroin, methamphetamine, and phencyclidine (PCP).

D. *Confidential Information*

On July 8, 2014 police detectives arranged for a confidential informant who knew Fimbres to assist the investigation by contacting Cordero. The confidential informant met Cordero in a car in the parking lot of a convenience store. The confidential informant convinced Cordero to meet with him by making up a story about how Taylor was connected with gang members who believed Fimbres killed Taylor in a drive-by shooting. The confidential informant told Cordero, “Everybody is saying that it was a drive-by and [Fimbres is] in a lot of trouble with some important people.” He told Cordero she should help him find Fimbres because “it could be dangerous to him from other people.”³ He also said people were looking for her, and he

³ The prosecutor later explained he wanted to ask more questions on the issue of drive-by shootings because “drive-bys are not allowed in Latino gangs. The fact that [Fimbres] actually got out of his car to commit the shooting I believe goes to his premeditation on the fact that he was not . . . under the influence of heat of passion, not under the influence of provocation. He was thinking clearly and he was staying inside of the rules and he got out of the car to accomplish the killing.” The trial court stated, “I don’t want to go down the Mexican Mafia road. I don’t want to

needed to contact Fimbres for his safety because he could be killed by high-ranking gang members. Cordero said she was not supposed to be talking about the incident and did not give the confidential informant much information.

The confidential informant eventually received a call from Fimbres, and the two of them met in an apartment where Fimbres was staying. The confidential informant wore a recording device, although it malfunctioned and did not record his conversation with Fimbres. Fimbres told the confidential informant he had given Taylor's girlfriend some money earlier in the day, and Taylor was upset because his girlfriend used the money to buy drugs. Fimbres told the confidential informant he killed Taylor because Taylor disrespected him. According to the confidential informant, Fimbres said, "The guy got mad, said it was his neighborhood, 'F' his hood and whatnot, and said he wasn't going to take the disrespect, and he shot him." Fimbres did not say that he acted in self-defense or that Taylor had a weapon. The confidential informant also told Fimbres that, for \$10,000, he could help Fimbres escape to Mexico.

The next morning the confidential informant picked up Fimbres at the apartment, and they had breakfast at a table service diner-style restaurant. Because the confidential informant had learned the recording device had not functioned properly the previous day, he tried to get Fimbres to talk again about shooting Taylor. Fimbres again said he shot Taylor "over

get into a lot of discussion as to the Mexican Mafia, who they are and what they do and how they control street gangs I understand your argument is premeditation. . . . I mean, I just think we ought to stay away from the Mexican Mafia. Just incites a lot of things."

disrespect” and because “he was not going to take that attitude of disrespect.”⁴ The two of them left the restaurant and drove to a gas station, where police arrested Fimbres.

Counsel for Fimbres impeached the credibility of the confidential informant’s testimony with multiple felony convictions and admissions that law enforcement assisted him in getting more lenient sentences for his help in police investigations. The confidential informant also admitted he had received over \$60,000 for providing information to law enforcement.

E. *Verdict*

The People charged Fimbres with first degree murder. The People alleged Fimbres personally used a firearm within the meaning of Penal Code section 12022.53, subdivision (b),⁵ personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), and personally and intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivision (d). The People further alleged Fimbres committed the offense for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1), although the court dismissed this allegation during the trial.

⁴ The prosecutor did not play the recording of this conversation because it was “quite muddy” and “really hard to hear.”

⁵ Statutory references are to the Penal Code.

The jury found Fimbres guilty of first degree murder and found true the allegation Fimbres intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivision (d). The trial court sentenced Fimbres to a prison term of 25 years to life for the murder conviction, plus 25 years to life for the firearm enhancement. Fimbres timely appealed.

DISCUSSION

A. *Counsel for Fimbres Did Not Provide Ineffective Assistance*

1. *Relevant Proceedings*

Fimbres filed a motion to bifurcate the trial on the gang allegation, and on the first day of trial there was a discussion about that allegation. The court, referring to a prior discussion off the record, had this discussion with the attorneys:

“The Court: We had a discussion in chambers about the motion in limine filed by the defense. One of the issues that came up was the fact that there is a gang allegation in this case. The People are thinking that maybe it’s not necessary to actually have the gang allegation, as long as you get into evidence gang membership and tendencies of gang members, is that your thought?

“[The prosecutor:] Yes, Your Honor, that summarizes it for me.

“The Court: So, let me ask the defense, are you willing to have the defendant being acknowledged as a gang member, but not that this is a gang crime?

“[Counsel for Fimbres:] Your Honor, I need to fully discuss that with my client. I think that that’s a strong possibility. The People just provided the parameters of what they want a stipulation to. So I respectfully request if I could just have the lunch hour.

“The Court: Well, here’s the problem. I’ve got jurors coming and they’re out there and they’re going to be coming in a minute and we have to tell them what the allegations are in the case. The charges are murder, the use of a gun, and it will be pretty hard to dance around the gang allegation. I can try to get into it a little bit, but I think you’re going to want me to voir dire on if anybody knows anybody in a gang.”

Later, before the testimony of the confidential informant, the following exchange occurred:

“[Counsel for Fimbres:] I don’t know if the People want to handle the stipulation right now about the gang allegation. We can do that later.

“[The Prosecutor:] I’d be happy to enter into it right now and I can repeat it in front of the jury. Counsel, do you stipulate that your client, Michael Fimbres, at the time of this crime, was a member of White Fence, a criminal street gang?

“[Counsel for Fimbres:] Yes.

“[The Prosecutor:] People join.

“The Court: That will be a stipulation and you’ll just read it into the record in front of the jury.

“[Counsel for Fimbres:] And the People will be dismissing the [gang] allegation?”

“The Court: Alright. The People are moving to dismiss the gang allegation and I approve of the dismissal.”

Counsel subsequently stated the stipulation in the presence of the jury. The trial court instructed the jurors to accept the stipulated fact as if it had been proven at trial through the testimony of a witness.

2. *The Gang Expert's Testimony*

Officer Mario Morales, an expert on the White Fence criminal street gang, testified for the prosecution. He stated White Fence had approximately 500 members in two separate territories, one in Hollywood and the other in Boyle Heights. After Officer Morales stated White Fence was known for committing crimes, the trial court interrupted the prosecutor's questioning and asked the attorneys to approach for a sidebar conference.

"The Court: I don't know where you're going with this man. What is his purpose in testifying in this case?"

"[The Prosecutor:] He's going to be testifying . . . about the existence of a gang and the facts that have to do with the gang culture. I was about to get there, judge.

"The Court: We don't have a gang allegation, and I applaud the People for dropping the gang allegation because I don't think this is a gang-related shooting. This is a single incident. I thought the purpose of introducing gangs was to say that if a gang member is disrespected, he's likely to act out in a violent manner. Isn't that where you're going?"

"[The prosecutor:] That's where I'm going. I'll get there.

"The Court: So why don't you just ask him that."

And the prosecutor did. Officer Morales testified that respect is important in gangs and that a gang operates "through

respect.” When asked about a gang’s “hierarchy,” the trial court interrupted the questioning again.

“The Court: We really don’t need all that detail. The whole point is people join gangs for various reasons and principally it’s respect; is that correct?

“The Witness: Yes, sir.

“The Court: That they like the idea of having people in the neighborhood fear them, is that also correct?

“The Witness: Yes, it is, Your Honor.

“The Court: And if someone is disrespected, is that a big deal for a gang member?

“The Witness: Yes, it is, sir.

“The Court [to the prosecutor]: Why don’t you go on.”

The prosecutor proceeded to question Officer Morales about respect and the consequences of disrespect for gang members. The officer testified that showing disrespect to a gang member in public shows weakness, and a member of one gang saying to a member of another gang, “Fuck your hood,” is a serious insult and would result in a violent response, particularly if the girlfriend of the gang member who received the insult is present. Officer Morales also testified that Fimbres admitted to him that he was a member of White Fence and that the “W.F.” tattoos on his face stood for White Fence and indicated Fimbres’s “lifetime commitment to his gang.”

On cross-examination, Officer Morales testified that Taylor was a member of the Vail Street gang and that there was no rivalry between White Fence and Vail Street. He also testified members from the two gangs could have a personal relationship and socialize with each other. He repeated his testimony about the importance of respect to gang members. And then this:

“Q: Now, there is something about gang justice system, isn’t that right?

“A: Yes, to an extent.

“Q: So we have our criminal justice system, what we’re doing right now in court, right?

“A: Yes, Ma’am.

“Q: But there is a separate parallel gang justice system operating also, right?

“A: Yes.”

“Q: And in that gang justice system, there is a hierarchy of individuals who are influential, right?

“A: Yes.

“Q: They determine that if a gang code is broken, that they will mete out their own punishment, correct?

“A: Yes, Ma’am.

“Q: Including killing—green lighting somebody, right?

“A: Yes.

“Q: Which means when you green light somebody, you’re basically putting a hit on them, right?

“A: Yes.

“Q: You’re basically saying that person, green light, kill him.”

Which caused the court to interrupt again and have another discussion with counsel outside the presence of the jury at sidebar.

“The Court [to counsel for Fimbres]: I don’t know where you’re going. I’m surprised by this line of questioning. The district attorney wants to get into Mexican Mafia. That seems to me what you’re—where you’re going with your questions.

“[Counsel for Fimbres:] I’m going to—

“The Court: My belief is this is not a gang shooting. This is a shooting over the problems that occurred between the two parties who were apparently in the narcotics business together. Where do you hope to go with these questions?

“[Counsel for Fimbres: The] People have brought in a statement from my client that he basically boasted to the [confidential informant] that he killed somebody out of disrespect. Now in gang culture, you . . . cannot appear weak because if you appear weak, you are now a coward and you are now open for a hit.

“The Court: So what? Doesn’t that play into the prosecution’s hands that you’re asking the questions you’re asking? You’re taking him right down the road that the People want you to go. I mean, I don’t understand your thought process on this. I’m trying to keep the Mexican Mafia out of the case because I don’t think it’s helpful to either side. Yes, the Mexican Mafia set out an edict probably 10 to 12 years ago where they said no more drive-by shootings. We still have some drive-by shootings. But the point is, they wanted walk-up shootings because too many people were getting shot in drive-by shootings because the shooters were so inaccurate. We don’t have to get into that in this case. It has nothing to do with this particular case. Let’s focus on the evidence. I don’t know what your gang expert is going to say. . . . I am uncomfortable with gangs being introduced in this case because I don’t think this is a gang case. I let the People have some latitude, I’m letting you have some latitude. Think about what you’re doing here because you’re opening the doors for a discussion on the Mexican Mafia.”

Counsel for Fimbres then returned to the topic of disrespect, and Officer Morales testified a gang member is

expected to react violently to public disrespect. The officer stated a gang member could respond verbally, but that was “not very common.” After the trial court sustained objections to two hypothetical questions by counsel for Fimbres, Officer Morales admitted that many crimes committed by gang members are unsolved. The trial court sustained two more objections to questions about what kind of weapon Officer Morales carried and about whether reaching for a waistband means a person may have a weapon, and counsel for Fimbres did not ask the officer any more questions.

3. *Trial Counsel for Fimbres Did Not Provide Ineffective Assistance*

Fimbres argues his trial counsel was constitutionally ineffective because she “elicited evidence about the violent nature of gang members that she previously sought to exclude.” Fimbres complains his trial counsel “stipulated to the fact that [Fimbres] was a member of a criminal street gang and went on to elicit mountains of evidence, from a gang expert, about the gang’s criminal activities—even after the trial court interposed its own objection.” Fimbres argues that, although the trial court “made clear that the only gang evidence the prosecutor could elicit was the effect that being ‘disrespected’ could have on a gang member,”⁶ counsel for Fimbres “proceeded to inquire at length

⁶ The record does not contain a formal order limiting gang evidence to this issue, but it was the basis of the parties’ stipulation, and the trial court’s comments suggest it intended to limit the admissibility of gang evidence in this way. Fimbres does not argue the trial court erred in admitting evidence about the importance of respect, and the consequences of disrespect, for

about the White Fence gang's territory, rivals, and criminal activities and elicited copious amounts of gang evidence.”

““To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.] ‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’”” (*People v. Rices* (2017) 4 Cal.5th 49, 80; see *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Mickel* (2016) 2 Cal.5th 181, 198.) If the defendant fails to satisfy one of these requirements, we need not address the other. (*Strickland*, at p. 697; *People v. Cain* (1995) 10 Cal.4th 1, 52.)

Moreover, “[i]t is particularly difficult to prevail on an appellate claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009; accord, *People v. Gallardo* (2017) 18 Cal.App.5th 51, 79; see *People v. Mickel*, *supra*, 2 Cal.5th at pp. 198-199 [“ineffective assistance of counsel claims are rarely successful on direct appeal because the

gang members. Fimbres argues only that his counsel was ineffective by asking questions beyond the scope of this topic.

appellate record will often not sufficiently reveal why defense counsel acted or failed to act on any given occasion”].)

To the extent Fimbres argues his trial counsel was ineffective because she stipulated to Fimbres’s gang membership, Fimbres has not shown deficient performance because his trial counsel had a rational and eminently sound reason for stipulating Fimbres was a member of White Fence: The People agreed to move to dismiss the gang allegation against Fimbres under section 186.22, subdivision (b)(1). The court granted the motion and dismissed the gang allegation, allowing the parties to introduce evidence only that Fimbres was a gang member, respect is important to gang members, and disrespect can lead to physical retaliation. By obtaining dismissal of the gang allegation, counsel for Fimbres drastically reduced the amount of evidence the jury would hear about White Fence, Fimbres’s involvement with the gang, and gangs in general.

Fimbres argues his trial counsel was ineffective because she elicited testimony from Officer Morales beyond the importance of respect in a gang and the consequences of disrespect. Counsel for Fimbres, however, had a rational and tactical reason for attempting, for the most part unsuccessfully, to obtain testimony from Officer Morales about White Fence: It was relevant to Fimbres’s self-defense and imperfect self-defense theories. Having established through the stipulation and Officer Morales’s testimony that Taylor was a member of a gang, counsel for Fimbres argued that “this is the streets” where a gang member would expect another gang member to have a gun. Counsel for Fimbres also argued there was no premeditation because Fimbres’s shot “was a reaction” by a gang member who had experience with firearms: “It was one shot. If a gang

member felt disrespected, he's going to make sure that that person is dead. Okay. This was a shot from about six to eight feet . . . with a moving target, ladies and gentlemen, that is not easy. That is not easy unless you're a marksman and you're pretty good or you practice a lot. That's not easy. The shot was dead on, consistent with Frank Taylor coming at—coming at Mr. Fimbres.” Counsel for Fimbres also used the “green light” reference in closing argument to explain why Fimbres tried to flee with the (supposed) assistance of the confidential informant. Counsel for Fimbres’s arguments may not have been persuasive, but they show counsel had additional tactical reasons for questioning Officer Morales.

Finally, Fimbres has not shown prejudice. (See *People v. Avila* (2014) 59 Cal.4th 496, 508 [“[a] defendant claiming ineffective assistance of counsel must establish a ‘reasonable probability’ of prejudice”]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217 [“[i]n addition to showing that counsel’s performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim”].) As noted, Fimbres argues that, in addition to questioning Officer Morales about the importance of respect in a gang and the consequences of disrespect, his attorney asked questions “at length” on topics she previously sought to exclude and introduced “copious amounts” of evidence and “mountains” of testimony about the gang’s activities, territory, and rivals.

The record shows, however, there was no mountain. Most of counsel for Fimbres’s questions concerned the importance of respect and perception to a gang member and the consequences of disrespecting a gang member in public. Counsel for Fimbres also asked questions establishing Taylor was in a gang that did not

have a rivalry with Fimbres's gang. She did not elicit any evidence about the kinds of crimes White Fence committed, predicate acts that would establish a pattern of criminal activity, common practices of gang members, field investigation cards or testimonial hearsay, creating fear in the community or intimidating witnesses, flashing gang signs or wearing gang colors, turf battles over territory, or any of the other things gang experts usually explain.⁷ She did ask six or seven questions covering less than one page of the reporter's transcript about "gang justice" and gang "hierarchy," including two questions about "green lighting," but the trial court quickly interrupted the line of questioning. These questions, which the trial court noted were beyond the scope of issues relating to respect and disrespect, were confined to one brief exchange with one witness. Thus, even if the trial court had interrupted counsel for Fimbres a little sooner and precluded her from asking the additional handful of questions about how gangs operate, there is no reasonable probability the result of the trial would have been any different. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241 ["[a] defendant must prove prejudice that is a "demonstrable reality," not simply speculation"].)⁸

⁷ When the prosecutor tried to ask Officer Morales about the kinds of crimes White Fence was known for committing, counsel for Fimbres objected and the trial court precluded the witness from answering the question. The court limited the prosecutor to asking questions about the importance of respect and disrespect in gang culture.

⁸ Fimbres also asserts: "In her closing argument, the defense discussed the Mexican Mafia." The trial court, however, sustained the prosecutor's objection to this comment and

B. *There Was Substantial Evidence of Premeditation*

“An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.’ [Citation.] In this context, “premeditated” means “considered beforehand,” and “deliberate” means “formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.” [Citation.] We normally consider three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported—preexisting motive, planning activity, and manner of killing—but ‘[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation.’” (*People v. Jennings* (2010) 50 Cal.4th 616, 645.) These factors “are simply an ‘aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.’” (*People v. Brooks* (2017) 3 Cal.5th 1, 59.) “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides . . . which are the result of mere unconsidered or rash impulse hastily executed.” (*Id.* at p. 58.)

instructed the jury to “disregard the statement of the Mexican Mafia and possible interest they might have in this man.”

Here, Fimbres had a motive, a plan, and a gun. He had accused Taylor of stealing his drugs and told Andrade he was going to physically retaliate. (See *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 295 [desire to retaliate is evidence of motive supporting premeditation and deliberation].) Fimbres drove to a spot along the route he knew Taylor routinely traveled. He “brought a loaded gun with him” when he went to find Taylor, and took it with him when he got out of his truck to confront Taylor, thus “demonstrating preparation.” (*People v. Salazar* (2016) 63 Cal.4th 214, 245; see *People v. Lee* (2011) 51 Cal.4th 620, 636 [fact that the “defendant brought a loaded handgun with him on the night [the victim] was killed, indicating he had considered the possibility of a violent encounter,” was evidence of premeditation]; *People v. Adcox* (1988) 47 Cal.3d 207, 240 [bringing a loaded gun and using it to kill the victim from less than six feet away was evidence of prior planning and premeditation].) That earlier in the day Fimbres was considering only hurting Taylor and “fuck[ing] him up a little” without actually killing him shows only that Fimbres was weighing his options and reflecting on how (and how much) he would retaliate against Taylor for a longer period of time. (See *People v. Cage* (2015) 62 Cal.4th 256, 276 [defendant’s statement he wanted to “fuck up” the victim was evidence of premeditation and deliberation].) And when Fimbres finished reflecting on his options and finally decided to shoot Taylor, he did so in the chest at close range. (See *People v. Mendoza* (2011) 52 Cal.4th 1056, 1071 [single shot to the head supports “the inference of a deliberate intent to kill”]; *People v. Elliot* (2005) 37 Cal.4th 453, 471 [method of killing can suggest premeditation]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1082 [“firing a shot at a vital area

of the body at close range” is “indicative of a deliberate intent to kill”].)

Had Fimbres shot Taylor in the alley behind his house when Fimbres felt Taylor disrespected him by saying, “Fuck your hood,” perhaps Fimbres would have been able to make a stronger argument to the jury that he acted without premeditation and deliberation. But Fimbres waited until later, and went to a place, unlike the alley, that he believed was not “hot” with police activity. He made plans and executed them. There was ample evidence to support the jury’s finding that Fimbres’s killing of Taylor was premeditated.

Fimbres suggests the evidence of planning and reflection was “wanting” because the view of the person who witnessed the killing was partially obstructed, Taylor appeared aggressive and had methamphetamine and other drugs in his system when he died, and the testimony of the confidential informant was “so unreliable [it] should be discredited *in toto* because he sustained numerous felony violations and, quite literally, made a living out of testifying for the prosecution, since he earned over \$60,000 by testifying against criminal defendants.” Such attacks on the weight of the evidence and the credibility of the witnesses, however, are for the jury. They do not show the jury’s verdict is not supported by substantial evidence. (See *People v. Brown* (2014) 59 Cal.4th 86, 106 [“[t]he final determination as to the weight of the evidence is for the jury to make,” and “[w]e do not reweigh it and substitute our view for theirs”]; *People v. Manriquez* (2005) 37 Cal.4th 547, 585 [“[i]n deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury”].)

C. *Fimbres Is Entitled to a New Sentencing Hearing*

When the trial court sentenced Fimbres, section 12022.53, subdivision (h), prohibited the court from striking the firearm enhancement. The Legislature, however, amended section 12022.53, subdivision (h), effective January 1, 2018, to give the trial court discretion to strike a firearm enhancement under section 12022.53. The amended statute provides: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.”

In supplemental briefs, Fimbres and the People agree the amended statute applies retroactively to this case. Fimbres and the People also agree remand for resentencing is appropriate here because the trial court gave no indication how it would have exercised its discretion under section 12022.53 if the court had had such discretion at the time of the sentencing hearing. We agree that remand for resentencing is appropriate for the trial court to exercise discretion under the amended statute. (See *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081-1082; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424.)

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated. The matter is remanded for the limited purpose of allowing the trial court to conduct a new sentencing hearing and to exercise its discretion under section 12022.53, subdivision (h).

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.*

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