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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JEREMY QUWAN MITCHELL, Defendant and Appellant.	B268501 (Los Angeles County Super. Ct. No. TA135618)

APPEAL from a judgment of the Superior Court, Los Angeles County, Michael J. Shultz, Judge. Remanded for resentencing.

Alex Green, 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, Steven D. Matthews, Scott Taryle and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Jeremy Quwan Mitchell of several crimes, including attempting to murder two victims for the benefit of and in association with a criminal street gang. One of Mitchell's codefendants, Semaj Tipton, pleaded guilty during the trial and the other, Dwayne Johnson, was acquitted by the jury.

Mitchell contends the trial court erred by denying his motion under *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Batson*/*Wheeler* motion) and by admitting the testimony of the prosecution's gang expert in violation of Mitchell's right to confrontation under the Sixth Amendment. Mitchell also argues that his trial counsel was ineffective and, in a supplemental brief, that we should remand the matter for resentencing to allow the trial court to exercise discretion under a recently-enacted statute to strike the firearm enhancement. We affirm the judgment but remand for the trial court to hold a new sentencing hearing under the new statute, to correct an unauthorized sentence, and to strike or impose the minimum parole eligibility alternate penalty for the gang enhancement.

FACTUAL AND PROCEDURAL HISTORY

A. *The Pirus and Their Rivals*

Mob Piru is a criminal street gang in Compton. Cedar Block Piru is a rival gang. There have been multiple shootings between the two gangs resulting in murders of members of both gangs.

Mob Piru gang members write graffiti that says "MOB" (which stands for "Money Over Bitches") and "CBP" (an

abbreviation for Cedar Block Piru) with the letters crossed out, which indicates Cedar Block Piru is a rival gang. Cedar Block Piru gang members write graffiti with the words "Fuck Monkeys," a derogatory term for Mob Piru, and "MOB" with the letters crossed out and the letters "CBP" underneath.

On October 21, 2014 a Mob Piru gang member named Shawn Williams was shot in the face. Detective Raul Magadan responded to the scene of the shooting, an area controlled by Mob Piru, and assisted with the investigation. Cedar Block Piru gang members were involved in the shooting.

B. *The Retaliation*

On October 23, 2014 three Mob Piru gang members, Mitchell, Tipton, and a third individual, who identified himself as Baby E.S., got into a car in which Johnson was sitting in the back seat. Johnson was a member of the Swan Family Blood gang, a criminal street gang not affiliated with Mob Piru or Cedar Block Piru. Johnson was in the car waiting for his girlfriend outside a party.

Inside the car, the three men "hit up" Johnson by asking him where he was from, telling him they were from Mob Piru, and identifying themselves by their respective gang monikers. Baby E.S. told Johnson that a Mob Piru gang member had been shot two days ago. Mitchell, who was in the driver's seat, appeared angry about the shooting because he was "mad-dogging."[1] Tipton also appeared upset about the shooting

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[1] To "mad-dog" a person is to stare at him or her in a mean or intimidating way, and is a sign of disrespect. (See *People v. Monterroso* (2004) 34 Cal.4th 743, 772; *People v. Thomas* (2012) 211 Cal.App.4th 987, 995; *People v. Torres* (2008) 163 Cal.App.4th 1420, 1423, fn. 2.)

because he was "fast motioning, mad-dogging, and just angry talkin'." Mitchell drove through a neighborhood controlled by the Cedar Block Piru gang and began to slow down as he approached a parked van.

Don Smith was sitting in the driver's seat of the van, and his cousin Ahmil Thompson was standing outside the van talking to him. Mitchell "mad-dogg[ed]" Smith and Thompson as he drove by, then made a U-turn and drove back towards them and stopped. Mitchell rolled down his window and asked Thompson, "Do you bang?" or "Where are you from?"[2] Thompson answered he and Smith were not affiliated with any gang. Baby E.S., who was seated behind Mitchell, opened the car door and began shooting at Thompson and Smith. Mitchell also pulled out a gun and shot at the victims, emptying "the whole clip." Thompson and Smith escaped uninjured.

Mitchell "pulled off from the scene." A police officer activated the sirens and lights of his patrol car and pursued Mitchell through several city blocks. Police officers eventually apprehended him.

C. *The Charges*

The People charged Mitchell with two counts of attempted premeditated murder in violation of Penal Code sections 187,

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[2] The People's gang expert testified that when a gang member asks, "Where are you from?" he is actually asking, "What gang you're from?" A gang member asks this question to challenge the person and to determine if he is from a rival gang. The question often precedes murders, attempted murders, and drive-by shootings.

subdivision (a), and 664, subdivision (a),[3] one count of fleeing or attempting to elude a pursuing peace officer while driving with a willful or wanton disregard for the safety of persons or property in violation of Vehicle Code section 2800.2, and one count of discharging a firearm at an occupied motor vehicle in violation of section 246. The People alleged Mitchell committed the offenses 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). The People also alleged a principal in the commission of the attempted murders personally and intentionally discharged a firearm, within the meaning of section 12022.53, subdivisions (c) and (e)(1).

D. *Gang Expert Testimony*

Detective Magadan testified about gang culture, how someone joins a gang, the territories each gang must control to survive, and the importance of respect and committing acts of violence to earn that respect. Detective Magadan also testified about the Mob Piru and Cedar Block Piru gangs and their longstanding rivalry. Detective Magadan testified, based on a hypothetical with facts mirroring the facts of this case, that the defendants committed the shooting for the benefit of and in association with the gang.

E. *Conviction and Sentence*

The jury convicted Mitchell of all charges against him and found true the gang and firearm allegations. On the first attempted premeditated murder conviction, the trial court sentenced Mitchell to life imprisonment with the possibility of

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

parole with a minimum period of confinement of seven years, plus 20 years pursuant to section 12022.53, subdivision (c). The court also imposed but stayed the minimum term of confinement of 15 years under section 186.22, subdivision (b)(5).

For the second conviction of attempted premeditated murder, the court sentenced Mitchell to life imprisonment with the possibility of parole with a minimum period of confinement of seven years, plus six years eight months (one-third of 20 years) under section 12022.53, subdivision (c), and imposed but stayed the minimum of confinement of 15 years under section 186.22, subdivision (b)(5). The court ordered Mitchell to serve the two life sentences consecutively because of the "high degree of violence." The court also imposed concurrent terms of seven years for fleeing a pursuing officer and 12 years for shooting at an occupied vehicle. Mitchell timely appealed.

DISCUSSION

A. *The Trial Court Did Not Err in Denying the Batson/Wheeler Motion*

Mitchell contends the trial court erred in ruling he failed to make a prima facie case of discrimination when the prosecutor exercised a peremptory challenge against Juror No. 8930. The record supports the trial court's ruling.

1. *Jury Selection*

a. Juror No. 7258

The court initially called 29 prospective jurors, one of whom was an African American man (Juror No. 7258) and some unspecified number of whom were African American women. During jury selection, counsel for Johnson asked if the

prospective jurors had any feelings about violence. Juror No. 7258 stated he was a "born-again Christian" who "shouldn't be here" because he had "an equilibrium thing" that required him to "hold onto something" when he stood up. The court told counsel it intended to excuse Juror No. 7258 because he appeared "physically unwell" and his "gait appeared very unsteady." Counsel for Mitchell objected and asked the court to inquire further. The following exchange occurred:

"The Court: You had mentioned to me that you weren't feeling well . . . and I noticed you seem a little unsteady on your feet. Are you physically okay?

"Juror No. 7258: I—tell you the truth, I'm giving it a try. This is the second time. Like Tuesday, I had to hold onto the furniture in order to get out of here. . . . My concentration—in my own opinion, I shouldn't be here.

"The Court: So, that statement really scares me because I think you're giving people ideas, and I don't want you to do that. When you say that, what do you mean by you shouldn't be here? I don't know what that means.

"Juror No. 7258: Because I'm a born-again Christian.

"The Court: Okay.

"Juror No. 7258: And like I said, just recently, I saw in the news that this man did something so horrible, it touches me, you know, a man's inhumanity to man. . . .

"The Court: . . .When you say you shouldn't be here, are you telling me you can't be a fair juror?

"Juror No. 7258: I listened to you. You explained clearly. . . . No reason for my mind to wonder [sic] off a little bit. I just kind of, you know. I'm just giving an honest opinion."

The court asked Juror No. 7258 if he could "physically serve," and the juror replied, "It would be difficult." The court asked him, "Do you have a problem fairly sitting in judgment of

the witnesses and the evidence in this case?" The prospective juror replied, "I don't like that word, 'judgment.'" When the court asked if the prospective juror would have any problem "listening to the evidence and rendering a verdict that is fair to both sides," he answered, "I'll give it a try. I'm here again. I'll give it a good try."

The prosecutor expressed to the court his concern with the physical health of Juror No. 7258 and his ability "to put in a verdict." The court stated, "There's no question he has a health issue. He has acknowledged that. He's also indicating he's having trouble focusing, that he's confused. I don't know why that is. I don't [know] if he's tired, if it's his age, if he's just naturally confused. However, he said he didn't have a physical problem, that he was going to try to work with me. . . . With respect to his ability to sit in judgment, he clearly said he did not like that word, but I asked him very clearly if he could listen to the evidence and judge the evidence fairly to both sides, and his response was neither yes nor no. It was, 'I'll do the best I can.'"

The court declined to excuse Juror No. 7258 for cause, but the court did excuse five other prospective jurors for cause. The prosecutor exercised three peremptory challenges, two against prospective jurors who were not African American and one against Juror No. 7258. The attorneys for the defendants exercised 10 peremptory challenges. The court called 18 additional prospective jurors.

b. Juror No. 8930

Of the second group of 29 prospective jurors, one was an African American man (Juror No. 8930), and an unspecified number were African American women. In response to the court's question whether anyone in the panel of prospective jurors had been charged with or arrested for a criminal offense, Juror

No. 8930 stated he was arrested for reckless driving and exhibition of speed and had pleaded no contest to reckless driving. The following discussion occurred:

"The Court: . . . Do you think the police treated you fairly?

"Juror No. 8930: They treated me okay.

"The Court: Okay. I'm not sure what that means, so you're going to share with me what—what does that mean to you?

"Juror No. 8930: Nothin' particular. It was just—I was just speeding. It was just being in the wrong place at the wrong time. But it was in Torrance, so it is what it is.

"The Court: And you say it was in Torrance. Does that mean something to you?

"Juror No. 8930: Honestly speaking?

"The Court: Yes.

"Juror No. 8930: When it comes to Torrance and black men, it's not a good combination.

"The Court: So, do you think there was some racial motivation behind the ticketing?

"Juror No. 8930: A little. A little.

"The Court: What about when you got to court, do you think that the court system treated you fairly?

"Juror No. 8930: The court was fine.

"The Court: Now, anything about that experience that causes you to think you'd be an unfair juror in this case?

"Juror No. 8930: No."

Counsel for Johnson sought to clarify the views of Juror No. 8930 on law enforcement. The prospective juror acknowledged, "I know I was speeding, but—okay, but I'm not going to give you a whole breakdown, but it—the underlying issue, but people know with Torrance." Counsel for Johnson surmised the underlying issue may have been "other things going' on," to which Juror No. 8930 stated, "Exactly, exactly, exactly." Counsel for Johnson also

asked Juror No. 8930 about his opinion on gangs and criminal acts, and the prospective juror stated, "I can't fault him for being in a gang. Doing the act, that's different." The prosecutor asked Juror No. 8930 if he would be "comfortable" as a juror making a decision "based solely on the evidence," to which the prospective juror answered, "No problem." The prosecutor exercised his fourth peremptory challenge against a prospective juror who was not African American, and the defense attorneys exercised five peremptory challenges before accepting the panel.

For the selection of the alternates, the prosecutor exercised his fifth peremptory challenge against Juror No. 8930. Counsel for Mitchell objected under *Batson*/*Wheeler*. Counsel for Mitchell argued to the court that, although there were African Americans seated on the jury panel, there were no African American men, and the prosecutor did not ask Juror No. 8930 any questions. Counsel for Johnson argued the prosecutor had already exercised a peremptory challenge against the only other African American man (Juror No. 7258) and the peremptory challenge against Juror No. 8930 was a second challenge to an African American man.

The prosecutor argued the defendants had not established a prima facie case, and he began to state his reasons for striking Juror No. 7258. The court, however, stopped him from doing so and asked the prosecutor to limit his argument to whether the defense had made a prima facie case. The prosecutor argued Juror No. 8930 was "extremely hostile" and was not "a person that's gonna gel with the remaining jurors." The court clarified it had not yet made a finding the defense had made a prima facie case: "This is just a question of whether or not, by exercising your [peremptory] challenge against Juror Number [8930], that somehow establishes a systematic exclusion of African American men." The court further stated it had interrupted the prosecutor

because the prosecutor was starting to give his reasons for exercising the peremptory challenge, which the court could not consider in determining whether the defense had made a prima facie case under *Batson*/*Wheeler*. The court ultimately allowed the prosecutor to make a record, and the prosecutor argued he was "bothered" about the prospective juror's comments of "Wrong place, wrong time" and "I can't fault him for being in a gang."

The court denied the *Batson*/*Wheeler* motion, ruling the defendants had not satisfied their burden of showing a prima facie case of discrimination. The court pointed out there were at least three African American jurors on the panel the prosecutor had accepted "several times." The court also stated it had considered excusing Juror No. 7258 for cause, as the court had stated on the record. The court ruled the prosecutor's peremptory challenge against Juror No. 7258 was not circumstantial evidence the peremptory challenge against Juror No. 8930 was a "systematic exclusion of African American males." The court stated, "I don't find it to be a prima facie case of systematic exclusion." The court pointed out the two victims in this case were both African American and one of the alternate jurors accepted by the prosecutor was an African American man.

2. *Applicable Law*

"[T]he exercise of even a single peremptory challenge solely on the basis of race or ethnicity offends the guarantee of equal protection of the laws under the Fourteenth Amendment to the federal Constitution. [Citations.] Such conduct also violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under . . . the state Constitution." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157.)

"When a party raises a claim that an opponent has improperly discriminated in the exercise of peremptory

challenges, the court and counsel must follow a three-step process." (*People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1158; see *People v. Lenix* (2008) 44 Cal.4th 602, 612 ["[t]he *Batson* three-step inquiry is well established"].) "'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination."'" (*People v. Cunningham* (2015) 61 Cal.4th 609, 663.)

"Ordinarily, we review the trial court's denial of a *Wheeler*/*Batson* motion deferentially, considering only whether substantial evidence supports its conclusions." (*People v. Bonilla* (2007) 41 Cal.4th 313, 341; accord *People v. Cox* (2010) 187 Cal.App.4th 337, 342.) If the record shows the trial court used an incorrect standard, however, we "independently review the record to '"'resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror on the basis of race."'" (*People v. Cunningham, supra,* 61 Cal.4th at p. 664.) For example, in *People v. Cunningham*, because the trial court appeared "to have used an incorrect standard, finding 'no systematic pattern of exclusion,' rather than no inference of discriminatory purpose," the Supreme Court conducted an independent review of the record. (*Ibid.*) The trial court in this case appears to have made the same error: In ruling the defendants failed to show a prima facie case, the trial court used the phrase no "systematic exclusion based on race or gender" rather than "no inference of discriminatory purpose." Because it

appears the trial court used an incorrect legal standard, we review the court's ruling de novo.

3. *The Trial Court Did Not Err in Finding No Prima Facie Case of Discrimination*

"'In deciding whether a prima facie case was stated, we consider the entire record before the trial court [citation], but certain types of evidence may be especially relevant: "[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention."'" (*People v. Parker* (2017) 2 Cal.5th 1184, 1211-1212.) "'A court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and "clearly established" in the record [citations] and that necessarily dispel any inference of bias.'" (*People v. Sanchez* (2016) 63 Cal.4th 411, 434-435; see *People v. Zaragoza* (2016) 1 Cal.5th 21, 43 ["a prima facie case of discrimination can be established only if the *totality* of the relevant facts gives rise to an inference of discriminatory purpose"].)

None of the factors courts consider in determining whether the moving party has stated a prima facie case weighs in favor of finding a prima facie case here. First, while the prosecutor did challenge two African American men in the pool of 47 prospective jurors,[4] it appears there were only three African American men in the pool, or 6.3 percent of the venire. Such a small size ""makes drawing an inference of discrimination from this fact alone impossible. . . . As a practical matter, . . . the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion."" (*People v. Parker*, *supra*, 2 Cal.5th at p. 1212; see *ibid.* [prosecutor's peremptory challenges against the only two African Americans in a 136-person pool of prospective jurors was insufficient to support inference that the prosecutor challenged the two prospective jurors because of their race]; *People v. Harris* (2013) 57 Cal.4th 804, 835 [given lack of African American prospective jurors, the fact that the prosecutor exercised peremptory challenges against the two who had been called to the jury box did not establish a prima facie showing]; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 343 [prosecutor's peremptory challenges against two African Americans in a pool of 78 prospective jurors did not establish a prima face case].)

African American men are a cognizable group for purposes of *Batson*/*Wheeler*. (See *People v. Gray* (2001) 87 Cal.App.4th 781, 790; cf. *People v. Bell* (2007) 40 Cal.4th 582, 597 ["African-American women constitute a cognizable group under *Wheeler*"], disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) The narrower the definition of the

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[4] There were 29 prospective jurors in the first group. The trial court excused five prospective jurors for cause, and the prosecutor and defense attorneys asked the court to excuse 13. The court then called an additional 18 prospective jurors.

cognizable group, however, the more difficult it becomes to draw inferences from the small size of the sample. "[G]iven numerous (increasingly small) subcategories and cross-categories of individuals, one is increasingly likely to find, somewhere, a particular category for which one side or the other happens to have stricken most or all of the (few) members of the group—not for reasons of discrimination, but as a simple consequence of the laws of probability. In such circumstances, the force of any corresponding inference of discrimination will necessarily be weakened." (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 344.) Thus, at first glance it appears the prosecutor exercised a seemingly disproportionate number of his peremptory challenges against African American men: two out of five, or 40 percent, out of a panel of 47 prospective jurors. This percentage, however, does not support an inference of discrimination because there was such a low representation of African American men in the panel (three out of 47, or 6.3 percent). (See *People v. Parker*, *supra*, 2 Cal. 5th at p. 1212, fn. 12 ["'[a] more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge'"].)

For example, in *People v. Bell*, *supra*, 40 Cal.4th 582 the prosecutor used two of 16 (or 12.5 percent) of his peremptory challenges against African American women, but there were only three African American women in the panel of 47 prospective jurors (or 6.4 percent). (*Id.* at p. 599, fn. 4.) The Supreme Court observed that, even though the former figure was almost twice the latter, "because of the small sample size the disparity carries relatively little information." (*Ibid.*) Similarly, here, the disparity between the percentage of peremptory challenges the prosecutor exercised against African American men and the

percentage of African American men in the jury pool does not carry sufficient statistical significance to support an inference of discrimination. (See *People v. Cunningham*, *supra*, 61 Cal.4th at pp. 664-665 [prosecutor's use of three of eight (or 38 percent) of his peremptory challenges to excuse African American prospective jurors did not support an inference of discrimination where the other two African Americans were seated on the jury]; *People v. Roldan* (2005) 35 Cal.4th 646, 703 [prosecutor's use of two out of eight (or 25 percent) of the prosecutor's peremptory challenges against African Americans did not establish a prima facie case], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22].)

Second, although Mitchell correctly observes the prosecutor failed to engage Juror No. 8930 in "'meaningful voir dire,'" the record shows further questioning by the prosecutor was not warranted. Although the prosecutor asked Juror No. 8930 only one question about his ability to base his decision on the evidence, the court and the attorneys for the defendants had extensively questioned the prospective juror about his perception that his speeding ticket incident was racially motivated and whether, notwithstanding that experience, he believed he could be fair and impartial. The prosecutor's failure to ask Juror No. 8930 about matters the prospective juror already disclosed did not raise an inference of bias. (See *People v. Melendez* (2016) 2 Cal.5th 1, 19 [prosecutor's failure to question a challenged juror was "of little significance" where court used a questionnaire and attorneys for the defendants questioned the juror at length]; *People v. Edwards* (2013) 57 Cal.4th 658, 699 ["although it is true that the prosecutor questioned some prospective jurors at greater length than he did [an African American prospective juror], he also engaged in perfunctory questioning of other prospective jurors, and at times declined to ask any questions at all," and

"[t]he record therefore provides no indication that there was any discernible racial pattern to the prosecutor's questioning"].)

Third, although Mitchell, like Prospective Juror Nos. 7258 and 8930, was an African American man, any inference of discrimination was weakened by the fact that the two victims were also African American men. (See *People v. DeHoyos* (2013) 57 Cal.4th 79, 116 [that the defendant and the victim were same race supported the court's denial of the *Batson*/*Wheeler* motion]; *People v. Jones* (2017) 7 Cal.App.5th 787, 806 [that the victims were in same protected class as the defendant supported the court's finding of no prima facie case].)

Fourth, the prosecutor accepted three African American women on the jury panel multiple times, and one of the four alternate jurors was an African American man. "[U]ltimate inclusion on the jury of members of the group allegedly targeted by discrimination indicates "'good faith'" in the use of peremptory challenges, and may show under all the circumstances that no *Wheeler*/*Batson* violation occurred." (*People v. Garcia* (2011) 52 Cal.4th 706, 747-748; see *People v. Bell*, *supra*, 40 Cal.4th at p. 599 [no inference of discrimination where the jury included three African American men, even though the prosecutor had exercised peremptory challenges against two of three African American women]; *People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 15 [the number and order of minority prospective jurors challenged, compared to representation of such minority groups in entire venire, was not sufficient to establish prima facie case, particularly where the jury included members of the same minority groups]; *People v. Jones*, *supra*, 7 Cal.App.5th at pp. 803, 806 [no inference of discrimination where the prosecutor exercised three of nine peremptory challenges against African Americans but retained two African Americans on jury panel].)

Finally, the record discloses obvious race-neutral reasons for the prosecutor's exercise of his peremptory challenge against Juror No. 8930. Juror No. 8930 had a prior encounter with the police that he believed was, at least in part, racially motivated. He admitted he was speeding, but believed he received a citation because of an "underlying issue." Even though this prospective juror stated he could be fair, his responses suggested a negative view of law enforcement and its treatment of African American men. (See *People v. Montes* (2014) 58 Cal.4th 809, 854-855 [peremptory challenge based on prospective juror's negative experience with law enforcement was valid].) This race-neutral reason, apparent from the record, dispels any inference that bias motivated the prosecutor to challenge Juror No. 8930. (See *People v. Sanchez*, *supra*, 63 Cal.4th at pp. 434-435.)

With respect to Juror No. 7258, he displayed signs of, and admitted he had, physical illness and confusion. Juror No. 7258 also stated he had an aversion to the word "judgment," which reasonably indicated he would have difficulty judging the facts in the case. (See *People v. Sattiewhite* (2014) 59 Cal.4th 446, 470 ["[w]hen . . . a prospective juror exhibits obvious signs of being unsuitable for the jury, the inference that the prosecutor excused the juror on an improper basis becomes less tenable and a correspondingly greater showing is required to support that inference"]; see also *People v. O'Malley* (2016) 62 Cal.4th 944, 975 ["'[a] prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons'"].)

4. *The Trial Court Did Not Make an Implied Finding of Discrimination*

Mitchell argues that, because the trial court "solicited" an explanation from the prosecutor without first ruling whether

there was a prima facie case, the court made "an implied prima facie finding" of discrimination. Mitchell argues that, under such circumstances, we should skip step one and proceed directly to step three of the *Batson/Wheeler* analysis without analyzing whether the record shows a prima facie case of discrimination. Mitchell is factually and legally wrong.

"[A]n appellate court properly reviews the first-stage ruling if the trial court has determined that no prima facie case of discrimination exists, then allows or invites the prosecutor to state reasons for excusing the juror, but refrains from ruling on the validity of those reasons." (*People v. Scott* (2015) 61 Cal.4th 363, 386.)[5] "A trial judge who asks a prosecutor to respond to a [*Batson/*]*Wheeler* motion is not required to forcibly interrupt the prosecutor when the response concerns not whether a prima facie case was made, but the prosecutor's reasons for exercising his peremptory challenges, in order to retain his or her discretion to determine whether a prima facie case was established. 'Thus, when an appellate court is presented with such a record, and concludes that the trial court properly determined that no prima facie case was made, it need not review the adequacy of counsel's justifications for the peremptory challenges.'" (*People v. Davenport* (1995) 11 Cal.4th 1171, 1200-1201, overruled on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

The record shows the trial court restricted the prosecutor to addressing the question whether the defendants had made a

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[5] Even if the trial court determines the prosecutor's stated reason is genuine, if the court has first determined no prima facie case exists, "an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling." (*People v. Scott, supra,* 61 Cal.4th at p. 391.)

prima facie case. The court interrupted the prosecutor when he tried to offer justifications for his peremptory challenges, and the court repeatedly focused the argument on whether the defendants had shown a prima facie case. Contrary to Mitchell's characterization, the court did not "solicit" a justification, but rather gave the prosecutor an opportunity to make a record regarding his reasons for exercising a peremptory challenge against Juror No. 8930. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122-1123 [trial court does not make an implied finding of prima facie case when the court expressly finds no prima facie case but allows the prosecutor to state reasons for the peremptory challenges, but the trial court does make an implied finding when the court immediately asks the prosecutor to justify the questioned challenges]; *People v. Davenport, supra,* 11 Cal.4th at p. 1200 [trial court does not make an implied finding of a prima facie case when the court states the defendant has not made a prima facie case and does not solicit the prosecutor's reasons for the peremptory challenges and the prosecutor offers reasons for the challenges]; see also *People v. Cunningham*, *supra*, 61 Cal.4th at p. 660, fn. 12 [the "better practice" is to allow the prosecutor to make a record of race-neutral reasons for excusing jurors in question, even though court finds no prima facie case of discrimination].)[6]

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[6] Mitchell's reliance on *People v. O'Malley*, *supra*, 62 Cal.4th 944 and *People v. Arias*, *supra*, 13 Cal.4th 92 is misplaced. In both of those cases the trial court did not determine whether the defendant had established a prima facie case and, instead, skipped the first step and proceeded directly to the third step of evaluating the prosecutor's reasons for exercising the peremptory challenges. (See *People v. O'Malley*, at pp. 974-975; *People v. Arias*, at p. 135.) In contrast, the trial court here made clear it was limiting its ruling to the finding of no prima facie case of

B. *Admission of the Gang Expert's Testimony Violated Neither State Law Hearsay Rules Nor Mitchell's Right to Confrontation, and Any Error Was Harmless*

Mitchell contends that Detective Magadan "related case-specific hearsay as true" and that, because the hearsay was "testimonial," its admission "violated [his] right to confrontation." Mitchell identifies four areas of Detective Magadan's testimony that he argues were "case-specific testimony": (1) statements about an ongoing war between Mob Piru and Cedar Block Piru; (2) testimony about an October 21, 2014 shooting in which a member of Mob Piru was injured and the target of the shooting was a member of Cedar Block Piru; (3) the detective's opinion that Tipton was a member of Mob Piru; and (4) testimony that the individuals who committed the two predicate offenses for purposes of the gang enhancement under section 186.22 were members of the Mob Piru gang. Mitchell argues the People could not have proved the gang allegation without Detective Magadan's testimony about these facts. Detective Magadan's testimony about the first two facts, however, violated neither state law hearsay rules nor Mitchell's right to confrontation, and any error in admitting Detective Magadan's testimony on all four issues was harmless.

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discrimination and refrained from making a ruling on the prosecutor's reasons. The fact that the prosecutor volunteered one or more nondiscriminatory reasons for excusing the juror "'is of no relevance at the first stage.'" (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 435.)

1. *The Gang Expert Testimony*

Detective Magadan worked for nine years as a gang detective in Compton, where he patrolled the streets, documented the activities of the city's gangs, and investigated crimes committed by Mob Piru. Detective Magadan testified Mob Piru is a criminal street gang and its primary activities are possession of narcotics for sale, assault with deadly weapons, attempted murder, and murder. In 2015 there were approximately 180 active members.

Detective Magadan also testified that territory is very important to a criminal street gang because most of the crimes the members commit are within the territory claimed by the gang. By committing crimes in the gang's territory, gang members create an atmosphere of fear and intimidation, making people reluctant to testify against them, which in turn enables the members of the gang to commit crimes freely. Going to the police or testifying against a gang member who committed a crime is considered "snitching," which can put the witness in danger. Gang members assault, shoot, or kill people to prevent them from reporting crimes.

Detective Magadan testified that criminal street gangs that do not maintain control of their territory are targeted and attacked by rival gangs seeking to take over their territory. When a gang member has been attacked by a member of another gang, his fellow gang members will retaliate. Rival gangs perceive a failure to retaliate as weakness.

Detective Magadan explained that going into a rival gang's territory is a sign of disrespect. Respect is very important to a gang like Mob Piru because its members thrive on fear and respect from fellow gang members and rival gang members. Having respect gives a gang member greater influence over fellow gang members, and a gang member gains respect by committing crimes.

With regard to this case, Detective Magadan testified that he encountered Tipton at a well-known Mob Piru hangout in Compton and assisted in investigating an incident involving Tipton three months prior to the shooting in this case. The incident led to Tipton's conviction for assault with a deadly weapon on a peace officer. Detective Magadan concluded Tipton was a member of Mob Piru based on his observations that Tipton associated with members of the gang at known gang locations, had tattoos indicating his affiliation with the gang, and admitted he was a member of the gang. Tipton had a tattoo with the letters "MOB."

Detective Magadan's testimony that Tipton had been convicted of assault with a deadly weapon on a peace officer was one of the predicate offenses the People used to establish Mob Piru's pattern of criminal activity. For the second predicate offense, Detective Magadan testified that another gang member, Kevin White, had been convicted of three counts of attempted murder four months prior to the shooting in this case. Detective Magadan personally responded to the scene of that shooting, assisted with the investigation, and determined White was a member of Mob Piru.

Based on a hypothetical mirroring the facts in this case,[7] Detective Magadan testified the shooting was committed to benefit the gang because the gang members demonstrated they were willing to enter rival gang territory and commit a violent assault in retaliation for a shooting of one of their gang members. Detective Magadan testified that this act created an atmosphere of fear and intimidation, not only in the gang's territory, but in the rival gang's territory, which allowed the members to commit crimes freely. The detective stated the shooting also benefited the individual gang members because they gain status by committing violent crimes, which builds their reputation and makes them more influential. Detective Magadan testified the shooting was also committed in association with a criminal street gang because two members of Mob Piru entered Cedar Block Piru territory in retaliation for the shooting of another gang member.

2. *Applicable Law*

Section 186.22, subdivision (b)(1), imposes additional penalties on "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." The enhancement "applies when a defendant has personally

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[7] The prosecutor asked Detective Magadan to assume that on October 21, 2014 a Mob Piru gang member is shot in the face in Mob Piru gang territory; two days later, two Mob Piru gang members and another individual arm themselves and drive into territory controlled by their rival, the Cedar Block Piru gang; they approach two individuals, ask them "Where are you from?" and find out they do not belong to any gang; and the gang members in the car open fire on the two individuals and then flee.

committed a gang-related felony with the specific intent to aid members of that gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 68; see *People v. Garcia* (2017) 9 Cal.App.5th 364, 379.) To establish that a group is a criminal street gang within the meaning of the statute, the People must prove the gang "'(1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in "a pattern of criminal gang activity."'" (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 698; see *People v. Ochoa* (2017) 7 Cal.App.5th 575, 581.) "[A] 'pattern of criminal activity' means the commission of, attempted commission of, conspiracy to commit . . . solicitation of, . . . or conviction of two or more of . . . [the enumerated] offenses . . . and the offenses were committed on separate occasions, or by two or more persons." (§186.22, subd. (e); see *Sanchez*, *supra*, at p. 698.)

"'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the . . . section 186.22, subdivision (b)(1), gang enhancement." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; see *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513 [an expert may testify about the "'"motivation for a particular crime, generally retaliation or intimidation," and "whether and how a crime was committed to benefit or promote a gang"'"].) An expert may also provide testimony that a gang "engage[s] in various criminal practices" to establish the "primary activities" element of section 186.22, subdivision (f). (*People v. Prunty* (2015) 62 Cal.4th 59, 82; see *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411.)

The Confrontation Clause, however, imposes limits on the admissibility of gang expert testimony. (See *Crawford v. Washington* (2004) 541 U.S. 36, 53-54 (*Crawford*).) "Gang

experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception." (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 685.)[8] Background information includes "general gang behavior," "descriptions of the . . . gang's conduct and its territory," (*id.* at p. 698) the gang's "'primary activities,'" and its "'rivalry with [another gang].'" (*People v. Vega-Robles, supra,* 9 Cal.App.5th at p. 411; see *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1247 [expert testimony about a gang's rivals is admissible as background information]).

"What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 686.) "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. . . . If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id.* at p. 686, fn. omitted.)

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[8] "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 676.)

Thus, "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term."[9] (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 680.) "We review the trial court's determination as to the admissibility of evidence (including the application of the exceptions to the hearsay rule) for abuse of discretion [citations] and the legal question whether admission of the evidence was constitutional de novo." (*People v. Mayo* (2006) 140 Cal.App.4th 535, 553; see *People v. Seijas* (2005) 36 Cal.4th 291 304 [review of a constitutional challenge, such as whether the admission of extrajudicial statements violated the confrontation clause, is de novo]; *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932,

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[9] The U.S. Supreme Court "has offered various formulations of what makes a statement testimonial but has yet to provide a definition of that term of art upon which a majority of justices agree." (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 687.) "Synthesizing the high court's numerous opinions following *Crawford*, the *Sanchez* court defined testimonial hearsay as 'statements about a completed crime, made to an investigating officer by a nontestifying witness . . . unless they are made in the context of an ongoing emergency . . . or for some primary purpose other than preserving facts for use at trial.'" (*People v. Vega-Robles*, *supra*, 9 Cal.App.5th at p. 409.)

964 ["[w]e review de novo a claim under the confrontation clause that involves mixed questions of law and fact"].)

3. *The Trial Court Did Not Prejudicially Err in Admitting the Gang Expert Testimony*

a. *The Admission of the Testimony About the Gang Rivalry Was Not Error, and Any Error Was Harmless*

Detective Magadan's testimony about the rivalry between Mob Piru and Cedar Block Piru was the kind of background information that an expert may relate. (See *People v. Vega-Robles*, *supra*, 9 Cal.App.5th at p. 411.) The detective based his testimony on the "several shootings over the past several years" between the two gangs that resulted in murders on both sides. He did not relate any case-specific information based on hearsay sources.

Mitchell argues Detective Magadan did not identify the source of his knowledge about the rivalry between Mob Piru and Cedar Block Piru, but the record shows Detective Magadan had personal knowledge of the rivalry because he responded to at least two shootings involving Mob Piru and one of his primary duties was to investigate crimes committed by Mob Piru. Moreover, even if the detective had based his testimony in part on hearsay, the information he conveyed was general in nature. (See *People v. Sanchez*, *supra*, 63 Cal.4th at p. 675 ["experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc."]; *People v. Vega-Robles, supra,* 9 Cal.App.5th at p. 411 [testimony about a gang's rival was general background information, even if it was based on hearsay sources like gang

members and gang officers].) Detective Magadan's testimony about the rivalry between the two Piru gangs did not violate state law hearsay rules or Mitchell's right to confrontation.

Moreover, any error in admitting his testimony was harmless beyond a reasonable doubt. (*People v. Sanchez*, *supra*, 63 Cal.4th at pp. 698-699; see *People v. Capistrano* (2014) 59 Cal.4th 830, 873 [harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) applies to confrontation clause violations].) The evidence of graffiti by the two gangs showed the hostility and rivalry between them. Mitchell shot at his victims in territory claimed by Cedar Block Piru. Johnson testified that on the way to the shooting Mitchell and Tipton were angry about a prior shooting of another member of their gang. Because the jury heard abundant evidence of the rivalry between the two Piru gangs other than Detective Magadan's testimony, any confrontation clause error in the admission of the detective's testimony on this point was harmless beyond a reasonable doubt. (See *People v. Bryant* (2014) 60 Cal.4th 335, 395.) Nor can Mitchell show it was "reasonably probable" (*People v. Wall* (2017) 3 Cal.5th 1048, 1060) he would have obtained a more favorable result in the absence of any state hearsay error. (See *People v. Stamps* (2016) 3 Cal.App.5th 988, 997 [hearsay error evaluated under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) standard].)

b. *The Admission of Testimony About the Prior Shooting Was Not Error, and Any Error Was Harmless*

An expert's testimony based on personal knowledge of case-specific facts is admissible and does not violate state law hearsay rules nor the confrontation clause. (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 683; see *People v. Vega-Robles, supra,* 9 Cal.App.5th

at p. 413.) Detective Magadan personally responded to the scene of the October 21, 2014 shooting. His testimony that the victim of the shooting was a Mob Piru gang member and that the targets of that shooting were members of the Cedar Block Piru gang was based on his personal knowledge; he did not rely on any hearsay. Mitchell argues it is "reasonable to infer" that Detective Magadan derived his knowledge about the involvement of Cedar Block Piru in the prior shooting from a police report because the detective did not identify the source of his knowledge and, when asked about the location of the shooting, he had to refer to the report to refresh his recollection. The detective, however, did not testify about the contents of the report, but to his personal recollection after his recollection was refreshed. There was nothing improper about that. (See *People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1039 ["'[a] witness may refer to hearsay to refresh his recollection'"].)

In any event, any error in admitting Detective Magadan's testimony on this point was harmless under either the *Watson* or *Chapman* standard because there was other evidence the shooting in this case was gang-related. Johnson testified Mitchell and Tipton were angry about the prior shooting. In addition, even without evidence of the prior shooting, there was sufficient evidence that the shooting in this case was gang-related. Smith and Thompson testified Mitchell made a gang challenge right before he began shooting. And Detective Magadan testified the shooting benefited the Mob Piru gang because it was committed in the territory of the rival Cedar Block Piru gang to intimidate the community and enable Mob Piru gang members to commit further crimes with impunity. Thus, even without Detective Magadan's testimony about the prior gang shooting, there was no reasonable doubt a rational jury would have found the shooting was gang-related.

c. *Any Error in the Admission of Testimony About Tipton's Gang Membership Was Harmless*

Detective Magadan's testimony that Tipton admitted he was a member of the gang was an out-of-court statement about a case-specific fact. (See *People v. Ochoa*, *supra*, 7 Cal.App.5th at p. 589.) Even if Detective Magadan's testimony that Tipton was an admitted gang member violated state law hearsay rules or Mitchell's right to confrontation, any error in its admission was harmless. Detective Magadan encountered Tipton at a "well-known Mob Piru hangout." Detective Magadan testified Tipton associated with gang members and had "MOB" tattoos confirming his affiliation with the gang. (See *People v. Sanchez*, *supra*, 63 Cal.4th at p. 677 [an expert's opinion regarding gang membership based on tattoos is admissible]; *People v. Iraheta*, *supra*, 14 Cal.App.5th at p. 1248 [personal observations by gang experts of gang member's tattoos, attire, companions, and location were admissible].) Detective Magadan served a search warrant at a well-known Mob Piru residence where Tipton was present. In addition, Johnson testified Tipton stated his gang affiliation when he challenged him in the car.[10] Even without Tipton's admission to Detective Magadan that he was a member of the Mob Piru gang, there was overwhelming evidence that he was. (See *People v. Ochoa, supra,* 7 Cal.App.5th at p. 587 [even without an admission by the defendant's associates, other evidence established their gang membership].)

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[10] The *Sanchez* court noted "[n]either we nor the high court has had occasion to consider the rule when a defendant offers hearsay that may work to the detriment of a codefendant." (63 Cal.4th at p. 680, fn. 6.) Mitchell does not challenge the admissibility of any portion of Johnson's testimony.

Finally, even without the evidence that Tipton was a Mob Piru gang member, there was evidence Mitchell committed the shooting to benefit Mob Piru. Gang membership may be relevant (although it is not required) to prove the shooting was committed to benefit a gang. (See *People v. Sanchez*, *supra*, 63 Cal.4th at pp. 698-699). Mitchell does not challenge the evidence establishing *his* gang membership. Therefore, even without evidence of Tipton's gang membership, Mitchell's criminal conduct and gang membership was sufficient for the jury to find he committed the shooting to benefit the gang. Detective Magadan's testimony about Tipton's admission was harmless under either the *Watson* or *Chapman* standard.

d. *Any Error in the Admission of Testimony About the Predicate Acts of Mob Piru Gang Members Was Harmless*

Finally, any error in the admission of Detective Magadan's testimony repeating Tipton's statement that he was a member of Mob Piru at the time he committed the (predicate) offense of assault with a deadly weapon on a peace officer was harmless because there was overwhelming evidence that Tipton was a member of the gang at that time. Tipton had gang tattoos, frequented known Mob Piru hangouts, associated with known Mob Piru gang members, and told Johnson he was a member of Mob Piru at the time of the shooting in this case, which was only three months after he was convicted of assaulting a peace officer. And Tipton was arrested for that offense at a location where Mob Piru gang members often congregate. Even without Detective Magadan's testimony about Tipton's admission, there is no reasonable doubt the jury would have found Tipton was a member of Mob Piru when he assaulted the peace officer.

With respect to Detective Magadan's testimony that Kevin White was a member of Mob Piru at the time he committed attempted murder, any error in its admission was harmless because the People may use the currently charged offense as one of the predicate offenses. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 624, disapproved on another ground in *People v. Sanchez*, *supra*, 63 Cal.4th at p. 686; *People v. Miranda* (2016) 2 Cal.App.5th 829, 840). Therefore, the People needed only one additional predicate offense to establish a "pattern of criminal gang activity" under section 186.22, subdivision (e), and Tipton's conviction for assault with a deadly weapon on a peace officer was that conviction.[11] The admission of Detective Magadan's testimony about White was harmless because there is no reasonable doubt the jury would have Mob Piru engaged in a pattern of criminal activity.

C. *Trial Counsel for Mitchell Was Not Ineffective*

Detective Edgar Solano testified he arrested Tipton on July 13, 2014 and determined he was a member of Mob Piru based on a number of facts, including Tipton's admission during

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[11] The admission of this evidence was also not erroneous because Mitchell fails to show the detective relied on testimonial hearsay. Detective Magadan explained he believed White was a member of Mob Piru because he personally responded to the scene of the attempted murders and assisted with the investigation. The record does not show Detective Magadan relied on any testimonial hearsay for his opinion that White was a member of the gang, and "we cannot simply assume the admissions to gang membership related by [the gang expert] were testimonial hearsay." (*People v. Ochoa*, *supra*, 7 Cal.App.5th at p. 585; see *People v. Giordano* (2007) 42 Cal.4th 644, 666 [""error must be affirmatively shown"""].)

his arrest, his admissions to the detective on two prior occasions, the tattoos on Tipton's arms, and the fact that Tipton was in the company of Williams, a known Mob Piru gang member. Solano testified to these facts while he referred to a field identification card, and he explained the purpose of the field identification card was to help officers "identify gang members out in the street."

Mitchell argues his trial counsel provided ineffective assistance by failing to object to Detective Solano's testimony. Mitchell argues the testimony violated his right to confrontation because the contents of the field identification card were testimonial hearsay. Mitchell's contention that he received ineffective assistance fails because he cannot show prejudice.

"'"In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel."'" (*People v. Brown* (2014) 59 Cal.4th 86, 109.)

On direct appeal, "'[a]n appellate court's ability to determine from the record whether an attorney has provided constitutionally deficient legal representation is in the usual case severely hampered by the absence of an explanation of an attorney's strategy.' [Citation.] For this reason . . . "'[i]f the record on appeal fails to disclose why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation or failed to provide one, or unless there

simply could be no satisfactory explanation, the claim must be rejected on appeal. [Citations.]'" [Citations.] The merits of such claims are more appropriately resolved, not on the basis of the appellate record, but rather by way of a petition for writ of habeas corpus." (*People v. Johnson* (2016) 62 Cal.4th 600, 653.)

"'[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*People v. Carrasco* (2014) 59 Cal.4th 924, 982.) Mitchell cannot show he "suffered prejudice to a reasonable probability" (*People v. Brown*, *supra*, 59 Cal.4th at p. 109) from the admission of Solano's testimony that Tipton was a member of Mob Piru. "'Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.'" (*People v. Pettie* (2017) 16 Cal.App.5th 23, 80.) As discussed, there was overwhelming evidence Tipton was a Mob Piru gang member. Detective Magadan and Johnson both testified that Tipton admitted he was a gang member, Tipton had "MOB" tattoos, and he associated with Mob Piru gang members. Detective Solano's testimony was a drop in a sea of evidence that Tipton was a member of Mob Piru. There is no reasonable probability the jury would have found otherwise. (See *People v. Bona* (2017) 15 Cal.App.5th 511, 522-523 [because it was not reasonably probable an objection under *Sanchez* would have led to a more favorable result, trial counsel was not ineffective in failing to object].)

D. *Mitchell Is Entitled to a New Sentencing Hearing*

1. *Senate Bill No. 620 Applies*

Senate Bill No. 620, which went into effect on January 1, 2018 and amended section 12022.53, subdivision (h), gives the trial court discretion to strike a firearm enhancement under section 12022.53: "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." (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.)[12] Mitchell contends, the People concede, and we agree the new law applies retroactively to this case. (See *People v. Conley* (2016) 63 Cal.4th 646, 656 ["'[i]t is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply,' including 'to acts committed before its passage[,] provided the judgment convicting the defendant of the act is not final'"].)

The People, citing *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 argue that "[r]emand is not appropriate because no reasonable court would exercise discretion under SB 620 to strike [Mitchell's] firearm enhancements." *People v. Gutierrez*, however, is distinguishable. In that case, while the appeal was pending in the Court of Appeal, the Supreme Court in a different case held

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[12] Prior to the amendment, section 12022.53, subdivision (h), provided, "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."

that trial courts have discretion to strike a serious or violent felony conviction. The Court of Appeal in *People v. Gutierrez* held that resentencing was required "unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*People v. Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) The *Gutierrez* court concluded that remand would not serve any purpose in that case because the trial court had "stated that imposing the maximum sentence was appropriate. [The trial court] increased [the defendant's] sentence beyond what it believed was required by the three strikes law, by imposing the high term . . . and by imposing two additional discretionary one-year enhancements." (*Ibid.*) Here, although the trial court noted the "high degree of violence," the court did not express an intention to impose the maximum possible sentence, nor did the trial court state it would not exercise discretion to strike the enhancement even if it had the discretion. (Cf. *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 ["[t]he petition [for resentencing] may . . . be summarily denied if the record reflects that the sentencing court clearly indicated that it would not have exercised discretion to sentence under [the more lenient statute] even if it had been aware that it had such discretion"].)

Moreover, "'[d]efendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citation.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; see *id.* at pp. 1391-1392 [remand was appropriate because the record did not clearly indicate the trial court would have imposed the same sentence had it been aware of the full scope of

its discretion after a change in the law].) When the trial court sentenced Mitchell, section 12022.53, subdivision (h), prohibited the trial court from striking the firearm enhancement, and section 12022.53, subdivision (f),[13] required the trial court to impose it. The new law gives the trial court discretion to strike the enhancement "in the interest of justice."

2. *The Trial Court Must Correct the Unauthorized Sentence on the Second Attempted Murder Conviction*

On Mitchell's second conviction for attempted murder, the trial court imposed a term of life imprisonment with the possibility of parole and a minimum period of confinement of seven years, plus one-third of 20 years (six years eight months) for the enhancement under section 12022.53, subdivision (c). This sentence was unauthorized. Section 1170.1, subdivision (a), provides that, when a person is convicted of two or more felonies, the term for the second (and all other) felonies "shall consist of one-third of the middle term of imprisonment for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses."

But "section 1170.1's one-third limit for consecutive subordinate terms and enhancements does not apply" to a "'gun-use enhancement attached to an offense which carries an indeterminate term of imprisonment.'" (*People v. Felix* (2000) 22 Cal.4th 651, 656.) The punishment for attempted premeditated murder is an indeterminate prison term of "life with the

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[13] Section 12022.53, subdivision (f), provides the trial court "shall" impose an enhancement and, if more than one enhancement is found true, must impose the enhancement that provides the longest term of imprisonment.

possibility of parole." (*Id*. at p. 659.) Therefore, the trial court should have imposed the full term of the firearm enhancement to both attempted murder convictions. (See *id*. at pp. 653, 659 [trial court correctly imposed full term enhancements under section 12022.5 for each of defendant's murder convictions].)

3. *The Trial Court Must Strike or Impose the Minimum Parole Eligibility Alternate Penalty for the Gang Enhancement Under Section 186.22, Subdivision (b)(5)*

The trial court, citing *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, imposed but stayed the sentence under section 186.22, subdivision (b)(5). That was error.

The court in *People v. Valenzuela* modified the judgment "to stay imposition of the15-year minimum parole eligibility term set forth in section 186.22, subdivision (b)(5)," because the jury found only a principal, not the defendant, personally used a firearm.[14] (*People v. Valenzuela*, *supra*, 199 Cal.App.4th at p. 1238.) The court in *Valenzuela*, although correctly noting the defendant "was not subject to an enhancement for participation in a criminal street gang, in addition to the enhancement imposed under section 12022.5," incorrectly in our view relied on *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129 to stay imposition of the 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5). (See *People v. Valenzuela*, at p. 1238.) Although the Supreme Court in *Gonzalez* held "the Legislature intended the trial court to stay, rather than strike, prohibited

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[14] Section 12022.53, subdivision (e)(2), prohibits the trial court from imposing an enhancement under both section 186.22 and section 12022.53, unless the person personally used or personally discharged a firearm in the commission of the offense.

enhancements under section 12022.53" (*People v. Gonzalez*, at p. 1129), *Gonzalez* involved multiple enhancements under sections 12022.5 and 12022.53, not, as in *Valenzuela*, the penalty provisions under section 186.22 and section 12022.53.

The applicable Supreme Court case is *People v. Brookfield* (2009) 47 Cal.4th 583 (*Brookfield*), which, as here, involved the "the interplay between . . . section 186.22 . . . and section 12022.53." (*Brookfield*, at p. 588.) In *Brookfield* the Supreme Court held that section 12022.53, subdivision (e)(2), "barred the trial court . . . from imposing *both* the penalty of a life term under section 186.22(b)(4) and . . . the . . . enhancement under subdivisions (b) and (e)(1) of section 12022.53." (*Brookfield*, at p. 595.) The Supreme Court in *Brookfield* also held the Court of Appeal in that case had properly stricken the lesser sentence. (*Id.* at p. 597.) Thus, under *Brookfield*, the trial court in this case could have stricken the enhancement under section 186.22, subdivision (b)(5). (See, e.g., *People v. Gonzalez* (2010) 180 Cal.App.4th 1420, 1427 [striking the 15-year minimum parole eligibility period under section 186.22, subdivision (b)(5), because court cannot impose both the firearm enhancement and the gang enhancement on a defendant who does not personally discharge a firearm].) If, on resentencing, the trial court strikes the firearm enhancement under Senate Bill No. 620, then the court must impose the minimum parole eligibility penalty under section 186.22, subdivision (b)(5), unless the court exercises its discretion to strike the penalty in the interest of justice. (See § 186.22, subd. (g).)

Therefore, remand for resentencing is appropriate for three reasons. First, the trial court must have an opportunity to exercise its discretion under Senate Bill No. 620 to strike the firearm enhancement under section 12022.53, subdivision (h). Second, the trial court must correct the unauthorized sentence it

imposed on the second attempted premeditated murder conviction. (See *People v. Woods* (2010) 191 Cal.App.4th 269, 273.) Third, if the trial court strikes the firearm enhancement under section 12022.53, subdivision (h), the trial court must either strike or impose the 15-year minimum parole eligibility penalty under section 186.22, subdivision (b)(5).

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 resentencing hearing under Senate Bill No. 620, to correct the unauthorized sentence the court imposed on the second attempted premeditated murder conviction, and, depending how the court resentences Mitchell under Senate Bill No. 620, to strike or impose the gang penalty under section 186.22, subdivision (b)(5).

SEGAL, J.

We concur:

ZELON, Acting P. J. BENSINGER, J.*

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