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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN FELLOWS et al., Defendants and Appellants.	B280629 (Los Angeles County Super. Ct. No. MA066874)

APPEAL from a judgment of the Superior Court of Los Angeles County, Andrew E. Cooper, Judge. Affirmed in part and remanded in part.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant Benjamin Fellows.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant Clarence Thomas.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell, Joseph P. Lee and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Benjamin Fellows and Clarence Thomas were each convicted, following a jury trial, of one count of shooting from a motor vehicle. (Pen. Code, § 26100, subd. (c).)[1] The jury found true the allegation that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). As to Thomas, the jury found true the allegations that Thomas and a principal personally used and discharged a firearm causing great bodily injury (§ 12022.53, subds. (b), (c), (d) & (e)(1)). As to Fellows, the jury found true the allegations that a principal personally used and discharged a firearm causing great bodily injury (§ 12022.53, subds. (d) & (e)(1)).

The trial court sentenced Fellows to the upper term of seven years for the shooting, plus a 25-year-to-life enhancement term pursuant to section 12022.53. The court stayed the gang enhancement term. The court sentenced Thomas to the upper term of seven years for the shooting, plus a five year term for the section 186.22 gang enhancement, plus a 25-year-to-life enhancement term pursuant to section 12022.53.

Defendants appeal from the judgment of conviction. Thomas contends there is insufficient evidence to support his substantive conviction, the true finding on the gang enhancement and the true finding that the victim suffered great bodily injury as the result of the firearm discharge. Thomas also contends the trial court erred in denying defendants' *Batson/Wheeler* motion. Fellows contends the trial court erred in finding prosecution witness Kimberly Lemons unavailable as a witness and permitting the use of her preliminary hearing testimony at trial.

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[1] Further undesignated statutory references are to the Penal Code.

Fellows further contends the court erred in permitting the prosecution's gang expert to opine that defendants committed the underlying crime and to answer hypothetical questions clearly based on the facts of the case. Both defendants contend the matter should be remanded to permit the trial court to consider whether the firearm enhancement should be stricken pursuant to recently enacted Senate Bill No. 620. Each joins in the contentions of the other on appeal. We remand this matter to permit the trial court to exercise its discretion under section 12022.53 and affirm the judgments of conviction in all other respects.

BACKGROUND

On September 2, 2015, around 12:40 p.m. Kimberly Lemons returned to her home in Palmdale. There, her son Tony McClain and his friend Essac Jackson helped Lemons unload groceries from her car.

As the group was unloading the groceries, Thomas and Fellows walked up to McClain and Jackson.[2] An argument ensued. Fellows said, " 'I'm from L.A., Brim, something.' " McClain replied that Fellows was in Palmdale, not Los Angeles, and was in McClain's mother's parking lot. McClain then said, " 'Since you are in front of my mom's house, we have to get down.' " Fellows replied, " 'We don't get down. We shoot.' "

Lemons went inside the house. A few minutes later, as Lemons was preparing to go back outside, her daughter-in-law said that "they were slowing down." Lemons asked who was

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[2] Lemons did not testify at trial. Her preliminary hearing testimony was read to the jury. Lemons identified Thomas and Fellows at the preliminary hearing in this matter.

slowing down. She heard gunshots and ran outside. She saw Jackson on the ground, bleeding from his right leg. His left leg had a hole in it.

A neighbor called 911 about the shooting. In the call, he stated that two or three African-American men in a gold or gray Altima shot a gun at the back of the apartment building and drove off. The car did not have license plates. It had a "Camacho" paper plate on the back.

Los Angeles County Sheriff's Department (LASD) deputies arrived and found Jackson on the ground near a stucco wall; he had gunshot wounds to both legs. Jackson was transported by ambulance to Antelope Valley Hospital. There, surgery was performed to remove a bullet from one of Jackson's legs.

Jackson told sheriff's deputies that he was about 60 feet away from the gun when he saw it. The gun was in the hand of the driver of a gold Altima. There were one or two other people in the car.

A description of the Altima was broadcast to law enforcement personnel. Deputy Chris Voda heard the broadcast and remembered seeing such a car in a driveway on Topaz Lane in Lancaster. He and other deputies watched the area to see if the Altima would return. It did, and deputies conducted a traffic stop.

Three men were in the stopped Altima. Thomas was in the driver's seat, Fellows was in the rear passenger seat, and a third man, Nyke Johnson, was in the front passenger seat. Thomas was wearing a black shirt and black pants. Fellows was wearing a black shirt and black shorts. Johnson was wearing a white t-shirt and gray shorts.

As Deputy Nathan Grimes was walking Fellows to the patrol car, Fellows broke free and ran away. Deputy Gelardo and others followed Fellows. Deputy Gelardo saw Fellows remove a gun from his waistband as he ran. Deputy Austin found a .38 caliber revolver near this area. Fellows was detained in the backyard of a house. A bag containing five .38 caliber casings was found under a blanket next to Fellows.

Gunshot residue (GSR) tests were conducted on Thomas, Fellows and Johnson. Fellows's test showed "numerous particles characteristic of GSR and numerous particles consistent with GSR." Thomas and Johnson each had one particle consistent with GSR.

Deputy Ivan Chavez compared the revolver, casings, and bullet recovered from Jackson's leg. Chavez opined that the casings and bullet were all fired from the recovered revolver.

At trial, Los Angeles Police Department Officer Filiberto Garcia testified for the prosecution as a gang expert on the Fruit Town Brims gang. The parties stipulated that Fruit Town Brims is a criminal street gang within the meaning of section 186.22. Officer Garcia explained that the Fruit Town Brims is a Blood gang, with its primary location near USC. Some members of the Brims moved to the Antelope Valley and started a small gang there; the gang does not claim any territory.

Officer Garcia opined that Thomas was a member of the Fruit Town Brims gang, based on Thomas's gang tattoos and association with other gang members, as documented in field identification (F.I.) cards, and the "knowledge" the crime was committed with another gang member. The officer similarly opined that Fellows was a Fruit Town Brims gang member, based on his gang tattoos, prior association with Thomas as

documented in FI cards, and the "knowledge" the crime was committed with Thomas. Photos and images from Fellows's Facebook account showed him making gang signs. In several Facebook messages, Fellows wrote that he was "banging Brim now."

In response to a hypothetical question based on the facts of this case, Officer Garcia opined that the shooting benefitted the Fruit Town Brims by instilling fear in the community. The shooting also enhanced the gang's reputation as a gang to be feared. Officer Garcia explained that witnesses in gang cases are often uncooperative, change their statements, and avoid service of process so they do not have to come to court.

DISCUSSION

I. The Unavailability Of Lemons As A Witness

The prosecution twice tried and failed to locate Lemons and serve her with a trial subpoena. The trial court found the sum of the prosecution's efforts constituted due diligence. Lemons was therefore "unavailable" as a witness and the prosecution was permitted to introduce Lemons's preliminary hearing testimony at trial pursuant to Evidence Code section 1291. Defendants contend the trial court erred in finding the prosecution exercised due diligence. They argue the subsequent erroneous admission of Lemons's prior testimony violated their state and federal constitutional rights to confront the witnesses against them. After independently reviewing the record, we find the prosecution exercised due diligence.

A. Applicable Law

The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.;

Cal. Const., art. I, § 15.) " ' "An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made 'a good-faith effort' to obtain the presence of the witness at trial." [Citations.]' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 674-675 (*Fuiava*).)

In California, "[e]vidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (Evid. Code § 1291, subd. (a).) A witness is unavailable if "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).)

The California Supreme Court often describes the efforts required by section 240 as involving due diligence. (See *Fuiava*, *supra,* 53 Cal.4th at p. 675.) " '[T]he term "due diligence" is "incapable of a mechanical definition," but it "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." [Citations.] Relevant considerations include " 'whether the search was timely begun,' " [citation], the importance of the witness's testimony [citation], and whether leads were competently explored.' " (*Ibid.*)

" 'It is enough that the People used reasonable efforts to locate the witness.' " (*Fuiava*, *supra*, 53 Cal.4th at p. 677.)

" '[T]he Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising.' " (*Ibid.*)

When the facts are undisputed, a reviewing court decides the question of due diligence independently, not deferentially. (*Fuiava*, *supra*, 53 Cal.4th at p. 675.)

B. Due Diligence Hearings

When this case first began, Lemons was a cooperative witness. Detective Anthony Delia, the assigned investigating officer in this case, contacted Lemons by phone before the October 2015 preliminary hearing. Lemons was cooperative and agreed to answer her phone when the detective called. Lemons said she was afraid of retaliation if she testified and asked the detective to help her move. Lemons testified at the preliminary hearing. For about two months afterwards, the detective worked on completing paperwork for Lemons's relocation. Lemons was "still semi-cooperative," but was concerned that her family had received threats. Around December 2015, Lemons stopped answering her phone, and the relocation process "f[e]ll apart."

Sometime in February 2016, Detective Delia contacted Lemons by phone. Lemons told him that she wanted to move to an apartment in Rialto. She sent the detective some paperwork with the Rialto address. At some point, however, she stopped returning his calls, and she did not receive relocation funds.

Trial of this matter was scheduled to begin in late August 2016. The prosecution tried but failed to locate Lemons and serve her with a subpoena to secure her attendance at trial.

1. *Efforts To Locate Lemons For The August Trial*

On August 26, 2016, the trial court held a hearing to determine whether the prosecution had used due diligence in its

efforts to locate Lemons and serve her with a subpoena. Evidence at the hearing showed that the prosecution's efforts to locate Lemons and serve her with a subpoena began about two weeks before the August 2016 trial date. At that time, Detective Delia contacted Lemons by phone. Lemons told the detective that she was afraid for her safety. She said she had had a death in the family, and "had a bunch of things going on." Lemons was "abrupt" with the detective. When Detective Delia said Lemons needed to come to court, the phone disconnected. The detective believed it was a dropped call, but Lemons could have hung up on him. Detective Delia called back several times and left messages. The detective believed Lemons would call back, but she did not.

Lawrence Arnwine, an investigator from the Los Angeles County District Attorney's Office, began his search for Lemons on August 23, 2016, the day after the case was called for trial. He checked with various law enforcement agencies and also determined Lemons was not in custody. Arnwine also checked the coroner's office and "the homeless district." From law enforcement databases, he learned of an address in Rialto and another address in Los Angeles.

Arnwine went to the Los Angeles address. No one answered the apartment door. Arnwine went to a neighboring apartment and showed Lemons's photo to the occupant. The person did not recognize Lemons. Arnwine then showed the photo to the apartment manager. The manager said that he had seen Lemons at the apartment complex several months earlier, but that she was not a tenant.

Other investigators checked the Rialto address, but without success. They spoke with the property manager, who told them

that Lemons filled out an application, but never completed the process.

Another investigator visited an address in Palmdale. The apartment was vacant, although a faded envelope on the front porch had Lemons's name on it. The investigator was unable to contact the manager or neighbors.

An investigator called a phone number retrieved from one of the databases and managed to speak with Lemons. She said she had moved to Oakland with a family member because she was being threatened in Palmdale. Lemons would not provide her Oakland address. Arnwine checked the law enforcement databases again to find an Oakland address, but did not find one.

Arnwine tried calling the number the other investigator found. He recognized the voice on the outgoing message as Lemons's, and left a message. Arnwine called the number two more times and left messages. He also texted the number and stated that he would help her obtain funding for relocation. Lemons never responded.

At the conclusion of the hearing, the court found that Lemons was not unavailable. Based on the court's ruling, the prosecution announced they were unable to proceed. All parties stipulated to the prosecution refiling the case under section 1387.2, and the information was deemed refiled.

2. Efforts To Locate Lemons For The November Trial

After the case was refiled, the prosecution again attempted to locate Lemons; they were again unsuccessful. On November 29, 2016, the court again held a due diligence hearing. The court incorporated the evidence from the prior due diligence hearing on the prosecution's efforts to locate Lemons.

The court also heard new evidence. That evidence showed that sometime in September 2016, Detective Delia received a call from a man using a blocked number who claimed to be one of Lemons's sons. He told the detective that Lemons was not coming to court or answering the detective's calls because all of Lemons's sons were in jail after they started carrying guns in fear of retaliation and Lemons was angry that the prosecution "did nothing to help them." Detective Delia did not try to discover the number. Detective Delia knew that Tony McClain was in jail, but he did not try to locate Lemons's other children. Detective Delia called Lemons about 15–20 times, but she never answered her phone. The detective also searched the databases again, but did not find any leads.

Beginning around September 27, investigators rechecked some law enforcement and other databases for updated information. They obtained a new photo of Lemons and visited a new address in Lancaster.

In October, investigators contacted Edwin Bermudez, an inspector from the Alameda County District Attorney's Office, for assistance in following up a lead that Lemons was in Oakland. On October 6, 2016, Bermutz reported that he had learned of another Rialto address for Lemons. Investigators also attempted to follow up a lead from Bermutz that Lemons might be a teacher in "L.A.U.S.D.," but they were unable to obtain any information from that entity. Other efforts by investigators included contacting several homeless shelters and investigating Lemons's work history with EDD.

Steve Sabosky, an investigator for the district attorney's office, inherited the case from Arnwine on November 22, 2016.

Sabosky was aware of investigators' previous work in searching for Lemons.

Sabosky reran Lemons's name through databases again and checked with the sheriff's department to see if Lemons was in custody. He attempted to follow up on a lead from the property manager at the first Rialto address, but was unsuccessful. The "TLO" database listed about 27 prior addresses for Lemons. Investigators had checked 15 of the addresses, going back as far as 1999.

Sabosky attempted to reach Lemons telephonically about 12 times and was successful twice. However, Lemons hung up on him both times. Sabosky viewed Lemons as "extremely uncooperative."

Sabosky reviewed Arnwine's memos and emails and noticed that a "secondary" address in Rialto provided by Bermutz in October had not yet been checked. Although Bermutz "didn't say why or how he found this information," Sabosky sent an investigator to the location on November 28, 2016. The apartment was empty. The investigator learned from neighbors that Lemons had moved out about two weeks earlier.

Sabosky checked various hospitals in the Los Angeles, Lancaster, and Rialto areas and the Los Angeles County coroner's office. A postal inspector informed Sabosky that Lemons last had mail forwarded to the secondary address in Rialto in August.

At the conclusion of the hearing, the court found the prosecution had exercised due diligence. The court explained: "It appears to this court extensive government resources and efforts were used in an attempt to secure the witness's attendance; and such efforts were begun in a timely manner, shortly after the

false start . . . of the first trial as well as the efforts that were made prior to that false start. [¶] Here, the court finds untiring efforts in good earnest and that the totality of such efforts were of a substantial character."

C. Analysis

Testimony at the due diligence hearing shows the prosecution's efforts to locate Lemons began in mid-August and, after a brief pause, continued from September 27 until the November trial date. Investigators pursued standard lines of inquiry such as law enforcement databases, hospitals, jails, homeless shelters, the post office, and her work history. They checked 15 of Lemons's 27 known addresses, stopping only when they had checked as far back as 1999. They physically visited at least four of the most recent addresses and spoke (or tried to speak) to neighbors or apartment managers to learn where Lemons might have moved. They obtained assistance from investigators in the Oakland area after Lemons stated she was in that area. They called her repeatedly, were able to speak with her occasionally, and informed her of the need to appear for trial. These activities constitute reasonable efforts to locate Lemons.

Defendants criticize the efforts investigators made as fruitless and inefficient, but they offer no suggestions as to other avenues which should have been explored. They contend only that investigators should have checked a secondary address in Rialto sooner than they did. As it turned out, Lemons was at that address until mid-November, but had moved by the time investigators physically checked the location in late November.

Due diligence requires reasonable efforts, not perfection. Investigators checked 15 addressed for Lemons and physically visited at least four of them. A delay in checking one address,

even a recent one, does not negate the otherwise extensive efforts made by investigators to check addresses. (See *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1294 [failure to conduct a physical check of the last known address of witness's mother and grandmother "does not transform [an] otherwise exhaustive effort into an unreasonable one, lacking the requisite diligence"].)

Defendants point out that due diligence also requires the prosecution to use reasonable means to prevent a witness from becoming absent. (*People v. Friend* (2009) 47 Cal.4th 1, 68; *People v. Louis* (1986) 42 Cal.3d 969, 991.) They contend the prosecution failed to use reasonable means to prevent Lemons from disappearing.

Generally, a prosecutor is not required " ' "to keep 'periodic tabs' on every material witness in a criminal case." ' " (*People v. Friend*, *supra*, 47 Cal.4th at p. 68.) However, when there is knowledge of a substantial risk that an important witness will flee, the prosecutor should take adequate preventative measures to stop the witness from disappearing. (*Ibid.*)

Here, Lemons was initially a cooperative witness. By the time the prosecution learned, through Lemons's phone calls with Detective Delia, that Lemons no longer intended to cooperate, it was too late to take preventative measure to stop her from disappearing. Lemons had already disappeared. Thus, the prosecution did not fail to use reasonable means to prevent Lemons from disappearing.

The trial court did not err in admitting Lemons's preliminary hearing testimony pursuant to Evidence Code section 1291. There was no violation of defendant's state or constitutional rights.

II. Gang Expert's Opinion Concerning Guilt

Defendants contend Officer Garcia improperly opined that defendants were guilty of the charged offenses, and that this testimony violated their rights to due process and a fair trial under the state and federal constitutions. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15.) Defendants acknowledge that their trial counsel did not object to this testimony; they contend that if this omission is found to forfeit their claim, they received ineffective assistance of counsel. We find forfeiture but no ineffective assistance of counsel.

A. Applicable Law

" ' "[O]pinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." ' " (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) As our Supreme Court has explained, when a defendant claims that an expert gave improper opinion testimony on the question of guilt, the claim is, "in substance, one of erroneous admission of evidence." (*People v. Coffman and Marlow*(2004) 34 Cal.4th 1, 76.)

A timely and specific objection at trial is required to preserve a claim that evidence, including expert opinion testimony, is not admissible. (*People v. Doolin* (2009) 45 Cal.4th 390, 448.)

The defendant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) To establish such a claim, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have

been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, at p. 694.)

"[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." (*Strickland v. Washington, supra*, 466 U.S. at p. 697.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Ibid.*)

B. Testimony

The prosecutor first asked Officer Garcia if he had an opinion as to whether Thomas was a member of the Fruit Town Brims. The officer replied: "My opinion is that he is a gang member of the Fruit Town Brims. And that factors in his gang tattoos and his association with other Fruit Town Brim gang members, which have been documented in F.I.'s, and just the general knowledge of this case that was committed with another Fruit Town gang member."

Later the prosecutor asked Officer Garcia if he had an opinion as to whether Fellows was a member of the Fruit Town Brims. The officer replied: "Same, that due to his tattoos. [¶] He's also been documented with Mr. Clarence Thomas before in an F.I. So, he's associating with other documented gang members. And just the crime, in general, that occurred with him and Mr. Clarence Thomas."

C. Analysis

Defendants did not object to Officer Garcia's testimony and so have forfeited their claim that he improperly opined they were guilty of the charged crimes. We "need not [and do not] determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

Assuming for the sake of argument that Officer Garcia's comments could be reasonably understood as an opinion that defendants were guilty, there is no reasonable probability that defendants would have received a more favorable outcome in the absence of those statements.

The jury instructions in this case made it clear that an expert's opinion does not decide the issue of guilt and does not relieve the jury of its duty to deliberate on this issue. The jury was also instructed generally that it alone determines what happened, based only on the evidence presented at trial. (CALCRIM No. 200.) The jury was instructed that gang evidence was admitted for the limited purpose of proving the gang allegation. (CALCRIM No. 1401) In addition, the jury was specifically instructed to consider the facts and information on which an expert relied in reaching an opinion and to decide the truth and accuracy of that information. (CALCRIM 332.)

Defendants complain none of the jury instructions explicitly told the jury that an expert may not opine on the guilt of a defendant. Such a pinpoint instruction was not necessary. CALCRIM 1401 made the point that the jury should not consider Officer Garcia's testimony for any purpose other than the gang allegation.

Officer Garcia's comments were, in any event, brief and vague. The evidence linking defendants to the crimes was very strong. Lemons identified defendants as present at her apartment shortly before the shooting. Defendants argued with Lemons's son Tony and Tony's friend, and made a statement about shooting. A neighbor reported that the shooting was committed by two or three men in a gold or gray Altima with a "Camacho plate on the back." The shooting victim confirmed the shooter was driving a gold Altima. About 30 minutes after the shooting, LASD deputies conducted a traffic stop of gold Altima with Camacho paper plates. Defendants and another man were in the car. Fellows fled, dropping a .38 caliber revolver in the process. Deputies apprehended Fellows, and found five expended .38 caliber cartridge casings in a bag nearby. The cartridge casings and a bullet recovered from Jackson's leg were all fired from the revolver found where Fellows had dropped a firearm. Fellow had gunshot residue (GSR) on both hands; Thomas had a particle consistent with GSR on his left hand.

Given the strong evidence of guilt and the jury instructions telling jurors they were responsible for determining guilt, it is not reasonably probable that the jury would have reached a different result in the absence of Officer Garcia's testimony.

III. Hypothetical Questions

Defendants contend the prosecutor improperly asked Officer Garcia to give an opinion on whether a shooting committed by Fruit Town Brims gang members was committed for the benefit of the gang "based not on a hypothetical situation but rather on the evidence adduced at trial and [defendants'] conduct."

Respondent contends defendants have forfeited the claim by failing to object at trial. Thomas objected to the first hypothetical, but was overruled. An objection by Fellows would have been futile; therefore the claim is not forfeited. (See *People v. Thompson* (2010) 49 Cal.4th 79, 130.) Neither defendant objected to the second hypothetical. That hypothetical was phrased similarly to the first one, and, similarly, an objection would have been futile. Accordingly, we find the claims are not forfeited.

A. Law

Generally, an expert may offer opinion testimony based on facts given in a hypothetical question that asks the expert to assume their truth. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) Gang experts are allowed to opine whether a particular crime was committed for the benefit of a criminal street gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 63 [expert permitted to opine that particular criminal conduct benefited a gang].) They can also offer insight as to the likely knowledge, intent or expectation of a typical gang member. (See, e.g., *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1179 [trial court erred by excluding expert opinion "as to whether in gang culture and operation every time a gang member rides with other gang members he or she is aware of what will happen"]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371 [permitting expert testimony that "focused on what gangs and gang members typically expect and not on [one of the defendant's] subjective expectation in this instance"].)

A hypothetical question asked of a gang expert "must be rooted in the evidence of the case being tried, not some other case." (*People v. Vang*, *supra*, 52 Cal.4th at p. 1046.) Thus, "[h]ypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence." (*Id*. at p. 1051.)

B. Hypotheticals

The prosecutor asked Officer Garcia a question based on the facts of this case as follows: "Well, I want you to assume that a Fruit Town Brim says to an individual who is in a parking lot of an apartment, " 'I'm Brim,' and, 'L.A.,' for Los Angeles. And then the person that they are talking to says, 'You are in Palmdale. You are in my Mom's parking lot.' And the Fruit Town Brim says -- or the -- the person in the parking lot says, 'You know what? Since you're in front of my Mom's house, we have to get down.' And the Fruit Town Brim says, "We don't get down. We shoot. [¶] Do you have an opinion about, in gang culture, what's going on there?"

Garcia responded opining, "So basically what is going on there is an individual from the Fruit Town Brim is, basically, ensuing or attempting to either fight or to do something to another individual, obviously, in the parking lot of Palmdale. [¶] That individual . . . there could either be a known person to the individual from the Brims. It could be a rival gang member. It could be just a regular community member, or he could be either involved or dabbling, an associate of the Brims or Crips and could either owe money, in bad standing or just a rival gang member. [¶] When that individual replies, You're in Palmdale, he's letting him know, the Brim, that you're not in your neighborhood.

You've not going to come and tell me, on Brim. So, basically, the Brim replies, we don't -- you know, we don't get down, or we don't fight. We shoot, meaning he's a shooter." In Garcia's opinion, the Brim "who replied, 'We shoot,' he's a trigger guy." The conversation is "a challenge" and incidents like this often end in violence.

Later, the prosecutor asked Garcia: "The question was, how -- how does an incident -- and you can tell me if this benefits the gang or it doesn't, in your opinion. But how does an incident where somebody approaches somebody and says, 'Brim,' and then shoots at them, how does that benefit the Brims, if it does at all?"

Garcia opined: "It totally benefits. It lets individuals know and the community know, whether its outside of their gang territory or inside, that they are willing to do violence; they are willing to commit crime, whether in broad daylight or in the evening. [¶] When an individual says, 'On Brims,' he's not speaking for himself. He's speaking for the gang's entirety. So every individual there, he's using the gang name to commit that crime. So, thus, boosting that individual gang and enhancing their reputation within the neighborhood, or, outside, of being a gang that's to be feared."

C. Analysis

Although the facts of the hypotheticals closely mirrored the facts of the case, the prosecutor did not refer to defendants or anyone else by name in posing his two hypotheticals. Similarly, Officer Garcia did not use individual's names in his responses to those hypotheticals. Thus, the testimony was proper. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3 [recognizing the difference in having an expert testify about specific persons rather than hypothetical persons].)

"Over the years, commentators have sometimes criticized the use of hypothetical questions, but not in a way that supports the conclusion that the questioner must disguise the fact they are based on the evidence." (*People v. Vang*, *supra,* 52 Cal.4th at p. 1051.) "[I]t is not a legitimate objection that the questioner failed to disguise the fact the question was based on the evidence." (*Ibid*.) More specifically, it is "not a legitimate objection that the prosecutor failed to disguise the fact he was asking about [a specific crime] based on the one that the evidence showed the defendants committed." (*Ibid*.) Thus, defendants' claim that the hypotheticals mirror the facts of the case is not well taken.

IV. Sufficiency Of The Evidence - Shooting From A Motor Vehicle

Defendants contend there is insufficient evidence to establish the shooter's "specific intent" in committing the offense of shooting from a motor vehicle or to establish the shooter's gang motivation for shooting. Defendants contend the evidence shows only that the shots fired were aimed at and meant to strike the Audi, and that victim Jackson was hit inadvertently when a bullet ricocheted off the car.

A. Sufficiency Of The Evidence

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any*

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] 'This standard applies whether direct or circumstantial evidence is involved.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

B. Section 26100

Section 26100, subdivision (c), provides: "Any person who willfully and maliciously discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle is guilty of a felony." " 'Conviction under a statute proscribing conduct done "willfully and maliciously" does not require proof of a specific intent. [Citation.]' " (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168.) Such an offense requires only the general intent of a " ' "purpose or willingness to do the act or omission." ' " (*Ibid.*)

"Cases construing section 246, which prohibits 'maliciously and willfully discharg[ing] a firearm at an inhabited dwelling house' or other specified targets, are instructive" in determining the intent requirement for shooting from a motor vehicle. (*People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1500 [noting that former section 12034, subdivision (c), repealed and replaced in 2010 by section 26100, subdivision (c), was "patterned on section 246"].) Under section 246 "the act of shooting 'at' a proscribed target is also committed when the defendant shoots in such close proximity to the target that he shows a conscious indifference to the probable consequence that one or more bullets will strike the target or persons in or around it." (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1356, fn. omitted.)

The testimony of Detectives Maria Martel and Delia is substantial evidence that Jackson was in the shooter's line of fire, and thus that the shooter had the requisite purpose in shooting. Detective Martel testified that she first saw Jackson on the ground near a bush by a stucco wall. Photos of the location show that the blue Audi was parked parallel to the stucco wall, with the car's right passenger side nearest the wall. Bullets hit the Audi on its right rear side. From the photographic exhibits introduced at trial, it does not appear to be impossible for a bullet fired toward the Audi from behind to have travelled through or past the Audi and along the stucco wall toward the bush where Jackson was found. Detective Delia testified that the blood he saw on the ground from Jackson was in the general trajectory from the parking lot (where the shooters were located) to the blue Audi and towards the tree (which photos show was past the bush mentioned by Detective Martel).

Although defense counsel argued that Jackson must have been hit by a ricochet, argument is not evidence. However, assuming for the sake of argument that Jackson was hit by a ricochet from a bullet fired at the Audi, reversal is not required.

Here, the bullets were fired from only about 60 feet away. Shooting in such close proximity to Jackson displayed a conscious indifference to the probable consequences that one or more bullets would hit Jackson. That is sufficient to satisfy the intent requirement of section 26100.

C. Section 186.22

Section 186.22, subdivision (b)(1), applies to "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[.]"

There was substantial evidence that defendants were both Fruit Town Brims gang members. Jackson told the police that the people in the car "threw out Brims," upsetting McClain. Lemons also saw defendants argue with Jackson and McClain. She heard Fellows say, " 'I'm from L.A., Brim,' something." When McClain challenged defendants to a fight, Fellows said, " 'We don't get down. We shoot.' " Given a hypothetical situation based on the facts of this case, Officer Garcia opined that the shooting was committed for the benefit of Fruit Town Brims because it instilled fear in the community and enhanced the gang's reputation. " 'Expert opinion that particular criminal conduct benefitted a gang' is not only permissible but can be sufficient to support the . . . gang enhancement. [Citation.]" (*People v. Vang*, *supra*, 52 Cal.4th at p. 1048.)

There was also evidence from which the jury could infer that the shooting was committed in association with Fruit Town Brims. Defendants were both Fruit Town Brims gang members. They arrived together, confronted Jackson and McClain together, and fled together after Jackson was shot. After they were detained, Fellows fled with the gun Thomas used and a bag of expended cartridge casings from the shooting. This evidence also "establishes that the defendant intended to and did commit the charged felony with known members of a gang, [and so] the jury [could] fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*People v. Albillar*, *supra*, 51 Cal.4th at p. 68.)

V. Sufficiency Of The Evidence - Great Bodily Injury

Defendants contend the evidence is insufficient to prove Jackson suffered great bodily injury from his gunshot wounds. They contend this court must set aside the jury's true finding on the section 12022.53, subdivision (d) firearm enhancement for the discharge of a firearm causing great bodily injury.

"The Legislature chose to define 'great bodily injury' in section 12022.53[, subdivision] (d) only by cross-reference to section 12022.7." (*People v. Le* (2006) 137 Cal.App.4th 54, 59.) Section 12022.7, subdivision (f) states that " 'great bodily injury' means a significant or substantial physical injury." Under section 12022.7, "a 'significant or substantial physical injury' need not meet any particular standard for severity or duration, but need only be 'a substantial injury *beyond* that inherent in the offense itself.' " (*People v. Le*, at p. 59; *People v. Escobar* (1992) 3 Cal.4th 740, 746-747, 750.) A single gunshot would can be sufficient to support a great bodily injury enhancement. (*People v. Lopez* (1986) 176 Cal.App.3d 460, 463–465.) "Whether great bodily injury occurred is a question of fact, and we review a jury's finding of great bodily injury under the substantial-evidence standard." (*People v. Le*, at p. 59; *People v. Escobar,* at p. 750.)

Here, a bullet passed through Jackson's left leg and lodged in his right leg. Two wounds are certainly beyond the injury inherent in being hit by a single bullet. The wounds caused extensive bleeding. A deputy who observed Jackson after the shooting perceived him to be "in an extreme amount of pain." Surgery was required to remove the bullet lodged in Jackson's leg. This is substantial evidence that Jackson's injuries were substantial, not superficial.

VI. *Batson/Wheeler* Motion

During voir dire, the prosecutor challenged three African-American jurors. Defendants, who are African-American, brought a *Batson/Wheeler*[3] motion after the prosecutor challenged the third African-American. At that point one African-American juror remained on the panel. The prosecutor conceded that defendants had made a prima facie case, and offered his reasons for excusing the three jurors. Defendants contend the trial court erred when it found the prosecutor's reasons to be credible and race neutral and denied the motion.

A. Applicable Law

"A prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against 'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds'—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment. [Citations.]" (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1008 (*Lewis and Oliver*).)

When a defendant challenges the prosecution's use of peremptory challenges on the basis of group bias, a three-step process follows. " '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

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[3] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

"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." [Citation.]' [Citation.]" (*Lewis and Oliver*, *supra,* 39 Cal.4th at pp. 1008–1009.)

"We review the trial court's ruling on purposeful racial discrimination for substantial evidence. [Citation.] It is presumed that the prosecutor uses peremptory challenges in a constitutional manner. We defer to the court's ability to distinguish 'bona fide reasons from sham excuses.' [Citation.] As long as the court makes 'a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.' " (*Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1009.)

B. The Trial Court's Ruling

After hearing the prosecutor's explanations for excusing the three African-American jurors, the court ruled: "Viewing the totality of the circumstances as well as my observations of the jurors and hearing their responses -- hearing their responses of these three jurors who were both referenced by the defense and the prosecution and viewing the totality of the circumstances, considering the evidence presented, this court finds that the reasons offered by the prosecution to justify the peremptory challenges demonstrates that the challenges were not exercised on the ground of group bias. Therefore, the motion pursuant to *Wheeler* and *Batson* is denied." There is substantial evidence to support the trial court's ruling.

1. Juror No. 1161

The prosecutor explained that he excused Juror No. 1161 because of three factors: "single-witness problems, social worker, and her family members who are incarcerated."

The prosecutor stated that being a social worker "is one of my almost automatic kicks." He elaborated on the single-witness problem, stating "she had problems with single-witness testimony, which I tried to work out with her. But it appeared she was having trouble figuring that out." The prosecutor acknowledged that as well as having incarcerated relatives, Juror No. 1161 had a family member who was a victim of a shooting and "I did like that."

It is well accepted that a prosecutor's use of a peremptory challenge on the basis of a juror's occupation as a social worker is race neutral. (*People v. Mai* (2013) 57 Cal.4th 986, 1053 (*Mai*); see also *People v. Clark* (2011) 52 Cal.4th 856, 907 [a "peremptory challenge based on a juror's experience in counseling or social services is a proper race-neutral reason for excusal."].) This reason has " ' " 'some basis in accepted trial strategy' " ' [citation] insofar as it stem[s] from a concern about the general attitudes and philosophies persons in that profession might harbor." (*Mai,* at p. 1053.) A prosecutor need not tie the peremptory to the juror's specific tasks as a social worker. In *Mai*, for example, the prosecutor stated only " 'I generally try not to have social workers. I generally will use a peremptory on social workers unless there is a reason not to.' " (*Id*. at p. 1047.)

Defendants note that Juror No. 6 was a social worker, and the prosecutor characterized him as pro-prosecution. They argue that this shows that the prosecutor did not believe that all social workers were anti-prosecution and disinclined to convict, and so

his statement that he excused Juror No. 1161 because she was a social worker was pretextual. We reach the opposite conclusion. The prosecutor's decision to excuse Juror No. 6 shows the heavy weight the prosecutor gave to a juror's choice of profession over the juror's expressed views during jury questioning. The prosecutor stated, "the guy who appeared to be a Trump supporter was also a social worker. I kicked him as well, even though he favored the prosecution. [¶] I tend to think social workers are not good for the prosecution. They tend to view these situations from a rehabilitative standpoint as opposed to a punishment viewpoint."

Defendants also argue that prosecutor's statement that he excused Juror No. 1161 in part because she had family members who were incarcerated was pretextual because the prosecutor "disregard[ed]" the fact that Juror No. 1161 had relatives who were crime victims and other relatives who worked in law enforcement. The prosecutor in fact acknowledged that Juror No. 1161 had "a family member that was a victim of a shooting [and] I did like that." The prosecutor simply gave more weight to the potential negative impact of incarcerated relatives than to the positive potential impact of victim relatives; this does not suggest he was engaging in a pretext in his weighing process.[4]

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[4] If we were to compare Juror No. 1161's attitudes towards her incarcerated relatives versus her victim relatives, we would conclude that the juror's sympathies lay with the incarcerated ones. She visited a relative in a juvenile camp up north, but did not attend the trials of her victim relatives and did not know the results of the trials of their assailants.

Defendants further argue that the prosecutor's statement that he excused Juror No. 1161 because she had a "single witness problem" was pretextual because she "appeared ready to apply the proper standard of proof, that is, to review all the evidence before committing to finding a defendant guilty based on the testimony of a single (believable) witness. Her answers did not reveal her inability to follow the law and apply it to the facts." (Italics omitted.) We do not agree.

While the complete instruction on single witness testimony tells jurors to review all the evidence before concluding that the testimony proves a fact, Juror No. 1161 had no way of knowing that when she was questioned by the court. More importantly, Juror No. 1161 clearly told the court that she would require evidence in addition to the testimony. That is not what the instruction means by reviewing the evidence before deciding on the testimony.

The trial court's questions and comments clearly show that Juror No. 1161 was either unable or unwilling to follow the law that the testimony a single witness is sufficient to prove any fact. The court twice asked her if she would "accept" the trial court's instruction that the testimony of a single witness was sufficient to prove a fact, and she twice replied, "I don't know." The court asked her why, and she said "I believe there's other things that are involved." The court asked if there were no other things presented to her apart from the single witness testimony, would she require more before making a decision. Juror No. 1161 replied unequivocally, "I would require more." Juror No. 1161 explained that "I deal with a lot of . . . evidence. It's not just one particular thing that can make you say 'yes' or 'no.' It's usually a collaboration of things. It's hard to just say, 'Yes, I believe this

person because this is what they saw.' [¶] It has to be other evidence that would assist in making that decision." The court then clarified, "So you're saying that you would accept that testimony, but you would require some supporting evidence?" Juror No. 1161 replied, "Yes."

The prosecutor's attempts to explore the single witness topic further only revealed confusion on Juror No. 1161's part. At one point, she volunteered "It is not about believing or disbelieving." Of course, deciding the credibility of witnesses is the primary duty of jurors and the single witness instruction only applied if the juror believed the witness. Thus, as the prosecutor later observed "it appeared she was having trouble figuring [the single witness instruction] out."

2. Juror No. 9558

The prosecutor explained he excused Juror No. 9558 because "he was talking about his kids being part of some Brotherhood Crusade, which seemed like an activist organization regarding people from Watts; and that he had -- he seemed to suggest, although he kind of backed off of it after I questioned him, he has relatives from L.A.P.D. who they -- they have issues at home between L.A.P.D. and this Brotherhood Crusade and that they -- they just don't talk about it. One side did their thing; one side did theirs. [¶] To me, that betrayed his view that those two job -- job activities are at odds with one another." The prosecutor added that Juror No. 9558 "suggested at one point . . . that I would have to do a little bit more. He backed off that when I questioned him individually. He seemed to suggest I would have to do more than the burden of proof in the case."

Defendants acknowledge that Juror No. 9558 initially stated that he expected the prosecutor to do more than meet the burden of proof in the case, but contend the prosecutor's references to this comment was proof was pretextual because Juror No. 9558 "backed off" from that position.

We do not view the prosecutor's concerns with Juror No. 9558's ambivalence about the burden of proof as pretextual. Although Juror No. 9558 "backed off" his initial statement, his answers indicated that he might well have some difficulty in applying the appropriate burden of proof.

Juror No. 9558 initially indicated that "I think I would need more answers or more proof." The court explained that the law only required the prosecutor to prove the case beyond a reasonable doubt, not beyond all possible doubt, and asked the juror if he was saying that he would hold the prosecutor to "a higher standard than what the law states?" Juror No. 9558 replied, "I don't know if I can answer that. [¶] I think I would . . . want to follow the rules and regulations and the law as it stands." This is an equivocal backing off. The court then explained that "there might be unanswered questions. But ultimately, those questions do not go to an element. They don't go to a defense, don't go to anything that must be prove in a courtroom. [¶] Are you one of those people who might be so distracted by the unanswered questions . . . that you couldn't just focus on what is, in fact, proven?" Juror No. 9558 agreed, "I might be one of those people; yes, sir."

Defendants implicitly acknowledge that the professions of Juror No. 9558's sons could be a race neutral factor. (See *People v. Clark*, *supra*, 52 Cal.4th at p. 907 [experience in social services is proper reason to challenge jurors].) They contend, however,

that the prosecutor's reliance on the professions of Juror No. 9558's sons was pretextual because the prosecutor described the Brotherhood Crusade as "an activist organization regarding people *from Watts*." (Emphasis added.) Defendants contend that because *residence* in a low income African-American neighborhood has been found to be a proxy for race, (see *U.S. v. Bishop* (9th Cir. 1992) 959 F.2d 820, 825 (*Bishop*) overruled by *U.S. v. Nevils* (9th Cir. 2010) 598 F.3d 1158), *working* for an organization that helps people from poor African-American community must also be considered a proxy for race.[5]

We do not accept defendants' logic. *Working* for an organization that helps poor African-American youth reasonably suggests that the worker is sympathetic to the difficulties of poor African-American youth. *Living* in a poor African-American neighborhood says nothing about an individual resident's views on any topic, including the frequent presence of police in that neighborhood. Therefore, it is reasonable to conclude that a prosecutor who claims such residents are likely to believe police pick on African-American people is engaging in a pretext, or in "pernicious stereotypes." (See *Bishop*, *supra*, 959 F.2d at p. 825.)

To the extent that defendants suggest that the holding of *Bishop* in any way involved the excused juror's occupation as an "eligibility worker," they are mistaken. The problem in *Bishop* was the prosecutor's reliance on the juror's residence without connecting that residence to the juror's possible approach to the specific trial at hand. (See *People v. Williams*, *supra*, 16 Cal.4th

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[5] "Of course, [*Bishop*] is not controlling. Decisions of lower federal courts interpreting federal law are not binding on state courts." (*People v. Williams* (1997) 16 Cal.4th 153, 190.)

at p. 190 [pointing out that the *Bishop* prosecutor peremptorily challenged African–American jurors who lived in a predominantly low-income, African-American neighborhood because they were likely to believe the police pick on African-American people generally without showing that their residence provided a link to how the juror would relate to the specific facts at issue].)

3. Juror No. 0084

The prosecutor explained he excused Juror No. 0084 because "I generally don't look favorably on unemployed jurors, especially if they are also single and have no kids, like this guy. It is a lack of responsibility and ties to the community, the very reason we ask these questions. [¶] Probably more importantly, he was stopped by the same agency that is going to be testifying in this case. And he said they basically stopped him for no reason and harassed him at his house. . . . I don't think you can go through that and not hold it against people from the same agency at this trial." The prosecutor added, "maybe even more importantly, he has someone from his immediate family who was prosecuted by my office for a very serious charge, which, by itself would be problematic for me. But he added to that that person . . . was also not treated fairly, which suggests to me he thought he was wrongly convicted."

"A potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge. [Citation.] As the Supreme Court observed in *Rice v. Collins* (2006) 546 U.S. 333, 341 [163 L.Ed.2d 824, 126 S.Ct. 969], it is not unreasonable for a prosecutor to believe a young person with few ties to the community might be less willing than an older,

more permanent resident to impose a substantial penalty." (*People v. Lomax* (2010) 49 Cal.4th 530, 575.)

Negative contact with the criminal justice system is a valid reason for a prosecutor to excuse a juror. (*People v. Garcia* (2011) 52 Cal.4th 706, 748; see *Lewis and Oliver, supra,* 39 Cal.4th at pp. 1010–1011 [prosecutor expressed race-neutral grounds for dismissing African–American male whose half brother had been incarcerated, and who reported being stopped by police on false pretenses].)

Defendants argue that the prosecutor's reasons are proxies for race because these reasons disproportionately impact urban African-American males. As we discuss in more detail below, disparate impact alone is not sufficient to invalidate an otherwise race-neutral reason.

C. Comparative Analysis

Defendants contend a comparative analysis of the prosecutor's reasons for excusing African-American jurors shows that the prosecutor retained jurors with the same characteristics he used to justify excusing African-American jurors. Such similarities, when they exist, is evidence tending to prove purposeful discrimination. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241.) We do not see any similarities.

1. Criminal Arrests Or prosecutions

The prosecutor stated that he excused Jurors Nos. 1161 and 0084 in part because they had relatives who were incarcerated. Defendants contend that these reasons were pretextual because the prosecutor retained non-African-American Jurors Nos. 2, 5, and 10 who had similar situations with relatives. Defendants are mistaken.

Juror No. 2 and Juror No. 5 had relatives who were *arrested*. Neither juror knew if the arrested relative was convicted. Thus, they were not similarly situated to Jurors Nos. 1161 and 0084, both of whom had relatives who were convicted of crimes. And although Juror No. 0084 was arrested, being arrested oneself is generally not comparable to having a relative arrested.

Juror No. 10 had one relative who had been convicted of crimes. Juror No. 1161 had multiple relatives who had been convicted. Their situations are not comparable.

Juror No. 10 and Juror No. 0084 were similarly situated in numbers of convicted relatives: each had one such relative. Juror No. 0084, however, believed that his brother was treated unfairly and wrongly convicted, while Juror No. 10 believed her daughter was treated fairly. Their situations are not comparable.

2. Length Of Questioning

In a section headed "protracted questioning," defendants contend that no jurors other then Juror No. 1161 and No. 9558 were questioned so extensively regarding their understanding of the prosecution's burden of proof. They contend Jurors Nos. 3, 4, 5, 6, 7, 11 and 12 were not asked any questions about single witness testimony or proof beyond a reasonable doubt. Assuming that comparing the kinds of questions asked of retained and excused jurors could provide evidence of purposeful discrimination, we see no unexplainable differences here.

a. Non-questioning of other jurors

The obvious explanation for the prosecutor's decision not to question Jurors Nos. 3, 4, 5, 6, 7, 11 and 12 on these topics is that the court did not question those jurors on those topics. In questioning Juror No. 1161 on single witness testimony and

Juror No. 9558 on the burden of proof, the prosecutor was following up on the court's questions.

b. Juror No. 1161

The prosecutor's questioning of jurors on the single witness issue likewise mirrored the trial court's questioning. The trial court questioned only two jurors on the single witness issue: Juror No. 1161 and Juror No. 8. The prosecutor initially addressed his questioning on this topic to both Juror No. 1161 and Juror No. 8, but before the prosecutor finished his initial questions, Juror No. 1161 interrupted him to state that "there is more to the story." Unsurprisingly, the prosecutor directed additional follow-up questions to her. Even without the interruption, we would find the prosecutor's focus on questioning Juror No. 1161 unsurprising and unsuspicious. The court asked Juror No. 1161 at least six questions on this topic. In contrast the court asked Juror No. 8 two questions on this topic. The prosecutor's questioning mirrored this focus.

We do not agree that Juror No. 1161 gave "essentially the same answers" as Juror No. 8. Juror No. 1161 repeatedly stated that she needed more evidence than the testimony of a single witness and also expressly stated that she did not know if she could follow the court's instructions. She told the prosecutor that it was not about believing or disbelieving a witness. Although Juror 8's answers had some similarity to Juror No. 1161's, Juror No. 8's answers were less definitive and seemed to focus on witness credibility, and he appeared to agree that he could follow the court's instructions.

Apart from this slight similarity in answers, the two jurors were quite different. Thus, there is nothing suspicious about the prosecutor's decision to keep Juror No. 8 but excuse Juror No. 1161.

c. Juror No. 9558

Defendants are factually incorrect that the prosecutor engaged in extended questioning of Juror No. 9558 on the burden of proof. The prosecutor asked him two questions on this topic.

Defendants contends three jurors initially misunderstood the burden of proof but were rehabilitated, but the prosecutor kept non-African-American Jurors Nos. 9 and 10 and excused African-American Juror No. 9558. Defendants ignore the fact that Juror No. 9's and Juror No. 10's misunderstanding favored the prosecution: both jurors initially stated that defense counsel had to prove their client's innocence. Juror No. 9558's misunderstanding was unfavorable to the prosecution: he wanted the prosecutor to do more than required.

D. Prosecutorial Conspiracies

Defendants argue that prosecutors as a group plan to strike minority jurors and provide false race-neutral reasons to cover up their racially biased actions. They provide one concrete example of such a conspiracy, which apparently occurred in Philadelphia. They also claim that prosecutors provide multiple reasons for excusal of minority jurors to prevent a proper comparative analysis.

We decline to address these unsubstantiated claims at any length. We simply note that every reason given by the prosecutor in this case is well established in the law as a proper reason to challenge a juror and is supported by the juror's own answers. Although the law recognizes that no one factor may be

dispositive, we have done a comparative analysis of individual factors and found no similarity between excused and retained non-African-American jurors.

E. Disparate Impact

Defendants contend that using incarcerated family members, police harassment, and unemployment as factors to excuse jurors has a disparate impact on African-American jurors. They conclude using these factors shows a discriminatory purpose. They are mistaken.

As we have discussed, the California Supreme Court and the United States Supreme Court have found these reasons to be legitimate race-neutral reasons for excusing a prospective juror. "*Batson* protects against intentional discrimination, not disparate impact." (*U.S. v. Brown* (7th Cir. 2016) 809 F.3d 371, 376; *U.S. v. Monell* (1st Cir. 2015) 801 F.3d 34, 44 [same]; see *Hernandez v. New York* (1991) 500 U.S. 352, 362. ["Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality."].)

VII. Senate Bill No. 620 Resentencing

Defendants contend this matter should be remanded to permit the trial court to consider whether to strike the section 12022.53 firearm enhancement as it is now authorized to do by Senate Bill No. 620. Respondent contends a remand for resentencing is not required because the trial court selected the upper term for the underlying conviction for both defendants, and thereby indicated it would not strike the enhancement if given the opportunity. We find remand to be appropriate.

On January 1, 2018, Senate Bill No. 620 (2017–2018 Reg. Sess.) took effect, which amends section 12022.53, subdivision (h), to remove the prohibition against striking the gun use enhancements under this and other statutes. (Stats. 2017, ch. 682, § 2.) The judgment was not yet final in this case when Senate Bill No. 620 went into effect and so the changes in the statute effectuated by that bill apply retroactively to defendants. (See, e.g. *People v. Chavez* (2018) 22 Cal.App.5th 663, 712.) Defendants have a right to have the trial court reconsider the enhancement in light of the new statute, unless the record shows that the trial court " 'clearly indicate[s]' the [trial] court would not have exercised its discretion to strike the firearm allegations had the court known it had that discretion." (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.)

The trial court gave no such clear indication here. The trial court did not state it would not strike the firearm enhancement if it had the discretion to do so. Although the trial court sentenced defendants to the upper term for their offenses, it relied on three essentially duplicative sentencing factors: "the crime involved great violence, great body harm" and "the defendant used a firearm." Two of these factors were necessary to impose an enhancement for the use of a firearm resulting in great bodily injury. In addition, the use of a firearm was also an element of defendants' convictions for shooting from a motor vehicle.

Generally, the trial court may not impose an upper sentencing term by using the fact of any enhancement upon which sentence is imposed unless the court strikes the punishment for the enhancement. (§ 1170, subd. (b) ["The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any

provision of law"]; Cal. Rules of Court, rule 4.420(d) ["A fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term"].)

Further, the trial court in this case is not faced with an all-or-nothing choice with respect to enhancements. The jury in this case found true a "lesser" firearm enhancement, and the trial court has the option to impose a shorter enhancement term than the current 25 years to life.

Defendants did not have lengthy criminal histories. Thomas's probation report shows he was twice arrested on controlled substance charges as a juvenile, but does not reflect the disposition of those charges. Thomas had two misdemeanor convictions as an adult, one for petty theft and one for hit and run. Although Fellows's probation report shows a number of juvenile offenses, the report lists only one arrest as an adult; the report does not show the disposition of that arrest. It appears this arrest resulted in misdemeanor charges which were dismissed.

Since the trial court has not expressly and specifically stated how it would have exercised its discretion, defendants have the right to try to persuade the court, with appropriate mitigating evidence, to exercise its discretion to refashion the sentence by striking the firearm enhancement. The trial court may or may not be persuaded. We express no opinion on how the court should exercise its new authority.

DISPOSITION

The matter is remanded to allow the trial court to exercise its discretion whether to strike the firearm enhancements under section 12022.53, subdivision (h). The judgments are affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.