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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. DESMOND MCMILLER et al., Defendant and Appellant.	B268622 (Los Angeles County Super. Ct. No. TA137063)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed and remanded for resentencing.

Sara H. Ruddy, under appointment by the Court of Appeal, for Defendant and Appellant Desmond McMiller.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant Patrick Pearson.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant Deshonda Young.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Theresa A. Patterson Deputy Attorneys General, for Plaintiff and Respondent.

Around 10:30 a.m. on March 6, 2014, Douglas Wooley walked across 97th Street on the west side of Main Street in Los Angeles. As he crossed, a gold Mercury Grand Marquis crossed Main on 97th and stopped where Wooley had crossed. Two men emerged from the passenger's side of the Grand Marquis and each fired several shots at Wooley, killing him. Desmond McMiller, Patrick Pearson, and Deshonda Young were arrested and charged with Wooley's murder and various other crimes—11 counts in all—associated with the murder and the ensuing investigation.

After a joint trial, the jury found the three defendants guilty on all counts. The trial court sentenced Young to 65 years to life, Pearson to 72 years to life, and McMiller to 161 years and four months to life in prison. Each defendant appeals, and each defendant joins in arguments made by each of the other defendants. Finding no error, we affirm. We remand, however, to allow the trial court to determine in the first instance whether to strike or dismiss firearm enhancements imposed pursuant to Penal Code section 12022.53.

BACKGROUND

A. The Murder

On March 5, 2014, McMiller put his belongings into Makeia Bailey's gold Mercury Grand Marquis and drove the car away from her home in Las Vegas, and traveled to Los Angeles. About 10:30 a.m. the next morning, Wooley was gunned down at the

intersection of 97th Street and Main Street by two men who emerged from the passenger's side of a gold Mercury Grand Marquis. Among other injuries, Wooley suffered two gunshot wounds to the head, two to the torso, several to "the upper extremities[,] and one to the buttock." "The totality of all of the injuries led to [Wooley's] death," probably within minutes of the shooting.

Across the street, Mirna Martinez stood at her front door and called her dog inside. Martinez screamed when she heard the shots. The shorter of the two gunmen turned his gun toward her home and fired, hitting the residence. Maurice Pikes was standing outside in a yard on the same block as Martinez's home when the shooting began. Pikes watched the shooting unfold from the time the two men emerged from the car until they got back in the car and it sped away on 97th Street. At trial, Pikes identified McMiller as one of the shooters, and Martinez identified both McMiller and Pearson as the shooters.

B. The Investigation

At the crime scene, investigators recovered 15 spent casings fired from two different guns. Four of the casings were fired from a gun that used .40 caliber ammunition; the remaining 11 were consistent with ammunition fired from an AK-47 assault rifle.

Several hours after Wooley's murder, Detective Manuel Castaneda and Detective Nathan Kouri stopped Young at 97th and Hoover Street in Bailey's Mercury Grand Marquis. Young was detained, questioned, and released; Bailey's car was impounded. McMiller was the first person Young called after her release.

On the morning of March 7, 2014, McMiller spoke to Erick Washington about the murder. Washington's children, girlfriend, and two of her friends were also present. McMiller told Washington that he, Young, and Pearson—all members of the Hoover Criminals street gang (as was Washington)—went into Main Street Crips street gang territory in Bailey's Grand Marquis. McMiller told Washington the shooting was retaliation for the shooting of another Hoover Criminals street gang member that happened on March 6. McMiller identified Young as the driver. "And he told me Trey Monk [Pearson] jumped out with a .40 Glock, shot the dude, knocked him down. And he said he [McMiller] jumped out with the chopper and chopped him up. And they jumped back in the car."[1] McMiller was concerned about Young having been pulled over the night before: "he was scared that she was . . . going to tell."[2]

Kouri interviewed Bailey on March 7, 2014, and Bailey identified clothing and other items recovered from the trunk of her car after the murder as McMiller's. During the interview, Kouri asked Bailey to call McMiller, and she did. Among other things, McMiller told Bailey, "don't fucking say nothing about me with that car," and that he was "ducking in the trenches."

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[1] "Chopper" is gang parlance for an assault rifle, like an AK-47 or a MAC-11.

[2] Washington was arrested on March 9, 2014 on an unrelated matter. While in custody, he reached out to detectives to share what he had learned from McMiller. Washington testified he reached out to detectives because on March 8 he learned Wooley was mentally disabled and was not a gang member.

As part of its investigation, the Los Angeles Police Department lifted fingerprints from the impounded Grand Marquis. All three defendants' fingerprints were on the car.

Defendants' cell phone locations and activity before and after the murder also featured prominently at trial. McMiller and Young's cell phones were used in Las Vegas between 6:04 p.m. and 7:37 p.m. on March 5. The next activity on each of McMiller's and Young's cell phones was in Los Angeles on the morning of March 6; McMiller's at 12:27 a.m. and Young's at 7:45 a.m. The first telephone calls from each of McMiller's and Young's phones in Los Angeles on March 6 accessed a tower about a mile north of the intersection where Wooley was murdered. All three defendants' phones made or received multiple telephone calls that accessed towers ranging from less than one mile to just over two miles away from 97th and Main Street.

Between 9:19 a.m. and 10:51 a.m., no defendant's phone made or received a call or sent a text message. Between 10:51 a.m. and 11:52 a.m., however, Pearson received three calls and sent two text messages from a cell tower antenna about a mile away from the crime scene, but facing it directly, which the People's expert testified was "consistent with being in the area of our crime scene."

McMiller and Young were separately arrested on April 8, 2014. During McMiller's arrest, officers discovered a MAC-11 assault weapon in a bag on the rear passenger seat of the vehicle in which he was riding.[3]

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[3] One officer described the MAC-11 as a "machine pistol, submachine gun with a pistol grip." The MAC-11 recovered during McMiller's arrest was not used in the attack on Wooley.

Washington was arrested again on the same unrelated charges on April 9, 2014. While he was in custody, Washington was attacked by other Hoover Criminals street gang members who accused him of cooperating with law enforcement and told him McMiller had ordered the attack.

Pearson was arrested on June 3.

The trial court conducted a preliminary hearing on August 14 and 15, 2014.[4] Between Pearson's arrest and the preliminary hearing, social media posts on accounts belonging to various Hoover Criminals street gang members identified Washington, referred to him as a "rat" and "snitch," and threatened Washington and his family. McMiller also spoke to other Hoover Criminals street gang members from jail about preventing Washington from testifying. As Washington approached the witness stand at the preliminary hearing, McMiller mouthed the words "fuck you" and shook his head at Washington.

Although he had no contact with her after their conversation in April in which he told Bailey, "don't fucking say nothing about me with that car," McMiller wrote Bailey in July. Among other things, McMiller wrote to Bailey, "I know the police questioned you," and asked her to call one of his friends who also lived in Las Vegas. After Kouri testified at the preliminary hearing about Bailey's March 7 interview, McMiller told that same friend—in a recorded jail call—Bailey's name and address and gave him directions to the casino food court where Bailey worked. McMiller also dispatched other Hoover Criminals

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[4] Although it is not clear from the record why and it affects no issues presented for review in this appeal, the original case (TA132616) was dismissed at some point. The case was re-filed and ultimately tried under a different case number (TA137063).

members to locate Bailey's contact information and report back. Eventually, Bailey received a call from someone whose voice she did not recognize calling from a private number; the caller said she was calling on McMiller's behalf and asked if McMiller could call Bailey.

The California Witness Relocation and Assistance Program assisted both Washington and Bailey with relocations.

C. The Charges

The People charged the defendants in 11 counts. McMiller, Young, and Pearson were jointly charged in count 1 with murder (Pen. Code, § 187, subd. (a)),[5] in count 2 with assault with a machine gun or assault weapon on witness Mirna Martinez (§ 245, subd. (a)(3)), in count 5 with shooting at an inhabited dwelling (§ 246), and in count 6 with dissuading a witness (Martinez) by force or threat (§ 136.1, subd. (c)(1)).

McMiller was separately charged in counts 3 and 8 with two separate counts of possession of a firearm by a felon (§ 29800, subd. (a)(1)), in count 7 with possession of an assault weapon (§ 30605, subd. (a)), in count 9 with dissuading a witness (Washington) from testifying (§ 136.1, subd. (a)(1)), and in counts 10 and 11 with conspiracy to commit witness intimidation (against Washington and Bailey) (§§ 182, subd. (a)(1), & 136.1, subd. (a)).

Pearson was separately charged in count 4 with possession of a firearm by a felon. (§ 29800, subd. (a)(1).)

The People also alleged as to count 1 that McMiller and Pearson personally and intentionally discharged a firearm,

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[5] Unless otherwise noted, statutory references are to the Penal Code.

causing great bodily injury and death. (§ 12022.53, subd. (d).) As to all three defendants, the People alleged that a principal personally used a firearm, which caused great bodily injury and death. (§ 12022.53, subds. (d) & (e)(1).) The People alleged gang enhancements as to all counts. (§ 186.22, subd. (b).) Finally, the People alleged that McMiller had a prior serious or violent felony conviction (§§ 667.5, subd. (c), 1192.7) and two prior prison terms (§ 667.5, subd. (b)).

D. The Trial

McMiller, Pearson, and Young were tried jointly before a jury in September 2015. McMiller's and Pearson's attorneys stipulated at trial that each had a prior felony conviction for purposes of possession of a firearm by a felon. On September 29, 2015, the jury returned guilty verdicts on all counts against all defendants. The jury determined that the murder was first degree, and found true all of the firearm allegations and gang enhancement allegations associated with each count. The jury found true on counts 10 and 11 that force or threats were used against Bailey and Washington between August 14, 2014 and August 17, 2014. On count 6, the jury found true that force or threats were used against Mirna Martinez on March 6, 2014.

On December 2, 2015, the trial court conducted a bench trial on McMiller's prior strike allegation, and the trial court found that allegation to be true.

The trial court sentenced Pearson to a total of 72 years to life. Young was sentenced to a total of 65 years to life. And McMiller was sentenced to a total of 161 years and four months to life. Each of the defendants' murder sentences—count 1—included an additional 25 years to life imposed based on the jury's firearm enhancement finding.

Each defendant timely appealed.

DISCUSSION

McMiller challenges the sufficiency of the evidence to support his convictions for dissuading Washington and Bailey from testifying. He also argues ineffective assistance of trial counsel because his attorney failed to either introduce testimony or request a continuance to obtain testimony from an eyewitness identification expert. Pearson challenges the sufficiency of the evidence to support the gang enhancements. Young contends the trial court committed instructional error by failing to instruct the jury to determine whether Washington was an accomplice and how to treat accomplice testimony. Young also argues that the prosecutor committed misconduct in closing argument based on the absence of a witness the prosecutor promised but failed to produce. Finally, Young contends McMiller's statements to Washington were inadmissible as to her and should have been excluded or limited. In a supplemental opening brief, Young also urges us to remand the case to the trial court for resentencing pursuant to Senate Bill No. 620, signed into law on October 11, 2017, which allows a trial court to strike or dismiss a firearm enhancement allegation or finding.

Each defendant joins in each other defendant's challenges that may apply.

I. McMiller's Statement to Washington

McMiller detailed the murder to Washington the morning of March 7, 2014. Young and Pearson both sought to have McMiller's statement to Washington excluded or limited to only McMiller. Young and Pearson contend the statement is inadmissible hearsay not subject to the hearsay exception for statements against penal interest in Evidence Code section 1230.

We review the trial court's decision for abuse of discretion. (*People v. Lawley* (2002) 27 Cal.4th 102, 153 (*Lawley*); *People v. Brown* (2003) 31 Cal.4th 518, 534.)

"Unless it falls within an exception to the general rule, hearsay is not admissible." (*People v. Duarte* (2000) 24 Cal.4th 603, 610 (*Duarte*).) "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.) The proponent of the evidence must show: (1) the declarant is unavailable; (2) the declaration was against the defendant's penal interest when made; and (3) the declaration was sufficiently reliable to warrant admission despite being hearsay. (*Duarte*, *supra*, at pp. 610-611.) Evidence Code section 1230, however, is "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant." (*People v. Leach* (1975) 15 Cal.3d 419, 441.)

Young challenges McMiller's admission to Washington on two separate bases. First, Young contends *Washington* was not credible and that the trial court should therefore have excluded Washington's testimony about *McMiller's* statement. Young claims that "Washington was granted huge advantages for his testimony, including monetary rewards in the mid five figures and failure to prosecute a three strikes charge. Thus, his testimony was not trustworthy." Second, Young contends that the portions of McMiller's statement in which he implicated

Young and Pearson were not against McMiller's penal interest and were, therefore, inadmissible.

A. Reliability of the declaration

Young cites no authority for her proposition that Washington's credibility has any bearing on the admissibility of McMiller's statement.[6] The focus of the trial court's inquiry into the statement's trustworthiness or reliability is on the trustworthiness of *McMiller's* statement, and *not Washington's* credibility. (*Cudjo*, *supra*, 6 Cal.4th at pp. 607-608.) Young's argument conflates Washington's credibility—a question for the jury—with the trustworthiness of McMiller's hearsay admission about which Washington testified—a question for the trial court. (See *ibid.)* And although Young raises Washington's credibility as an issue, she fails to cite *any* authority about the issue; the argument is forfeited. (*People v. King* (1991) 1 Cal.App.4th 288, 297, fn. 12.)

Even if we were to examine the trustworthiness of McMiller's admission to Washington through the lens of Washington's credibility, the defendants' attack on Washington's credibility is unavailing.

The jury having heard all the evidence which supported Washington's credibility and the evidence that challenged it, determined to believe him. Young has not given us any reason to second guess the jury. The monetary reward Young refers to is the relocation expense paid to move Washington and his family

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[6] "To determine whether the declaration passes the required threshold of trustworthiness, a trial court 'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' " (*People v. Cudjo* (1993) 6 Cal.4th 585, 607 (*Cudjo*).)

from the reach of threatened gang retaliation. Thus, his willingness to testify despite the danger and inconvenience to him and his family has a tendency in reason to support his credibility, not to question it. Regarding the dismissal of his third strike charges, that might be a reason the jury could have discredited his testimony, but it is not discrediting as a matter of law.

B. Declaration against penal interest

Young argues that "nothing McMiller allegedly said about the others made McMiller any more culpable, since he had already admitted to shooting the gun at Wooley." Young describes McMiller's statement as an "attempt[] to spread the blame by naming others he said were also involved," which would make the statements inculpating Young and Pearson inadmissible. (See *Lawley*, *supra*, 27 Cal.4th at p. 154.)

The People point out, however, that " '[t]he question . . . is always whether the statement was sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," and this question can only be answered in light of all the surrounding circumstances.' " (*People v. Cortez* (2016) 63 Cal.4th 101, 127 (*Cortez*), quoting *Williamson v. United States* (1994) 512 U.S. 594, 603-604.)

The facts our Supreme Court considered in *Cortez* are strikingly similar to the facts here. *Cortez* begins: "While riding in a car driven by defendant Norma Lilian Cortez, Rodrigo Bernal fired five or six shots at 19-year-old Emanuel Z. and 16-year-old Miguel Guzman, killing the latter." (*Cortez*, *supra*, 63 Cal.4th at p. 105.) *Cortez* involved a taped interview in which Bernal's nephew "told police . . . that he 'and this woman . . . went

to—we went shooting some 18s,' that they 'went . . . in her car,' and that she 'was the one driving' and 'he was the one shooting.' " (*Id.* at pp. 107-108.) He also confirmed that Bernal had identified the defendant by name as the driver. (*Id.* at p. 108.) According to *Cortez*, by the time Bernal identified the defendant to his nephew, Bernal "knew she and her car were already in police custody. He thus also knew that, by identifying her, he was increasing the likelihood that evidence connecting him to the shooting would be found. Indeed . . . police found on the floor of the passenger side of defendant's car a live round matching the caliber and brand of several found at the scene of the shooting. Finally, Bernal knew that 'being linked to' defendant 'would implicate' him in a drive-by shooting for which defendant had been arrested." (*Id.* at p. 127, fn. omitted.)

The People argue that McMiller's statement, including identifications of Pearson and Young, were against McMiller's penal interest in several ways. The facts show that the crime was committed with other gang members and for the benefit of the gang, which supported the gang enhancement. The facts also supported a finding that the murder was premeditated. As in *Cortez*, by the time McMiller told his story to Washington, he knew the Grand Marquis had been impounded and that the police would likely find physical evidence linking him and the others to the car.

We agree and find that the trial court did not abuse its discretion in admitting McMiller's March 7 statement to Washington.

II. Accomplice Instruction

No party requested or objected to the omission of a jury instruction regarding accomplice testimony. Nevertheless, Young

contends "the trial court failed in its sua sponte duty to instruct the jury on the principles of accomplice testimony" because, she contends, there was "ample evidence that Erick Washington was involved in the Wooley shooting."

"A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.)

"If there is evidence from which the jury could find that a witness is an accomplice to the crime charged, the court must instruct the jury on accomplice testimony. [Citation.] But if the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, the trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony." (*People v. Horton* (1995) 11 Cal.4th 1068, 1114.) We review the record for substantial evidence to support Young's allegation that Washington was an accomplice. (*People v. Lewis* (2001) 26 Cal.4th 334, 369 (*Lewis*).) "Substantial evidence" in this context is " 'evidence sufficient to "deserve consideration by the jury," not "whenever *any* evidence is presented, no matter how weak." ' " (*Ibid.*, original italics.)

Young argues that the "record contains powerful evidence upon which a jury could conclude that Washington was a principal in the offense." Washington and McMiller were close friends, Young argues. They were both intimate with Bailey at

different times. They were members of the same gang. Washington had McMiller's phone number in his phone, and the two contacted each other both before and after the murder. And Washington waited two days to report McMiller's statement to the police.

Young's "evidence supporting the request for accomplice instructions was not substantial but speculative." (*Lewis*, *supra*, 26 Cal.4th at p. 369.) We find no error where the trial court did not sua sponte give an unrequested jury instruction for which there was no evidentiary basis. On this record, we find no reason for the trial judge to have even considered whether Washington—one of McMiller's victims—was also an accomplice to another one of the defendants' crimes.

III. Prosecutorial Misconduct

When McMiller showed up at Washington's home on March 7 to tell Washington about Wooley's murder, Washington was not alone; Washington's children, his girlfriend, and some of her friends were also present. During rebuttal argument, the People argued that if the defense wanted to argue McMiller did not admit his crimes to Washington, the defense could have called one of the other people present when the conversation took place to counter Washington's testimony.

Young contends that the People's argument was a reference to Shaquita Sanders, Washington's wife, even though the People knew Sanders was unavailable to testify.[7] Alleging prosecutorial misconduct based on that argument, the defendants moved for a mistrial, which the trial court denied.

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[7] Sanders and Washington married on August 1, 2015. For dates before August 1, 2015, Sanders is denoted as Washington's girlfriend.

Young points out that it "is well established misconduct for a prosecutor to argue to the jury that the absence of [a] witness is evidence of guilt, knowing that the witness was unavailable." The People point out, however, that the prosecutor did *not* refer to Sanders by name, and that there were other logical witnesses present when McMiller told Washington about the murder. The record contains no discussion of the identity of those other witnesses to McMiller's statement (only that they were friends of Washington's then-girlfriend), of efforts to locate them, or of their availability to testify. "It is well established . . . that the rule prohibiting comment on defendant's silence does not extend to comments on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses." (*People v. Medina* (1995) 11 Cal.4th 694, 755, accord, *People v. Denard* (2015) 242 Cal.App.4th 1012, 1020; see *People v. Thomas* (2012) 54 Cal.4th 908, 945.) It was not misconduct to invite the jury to question why the defense failed to call witnesses other than Sanders. (See also *People v. Ford* (1988) 45 Cal.3d 431, 445-446.) The trial court did not err by denying the defendants' motion for a mistrial based on the prosecutor's argument.

IV. Sufficiency of the Evidence

When an appellant challenges the sufficiency of the evidence to support a criminal conviction, "we review the whole record in the light most favorable to the judgment to determine whether it discloses 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." (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) "Although we must ensure the evidence is reasonable, credible,

and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends." (*People v. Jones* (1990) 51 Cal.3d 294, 314.) It "is not a proper appellate function to reassess the credibility of the witnesses." (*Id.* at pp. 314-315.)

A. Gang enhancements

Pearson contends the evidence is insufficient as a matter of law to support the gang enhancement allegations the jury found to be true.

To sustain gang enhancement allegations under section 186.22, subdivision (b), the People must prove that a felony was "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 . . . ." A "criminal street gang" is "any ongoing organization, association, or group of three or more persons, whether formal or informal . . . whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity," among other requirements. (§ 186.22, subd. (f).) " '[P]attern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, . . . or conviction of two or more [offenses from a list included in the statute], provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons . . . ." (§ 186.22, subd. (e).)

Citing *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), Pearson specifically contends that the prosecution was required

to show a connection between the specific subsets of the Hoover Criminals street gang involved in the predicate offenses and those gang members who committed the crimes at issue here.

The People introduced predicate crimes committed by Andrew Vincent Jackson and David Jackson Cash, two Hoover Criminals street gang members. Jackson and Cash were convicted of their crimes in 2014. Pearson accurately reports, however, that the record contains no evidence about the subset of Hoover Criminals with which Jackson and Cash were associated. The record could *not*, therefore, contain evidence connecting Jackson and Cash's subset with *Pearson's* subset.

The Hoover Criminals street gang is divided into nine subsets, identified by various numbered streets that intersect Hoover: four-trey (43), five-deuce (52), five-nine (59), seven-four (74), eight-trey (83), nine-deuce (92), nine-four (94), 107, and eleven-deuce (112). Added together, the numbers equal 716, which is a number used to represent the entire Hoover Criminals street gang. Pearson and McMiller are members of the "eight-trey" subset and the "Jump Out Boys" (J.O.B.) clique. Young was a member of the 107 subset.

The core conclusion of *Prunty* is that "where the prosecution's case positing the existence of a single 'criminal street gang' for purposes of section 186.22(f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets." (*Prunty*, *supra*, 62 Cal.4th at p. 71.) "That connection," *Prunty* explained, "may take the form of evidence of collaboration or organization, or the sharing of material information among the subsets of a larger group. Alternatively, it may be shown that the subsets are part of the

same loosely hierarchical organization, even if the subsets themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization." (*Ibid.*)

Prunty spelled out examples of the types of evidence prosecutors might introduce to make the necessary organizational showing, specifically noting that situations may arise where "formal structure or hierarchy may not be present, but the facts may suggest the existence of behavior reflecting such a degree of collaboration, unity of purpose, and shared activity to support a fact finder's reasonable conclusion that a single organization, association, or group is present." (*Prunty*, *supra*, 62 Cal.4th at p. 78.) "Even evidence of more informal associations, such as proof that members of two gang subsets 'hang out together' and 'back up each other,' can help demonstrate that the subsets' members have exchanged strategic information or otherwise taken part in the kinds of common activities that imply the existence of a genuinely shared venture. [Citations.] This type of evidence routinely appears in gang enhancement cases. [Citation.] *In general, evidence that shows subset members have communicated, worked together, or share a relationship (however formal or informal) will permit the jury to infer that the subsets should be treated as a single street gang*." (*Id.* at pp. 78-79, italics added.) Moreover, "[t]his evidence need not be direct, and it need not show frequent communication or a hierarchical relationship among the members who communicate." (*Id.* at p. 78.)

Prunty specifically noted that "evidence that two members of different neighborhood subsets have engaged in activities suggesting that they identify one another as belonging to the same criminal street gang could be relevant to showing that the subsets form a single group. Such evidence, coupled together with appropriate evidence that a gang exists, that it operates within a particular geographic area, and that it conducts its activities through subsets or in another decentralized fashion, could permit the inference that the different subsets are members." (*Prunty*, *supra*, 62 Cal.4th at p. 79.)

The type of evidence *Prunty* laid out in great detail is the same evidence the People introduced here.

One of the prosecution's gang experts specifically identified the Hoover Criminals street gang's territory, large as it was, stretching from Imperial Highway to Vernon Avenue and from Broadway to Vermont. While subsets existed, the Hoover Criminals have been engaged in a gang war with the Main Street Crips—a common activity—since 2009 or 2010.

The evidence here was compelling, however. Washington, himself an eight-trey Hoover Criminal, testified that the subsets did not matter when retaliation for a Hoover Criminals shooting was at issue: "When it comes down to that, it's Hoover. Don't matter what clique does it." And the evidence in the record is more than circumstantial; McMiller declared his allegiance to 716—all nine Hoover Criminals subsets—in a recorded jail call.

The evidence here is sufficient to distinguish this case from *Prunty* and to support the jury's gang enhancement findings.

B. Dissuading Washington from testifying

McMiller contends the record contains insufficient evidence to sustain his conviction for dissuading Washington by force or

threat. McMiller argues that section 136.1, subdivision (c)(1), under which he was convicted in count 9, requires that the prosecution prove the defendant specifically intended to dissuade a witness from testifying. (See *People v. Lyons* (1991) 235 Cal.App.3d 1456, 1460-1461.) According to McMiller, merely saying "fuck you" to Washington as he approached the witness stand and shaking his head at Washington while Washington testified was not evidence from which the jury could infer that intent.

We disagree with McMiller's assessment in the first instance. We also note that McMiller omits key evidence from which the jury could have gleaned McMiller's intent.

As an initial matter, the judge presiding over the preliminary hearing interpreted McMiller's actions—on the record—"as intimidation to sway the witness from testifying." In fact, at the very moment McMiller attempted to intimidate Washington, the trial court made a record: "Mr. McMiller, you are mouthing off something to the witness right now. You are telling him not to testify." The preliminary hearing judge testified at trial that he saw McMiller mouth the word " 'fuck' and other—other words, and the . . . shaking of the head as Mr. Washington was taking the stand." Courtroom video from the preliminary hearing was introduced as evidence at trial, and corroborates the testimony of the various witnesses who testified about what happened in the courtroom that day. While the transcript from the preliminary hearing was not introduced at trial, it is instructive that a reasonable person viewing the incident could have inferred that McMiller intended to dissuade Washington from testifying.

Moreover, the judge's testimony and the courtroom video are not the only evidence the jury could have considered. The jury heard multiple jail calls between McMiller and others—albeit in coded language—from which a reasonable juror could have inferred McMiller was inciting others to act to prevent Washington from testifying.

The evidence is sufficient to sustain McMiller's conviction on count 9.

C. Conspiracy to dissuade Bailey from testifying

McMiller's contention on count 10—conspiracy to dissuade Bailey from testifying—is largely the same as his contention on count 9. McMiller argues that there is no evidence he intended to enter into an *unlawful* agreement to "vex, annoy, harm, or injure" Bailey to prevent or dissuade her from testifying. McMiller insists he was attempting to find out if Bailey was still pregnant with his child when he repeatedly attempted to locate her—after she changed her telephone number and began studiously avoiding any contact with him.

When Bailey telephoned McMiller at Kouri's request on March 7, 2014, McMiller told her: "don't fucking say nothing about me with that car." "Don't fucking say nothing about me with that car" does not convey concern about Bailey's pregnancy. And that evidence alone is sufficient for the jury to conclude McMiller's intent was to dissuade Bailey from testifying. But again, there is more.

In addition to the attempts he set in motion to locate Bailey after he learned she had been cooperating with the police, McMiller wrote Bailey a letter in July 2014. In that letter, he told her "[d]on't turn your back on me" and "I know the police questioned you." Again, those statements cannot be interpreted

as concern for Bailey or the child she was carrying. And the jury could have reasonably interpreted them as evidence of McMiller's concern about and intent to dissuade Bailey from testifying.

V. Ineffective Assistance of Counsel

Two eyewitnesses—Pikes and Martinez—identified McMiller as one of Wooley's murderers. The identifications first came at trial. The People produced discovery in April before the September 2015 trial that Pikes would identify McMiller. McMiller's counsel apparently did not notice—though acknowledged receiving—that piece of discovery. Nevertheless, defendants' counsel claimed surprise at the idea of eyewitness identifications, and neither called an eyewitness expert to rebut Pikes's and Martinez's identification testimony nor requested a continuance to obtain that testimony. McMiller claims those actions constituted ineffective assistance.

A claim that counsel was ineffective requires a showing by a preponderance of the evidence of objectively unreasonable performance by counsel and a reasonable probability that but for counsel's errors, the defendant would have obtained a more favorable result. (*In re Jones* (1996) 13 Cal.4th 552, 561.) The defendant must overcome presumptions that counsel was effective and that the challenged action might be considered sound trial strategy. (*Ibid.*) To prevail on an ineffective assistance claim on appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. (*People v. Majors* (1998) 18 Cal.4th 385, 403.) A "court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that

course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697; accord, *In re Fields* (1990) 51 Cal.3d 1063, 1079.)

We need not determine whether counsel's performance was deficient because defendants here suffered no prejudice. With or without an eyewitness identification, McMiller identified himself, Pearson, and Young to Washington, and identified the roles each played in Wooley's murder. The defendants' fingerprints were on the car that surveillance cameras captured both at and fleeing the crime scene. McMiller's ex-girlfriend identified McMiller's clothing connecting him to the car. The defendants' cell phone records corroborated the prosecution theories about their locations before and after the murder. Far from a "reasonable probability" of a more favorable result, it is *highly unlikely* that an eyewitness expert would have changed the outcome. McMiller has therefore failed to show prejudice caused by the alleged deficient performance of trial counsel.

VI. Resentencing Under Senate Bill No. 620

At the sentencing hearing on December 2, 2015, the trial court imposed a 25 years to life enhancement pursuant to section 12022.53, subdivision (d) for McMiller and Pearson and section 12022.53, subdivision (e)(1) for Young because of the jury's findings on the People's firearm enhancement allegations.

On October 11, 2017, the Governor signed Senate Bill No. 620 into law. Senate Bill No. 620 amended section 12022.53 to provide that the "court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h); Stats. 2017, ch. 632, § 2.)[8]

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[8] Under section 1385, the court may, in furtherance of justice, "strike or dismiss an enhancement" or "strike the

On November 16, 2017, Young filed a request for leave to file a supplemental opening brief contending we must remand the case to the trial court for resentencing under section 12022.53, subdivision (h). We granted Young's request and the brief was filed. The People did not respond.

An amendment to the Penal Code will not generally apply retroactively. (See § 3.) However, an exception applies when the amendment reduces punishment for a specific crime. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*); accord, *People v. Brown* (2012) 54 Cal.4th 314, 323-324.) Reduction of a punishment indicates the Legislature has "expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act," and "should apply to every case to which it constitutionally could apply." (*Estrada*, *supra*, at p. 745.) That includes all cases in which the judgment is not yet final as of the effective date of the legislature's sentence reduction. (*Id.* at p. 744.) The exception to nonretroactivity extends to amendments that do not necessarily reduce a defendant's punishment but give the trial court discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76; see also *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308.)

In December 2015, the law did not allow the trial court to strike firearm enhancements, so defendants' counsel had no reason to argue at the sentencing hearing that the court should strike that enhancement in this case. We therefore remand the case to the trial court for resentencing to allow defendants and

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additional punishment for that enhancement." (§ 1385, subds. (a) & (c); see *People v. Meloney* (2003) 30 Cal.4th 1145, 1155.)

their counsel "a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion." (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 258.)

DISPOSITION

We remand the case for the trial court to hold a new sentencing hearing to consider whether to exercise its discretion under section 12022.53, subdivision (h), to strike or dismiss an enhancement otherwise required by section 12022.53. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.