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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. DASHAWN COLEMAN, Defendant and Appellant.	B281634 (Los Angeles County Super. Ct. No. TA138385)

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

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Colleen M. Tiedemann, and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

As charged by the Los Angeles County District Attorney's Office, a jury convicted defendant and appellant Dashawn Coleman with first degree murder (Pen. Code, § 187, subd. (a); count 1),[1] possession of a firearm by a felon (§ 29800, subd. (a)(1); count 5),[2] and assault with a semiautomatic firearm (§ 245, subd. (b); counts 6-8). Gang enhancements were found true as to all counts. (§ 186.22, subd. (b)(1)(B).) As to counts 1 and 6 through 8, the jury found that defendant personally used a firearm. (§§ 12022.5, subd. (a), 12022.53, subds. (b)-(d).) As to count 8, the jury found that defendant inflicted great bodily injury on the victim. (§ 12022.7, subd. (a).) And as to all counts, the trial court found that defendant had suffered a prior conviction. (§§ 667, subds. (a)-(i), 1170.12, subds. (a)-(d).)

Defendant was sentenced to 103 years to life in state prison: 25 years to life as to count 1, plus 50 years for the prior strike offense and 25 years for the firearm enhancement, together with two years in prison for each of counts 6, 7, and 8, plus two-year prior enhancements and three-year, four-month gang enhancements on those three counts. A six-year sentence was imposed and stayed as to count 5. Various fines and fees were imposed, and defendant received 534 days of actual custody credit.

Defendant timely appealed. He argues: (1) The trial court erred in failing to grant the defense motion for a mistrial for the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Counts 2 through 4 were omitted from the amended information, which was filed after defendant's first trial ended in a hung jury.

late prosecution discovery or to exclude the late-produced evidence; (2) The trial court erred in failing to instruct the jury with CALCRIM No. 319 [prior statements of unavailable witness]; (3) Insufficient evidence supports the gang enhancements; and (4) The matter must be remanded for the trial court to exercise its discretion to strike the section 12022.53 and 12022.5 allegations.

We affirm.

FACTUAL BACKGROUND

I. *Prosecution's Case*

A. Defendant's cousin is killed and the rumor-mill blames Kevin Goodrum (Goodrum)

Defendant grew up in the Imperial Courts Housing Project with two of his cousins, Mark Brider (Brider) and Deandre Fountain (Fountain). The three men were close friends; Brider was Fountain's older brother, while Fountain and defendant were around the same age.

Brider was killed in 2005, and both defendant and Fountain got memorial tattoos with his moniker, "PP." By this point, both defendant and Fountain were members of the PJ Watts Crips gang.

Neighborhood rumor blamed Brider's death on Goodrum,[3] who had also grown up in the area. Even several years later, Fountain admitted to police that some members of the family "had a little bit of a grudge" against Goodrum. Fountain still felt that "everything's going to come around," like "[k]arma."

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[3] Like Brider, defendant and Goodrum used aliases. Defendant was "Taco," and Goodrum was "KB."

B. Defendant chases Goodrum with a gun near the Imperial Courts Housing Project, but Goodrum escapes

Over the decade following Brider's death, defendant and Fountain were incarcerated at various times. By late 2015, both defendant and Fountain were free.

In August 2015, Goodrum was staying in the Imperial Courts Housing Project with his cousin, Frances Lawson (Lawson). One day early that month, at around 3:00 or 4:00 a.m., Lawson heard Goodrum scream. She looked outside, where she saw Goodrum's car parked in the middle of the street. When he came inside, "his eyes were real big . . . like he saw a ghost."

Goodrum looked like somebody had tried to kill him, and he told Lawson that defendant had been chasing him with an AK-47. Lawson looked outside again, and she saw four men standing at one end of her block. Another man was standing on his own near a car at the other end of the block, where Goodrum had been waylaid by defendant.

C. Goodrum insults Fountain; Fountain tells defendant; defendant shoots Goodrum

About a week later, at around 9:30 p.m. on August 15, 2015, Fountain and his girlfriend were in a parking lot at the Imperial Courts Housing Project. They were standing in an area known as "The Island," when Goodrum approached them and "said something smart" about Fountain's girlfriend, something like "who is this lovely . . . [s]he ready to get f***ed on camera?"

Defendant called Fountain on his cell phone a few minutes later, and they spoke for about one minute. Closed circuit video capture the next several minutes. Shortly after the telephone call ended, a Buick, like the one that defendant was using at the

time, pulled up near the Island. Two figures then walked over toward the car from the parking lot.

The Buick's driver, defendant,[4] got out of the car and ran across the parking lot with a rifle, approaching Goodrum around 9:45 p.m. Goodrum was standing with a group of people, including Shyieka Carrell (Carrell), Derricka Hayes, and Angela Cole (Cole). After a brief conversation, Goodrum said, "You're going to do me like this, you b**** a** n*****?", and defendant gave a warning to the crowd: "[O]n the count of three you all better move. I'm going to shoot." He then opened fire, killing Goodrum and wounding Cole.

More than 20 other people were in the parking lot near Goodrum at the time of the shooting. Most of them ran away, and "a lot of people" were "hollering and screaming." Lawson learned about the shooting within a few minutes, and hurried to see what had happened. Once she got to the Island, she overheard some of the bystanders talking to one another about the murder, saying "'Taco did it.'" One of Goodrum's aunts, Virginia Augustine (Virginia),[5] received a phone call from another witness at around the same time, informing her that "'Taco shot KB.'"

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[4] Although the video did not capture a clear image of the driver's face, defendant does not argue that there was insufficient evidence that he was the shooter/driver, and two witnesses identified the image as defendant.

[5] Because multiple witnesses with the same last name testified, we refer to them by their first names for clarity. No disrespect is intended.

Cell tower and Facebook GPS data from defendant's cell phone and Facebook account showed that, just after the shooting, defendant began moving away from the scene of the crime. He drove to Compton, then to Paramount, where he was arrested two months later.

D. Gang evidence

Defendant and Fountain were both members of the PJ Watts Crips. Several photographs were shown to the jury in which defendant could be seen "throwing up a gang sign." Defendant also had numerous gang-related tattoos.

Los Angeles Police Department Detective Francis Coughlin testified at trial as a gang expert. He stated that the PJ Watts Crips have about 600 members and a shared sign. Their main activities are selling drugs, robbery, and murder. They have a shared code that prohibits "snitching" on other gang members, and their territory is "[i]n and around the Imperial Courts Housing Development." Gang members generally "put[] in work" by committing violent felonies to "creat[e] fear" in the community.[6] They might also commit crimes that create a profit for the gang, or generally "promote . . . respect to that gang." PJ Watts Crips gang members had been convicted of predicate offenses on at least two prior occasions.

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[6] Notably, several of the witnesses who testified at trial were present during the shooting. At least four of them had revealed to Goodrum's family members that defendant was the shooter. Another witness had previously testified that she saw the shooter, but was afraid to talk about it. During trial, they all denied knowing what had happened. As one witness stated, even if he knew something, he "wouldn't tell you [the prosecutor] nothing."

In response to a hypothetical based on the facts of this case, Detective Coughlin testified that "there's a strong possibility [that the hypothetical shooting] was done in association with" the gang. It "had a benefit for the entire Project Crips street gang [on] multiple levels." He explained: "[I]t's been my experience that gangsters work in concert to help execute, commit a crime. [¶] I think based on the hypothetical and reviewing the video, you had two members of the same gang making notifications to each other before the murder. Both were in the same area. You could see one left from the vehicle after the phone call to execute the crime of the murder. [¶] This working in concert between the same gang is your association."

Detective Coughlin continued: "[The crime] sends a message to rival gang members in the neighborhood that if you want to go to war with the Project Crips, be prepared to die because we have the weapons to do it and we have the manpower to that. [¶] That benefits the gang because gangs like to sustain themselves and congregate in territory. . . . They're able to congregate with one another and plan their crimes and they're able to control that neighborhood. That's a big benefit to the gang. [¶] But I think the most important benefit, it sends a message to the community, the people who are good families, who are not gang members. And that message is respect the PJ Crips. This is our territory. If you interfere with us or our business, you may be killed. [¶] And after having such a long history of crimes like this, people are afraid. When people are scared, they don't want to contact the police about this gang. [¶] They definitely don't want to go to court and testify against this gang. They don't even want to go outside when this gang is outside loitering. That's a huge benefit to the Project Crips

because they feel like they can commit crimes without fear of prosecution."

Finally, Detective Coughlin noted that gang members could commit crimes "on their own for their own personal benefit," but when doing so, they could simultaneously have a "dual purpose" to benefit the gang.

II. *Defense case*

Los Angeles Police Department Officer Taylor Hitchens testified that one of the witnesses had described the shooter as about five feet five inches tall.[7] Janet Centeno, who had lived in the area for six or seven years, did not recognize defendant as the shooter.

DISCUSSION

I. *Late-produced discovery*

Defendant argues that the trial court erred in failing to grant the defense motion for a mistrial for late prosecution discovery or to exclude the late-produced evidence.

A. Relevant proceedings

During trial, Goodrum's aunt, Virginia, testified about what she heard from several neighbors in the immediate aftermath of the shooting. She testified that Lisa Knowles (Knowles) had called her on the phone, screaming, crying, and saying "'Taco shot KB.'" Virginia also testified that another neighbor, Dwight Lockett (Lockett), told her the next day that (1) he was present at the shooting, (2) he had seen the shooter, and (3) defendant was the shooter. She also testified that she told the police about Lockett's statement some time in August 2015.

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[7] Defendant is about six feet tall.

Defense counsel briefly cross-examined Virginia. He asked her about several statements she had made to the police, including: how many times she had met with detectives, whether she had told detectives that Knowles thought defendant was the shooter, and whether she had been able to identify various people in the surveillance video of the shooting. Defense counsel also asked one question concerning Virginia's statements to police about Lockett: "When the detectives came to your house in early to mid August of 2015, you did not mention any conversations you had with . . . Lockett . . . in the yard of your residence to the detectives; isn't that true?" Virginia replied, "No, it's not true. I mentioned it to him from the first beginning." Virginia later added that she had "explained" Knowles, Lockett, and a third witness to the police.

Los Angeles Police Department Detective Patrick Flaherty subsequently testified about statements Virginia had made to police. He agreed with the premise of defense counsel's final question to Virginia: He testified that Virginia had not mentioned Lockett at all.

After both Virginia and Detective Flaherty had testified, the prosecution discovered a previously undisclosed recording of Virginia being interviewed by a different detective in September 2015. The prosecutor disclosed the recording and described it to the court as follows: "[I]nvestigating officer Detective Kirby went through his murder book and in an effort to kind of get an idea of past interviews and prior statements regarding Virginia . . . , he came across a CD that I'm not familiar with. [¶] It's a phone call from Virginia . . . where she mentions . . . Lockett as having seen the whole thing. I haven't listened to it. I just literally found out

about this five minutes ago. I am fairly confident I do not have it since I scrolled through all of my discovery I have digitally."

Defense counsel moved for either exclusion of the recording or a mistrial.

Ultimately, the trial court determined that the recording was not kept from defendant in bad faith. It decided to admit the recording, deny defendant's request for a mistrial, and instruct the jury as to the late discovery. The jury was told that the recording had not been provided to defendant, and defense counsel cross-examined Detective Kirby about the late discovery.

The trial court also instructed the jury with CALCRIM No. 306: "Both the People and the defense must disclose their evidence to the other side before trial within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence to counter opposing evidence or to receive a fair trial. One or more members of the prosecutorial team failed to disclose an audio recording of Virginia . . . within the legal time period. In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."

B. Relevant law

Section 1054.1 requires the prosecutor in a criminal case to disclose certain information, including all "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at trial." (§ 1054.1, subd. (f).) If the prosecutor fails to comply with the statutory disclosure requirements, the trial court "may make any order necessary to enforce [those provisions], including, but not limited to, immediate disclosure, [initiating] contempt proceedings, delaying or prohibiting the testimony of a witness or

the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." (§ 1054.5, subd. (b); see *People v. Verdugo* (2010) 50 Cal.4th 263, 280.)

The trial court may exclude evidence "only if all other sanctions have been exhausted." (§ 1054.5, subd. (c).) And a mistrial should be granted only when "'a party's chances of receiving a fair trial have been irreparably damaged.'" (*People v. Welch* (1999) 20 Cal.4th 701, 749.)

We review a trial court's ruling on discovery matters for abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) This includes the trial court's denial of a motion for a mistrial based on the prosecutor's violation of the discovery statutes. (*Id*. at p. 282.) Moreover, the defendant bears the burden of demonstrating prejudice, and "[w]hether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.)

C. The trial court effectively addressed the late discovery by instructing the jury with CALCRIM No. 306

The trial court exercised its sound discretion in concluding that neither a mistrial nor exclusion of evidence was warranted. Any possible negative inferences were adequately addressed by the trial court's instruction to the jury.

Defense counsel's cross-examination of Virginia was short. His questioning about Lockett was even shorter. Indeed, defense counsel asked Virginia only one question about Lockett. Rather, it appears that defense counsel was more focused on whether Virginia had told the police that Knowles had identified

defendant as the shooter and whether Virginia could recognize specific people in the video of the shooting.

In other words, the question of when Virginia told police about Lockett was a relatively insignificant part of the defense strategy, and a relatively insignificant part of Virginia's testimony. It was particularly insignificant when weighed against the other evidence in this case. Video and GPS data showed defendant fleeing the shooting; defendant had attacked Goodrum just a week before; and at least one witness other than Lockett repeated the same story—"'Taco shot KB.'"

In urging reversal, defendant argues that the delayed disclosure made him look "foolish or incompetent, or . . . deceptive with the jury." To the extent a single question had the potential to create such an impression, that impression was cured by Detective Flaherty's testimony, which agreed with defense counsel's insinuation that Virginia did not mention Lockett. And, it was cured by the jury instruction, which told the jury that the prosecution had not complied with its obligation to provide the recording until partway through the trial. (*People v. Gonzales* (2011) 51 Cal.4th 894, 940 ["It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions"].)

Regardless, defendant has failed to show that the discovery violation was prejudicial. A violation of section 1054.1 is subject to the state law harmless error standard: The error is reversible only if it is reasonably probable that the error affected the result at trial. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13, overruled in part on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

As set forth above, neither the prosecutor nor defense counsel knew about the recording until partway through trial. The recording was relevant only to a minor point raised by a single witness. And the trial court instructed the jury with CALCRIM No. 306, which informed the jury that the interview recording was discovered during trial. If anything, this instruction could have led the jury to hold the late discovery against law enforcement witnesses like Detective Flaherty, who failed to disclose the conversation through "carelessness, haste[,] or too many cases."

In light of the overwhelming evidence of defendant's culpability—he chased Goodrum with a rifle the week before; he fled the scene of the crime after talking to Fountain; and multiple witnesses told Goodrum's family that defendant was the shooter—any error in addressing the late discovery was harmless.

II. *Trial court instructions*

Defendant argues that the trial court erred by failing to instruct the jury with CALCRIM No. 319.

A. Relevant proceedings

Defendant was tried twice. Four witnesses at those trials testified about several relevant pretrial conversations: Detective Flaherty, Los Angeles Police Department Detective Shandrea Porter, Goodrum's aunt Shawnte Augustine (Shawnte), and Carrell.

Detective Flaherty, Detective Porter, and Shawnte all testified in person at both trials. Carrell testified in person at the first trial, but she was unavailable for the second trial. Thus, her testimony from the first trial was read to the jury in the second trial.

Both times they testified, Detectives Flaherty and Porter described statements Carrell made to them during interviews. (Additionally, Detective Flaherty identified a recording of his interview, and the recording was played for the jury. Both times, the testimony and recordings indicated that (1) Carrell had told them she saw the shooter, (2) defendant was the shooter, and (3) Carrell was afraid of being labeled as a snitch. Likewise, both times that Shawnte testified, she described a similar conversation in which Carrell told her family that defendant was the shooter.

At the first trial, Carrell denied that she made these statements to Flaherty, Porter, or Shawnte. Because she was deemed unavailable for the second trial, the trial court allowed the prosecutor to read this testimony to the second trial jury.

During closing instructions, the trial court instructed the jury with CALCRIM No. 318: "You have heard evidence of statements that witnesses made before the trial. If you decide that those witnesses made those statements, you may use those statements in two ways: [¶] Number one, to evaluate whether the testimony, the witness's testimony in court is believable; [¶] And number two, as evidence that the information in those earlier statements is true."

The trial court then began to instruct the jury as to Carrell's prior testimony, using CALCRIM No. 319, stating: "Carrell did not testify in this trial. But her testimony taken at another time was read for you. In addition to this testimony, you have heard evidence that . . . Carrell made other statements. I am referring to the statements about which Detective . . . Porter and Detective . . . Flaherty testified to. If you conclude that . . . Carrell made those other statements, you may consider them

in a limited way. You may only use them in deciding whether to believe the testimony of . . . Carrell that was read here at trial—strike that."

Thereafter, the trial court discussed CALCRIM No. 319 with both counsel, outside the presence of the jury. The trial court stated: "During the reading of the instructions, I began to read CALCRIM [No.] 319. I stopped reading it. And then unless either of you want to be heard, I just think it's wholly inappropriate, given the fact that . . . Carrell was cross-examined . . . at the last trial and actually both of the areas that she was impeached on were discussed during the examination, some during cross-examination, some during direct. [¶] So I withdrew 319."

No one asked to be heard on the matter.

B. Forfeiture

We agree with the People that defendant forfeited any objection to CALCRIM No. 319 not being read to the jury. "A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

C. Defendant's claim fails on the merits

Regardless, defendant's argument fails on the merits.

Evidence Code section 1235 provides, in relevant part, that "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing." In other words, "[s]ection 1235 of the Evidence Code provides in effect that a prior inconsistent statement of a witness is admissible not only to impeach his credibility but also to prove the truth of the matters

asserted therein." (*People v. Williams* (1976) 16 Cal.3d 663, 666, superseded by statute as stated in *People v. Martinez* (2003) 113 Cal.App.4th 400, 408; *People v. Dykes* (2009) 46 Cal.4th 731, 758.) Evidence Code section 1291, subdivision (b), provides that "former testimony . . . is subject to the same limitations and objections as though the declarant were testifying at the hearing."

Carrell's out-of-court statements to Shawnte and Detectives Flaherty and Porter were inconsistent with her testimony at the first trial. Accordingly, Shawnte and Detectives Flaherty and Porter could recount those statements at the first trial, and the jury at the first trial could properly consider them for their truth. (Evid. Code, § 1235; [prior inconsistent statements generally can be considered for their truth].)

Because Carrell's testimony from the first trial was introduced verbatim at the second trial, and the other witnesses' accounts were unchanged, Carrell's out-of-court statements were again inconsistent with the testimony at the second trial. And because it was introduced verbatim, the "former testimony" introduced at the second trial is subject to the same rule as the testimony at the first trial. (Evid. Code, § 1291, subd. (b).) In other words, because Carrell's testimony at the first trial was attacked by her out-of-court statements to Shawnte and Detectives Flaherty and Porter, her testimony at the second trial was subject to the same attack. And the jury could consider it all.

In urging reversal, defendant ignores Evidence Code section 1291. Instead, he relies solely on Evidence Code section

1202,[8] encapsulated in CALCRIM No. 319, which informs the jury that it may use specified statements for credibility only—not for their truth. Based upon these authorities, defendant asserts that the jury should have been prohibited from considering Carrell's pretrial statements for their truth.

We disagree. Prior statements are made admissible solely for credibility purposes where the declarant "has not had an opportunity to explain or to deny such inconsistent statements." (Evid. Code, § 1202.) Evidence Code section 1202 thereby protects defendants who might be "deprived of their opportunity to cross-examine as to those inconsistent statements not brought forward during" the prior proceeding. (*People v. Blacksher* (2011) 52 Cal.4th 769, 808.) Here, however, Carrell had the "opportunity to explain or deny" her prior statements. The prior inconsistent statements were introduced during the first trial, when Shawnte and Detectives Porter and Flaherty all told the same stories they told at the second trial. And Carrell was cross-examined about these stories at the first trial.

Because the statements could be properly relied upon for their truth, the trial court did not err by omitting CALCRIM No. 319.

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[8] Evidence Code section 1202 provides, in relevant part: "Evidence of a statement . . . by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement."

D. Any presumed error was harmless

Even if the trial court erred in failing to instruct the jury with CALCRIM No. 319, the presumed error was harmless. (*People v. Kopatz* (2015) 61 Cal.4th 62, 86; *People v. Carpenter* (1997) 15 Cal.4th 312, 393; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) It is not reasonably probable that the verdict was affected by the testimony about Carrell's prior statements. There was overwhelming evidence against defendant—he attacked Goodrum with a rifle just the week before the murder. He fled the scene of the crime after talking to Fountain. And two witnesses identified defendant from surveillance footage.

Citing *People v. Rivera* (1985) 41 Cal.3d 388, 393, footnote 3, defendant argues that the impact of this alleged instructional error can be gauged by comparing the outcome of the first and second trials. But, as pointed out by the People, it "strain[s] credulity" to think that "impeachment testimony about a single witness, on a single topic, addressed by numerous other witnesses over the course of a nine-day trial, was the only piece of evidence tipping this case from a hung jury to a guilty verdict."

III. *Gang enhancements*

Defendant argues that the gang enhancements were not supported by substantial evidence.

In evaluating a claim the evidence is insufficient to support a true finding on an allegation, we review the entire record in the light most favorable to the judgment to determine "'whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 496.) "We draw all reasonable inferences in support of the

judgment. [Citation.]" (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 186.22, subdivision (b)(4) applies to "[a]ny 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[.]" Application of the gang enhancement "does not depend on membership in a gang at all." (*People v. Albillar* (2010) 51 Cal.4th 47, 67–68 (*Albillar*).)

Section 186.22, subdivision (b)(4) has two prongs. The first prong requires the crime to be "committed for the benefit of, at the direction of, or in association with any criminal street gang." This prong is intended to make it clear the enhancement applies only if the crime is "'gang related.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 622, overruled on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

Applying these legal principles, we readily conclude that defendant killed Goodrum in association with a fellow PJ Watts Crips gang member—his cousin Fountain. Less than five minutes after Goodrum insulted Fountain and Fountain's girlfriend, Fountain spoke to defendant by telephone. Defendant then showed up in person and they spoke again. Thereafter, defendant ran directly over to Goodrum and shot him.

Defendant asserts that the shooting was purely a "personal" dispute. Even if personal motivations were one factor, defendant and Fountain's gang affiliations were also a necessary component of the attack on Goodrum. Their "common gang

membership ensured that they could rely on each other's cooperation." (*Albillar*, *supra*, 51 Cal.4th at p. 62.) They came together as gang members and thus committed the crime in association with their gang. (*Ibid*.)

Moreover, defendant killed Goodrum in a manner designed to benefit his gang, by securing the PJ Watts Crips gang borders, by showing other gangs that they were willing to kill, and by instilling fear in the community. Expert testimony that a violent crime would benefit the gang by "'terroriz[ing] the public'" can support a gang enhancement. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1172.) So too can testimony "that particular criminal conduct benefited a gang by enhancing its reputation for viciousness." (*Albillar*, *supra*, 51 Cal.4th at p. 63.) And we cannot ignore the fact that the expert's opinion in this case was borne out by the witnesses' subsequent conduct. Everyone ran away from the scene of the crime "hollering and screaming." And out of the 20 people present at the time, not one was willing to identify the killer to law enforcement. At least four of them told Goodrum's family that they had seen defendant pull the trigger, but they all denied any knowledge when they were called as witnesses at trial.

The cases cited by defendant are readily distinguishable. Not one of those cases involved a public shooting by a known gang member. In *People v. Ramirez* (2016) 244 Cal.App.4th 800, 819, "there was insufficient evidence to show [that the defendants] were both known" gang members. In *In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1363, the crime was determined to be "spur-of-the-moment" and therefore could not have been intended to benefit the gang. In *People v. Ochoa* (2009) 179 Cal.App.4th 650, 662, there was no evidence that anyone involved

in the case knew the defendant was a gang member, and the crime occurred outside his gang's territory. In *People v. Ramon* (2009) 175 Cal.App.4th 843, 847–848, there were no civilian witnesses to the crime. And in *People v. Perez* (2017) 18 Cal.App.5th 598, 609, "the only shred of evidence" connecting the offense to a gang was "the fact [that] defendant was a tattooed, validated gang member."

In contrast, here there was overwhelming evidence that the community knew of defendant's gang association and refused to identify him at trial because they were afraid of retaliation. Defendant killed Goodrum in front of witnesses, in his gang's territory, ensuring that the neighborhood would continue to fear him and his gang. It follows that there is ample evidence to support the gang enhancements.

IV. *Request for remand for resentencing*

Finally, defendant argues that his case must be remanded for the trial court to exercise its discretion in deciding whether to strike his firearm enhancements. Although we agree with the parties that sections 12022.5 and 12022.53 apply retroactively, we decline defendant's request that the case be remanded; the trial court's statements at sentencing indicate remand would be futile. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 ["remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement"]; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

Here, during sentencing, the trial court "clearly indicated" its views on defendant's actions. "The Court does find the victim was particularly vulnerable. [¶] The manner in which the crime was carried out indicates planning, sophistication or

professionalism. . . . [¶] The Court finds [that defendant] engaged in violent conduct that indicates he's a serious danger to society; that his prior convictions as an adult are numerous or of increasing seriousness. [¶] . . . ¶] . . . He was on parole at the time that the crime was committed; that his prior performance on probation or parole is unsatisfactory. [¶] The Court finds no circumstances in mitigation whatsoever. [¶] One thing that struck me about what Miss Augustine said, it's really true, not just about the fact that he killed someone. He took them away from their family, but this case of all the cases that I've handled at trial, really underscored how he divided a very tight community. [¶] They were part of the same gang. But more importantly, they were part of the same community. They grew up together. They all knew each other. Every witness who testified knew the other witness who testified and had some relationship with them." The trial court then imposed a 103 years to life sentence.

Given the trial court's statements, there is no reason to believe that it would exercise its discretion to strike defendant's firearm enhancement. It follows that remand would serve no purpose. (*People v. Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896; see also *People v. McVey* (2018) 24 Cal.App.5th 405, 419 ["remand in these circumstances would serve no purpose but to squander scarce judicial resources"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

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