Filed 2/23/18 P. v. Fifita CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. PULUPAKI FIFITA et al., Defendants and Appellants.	B276521 (Los Angeles County Super. Ct. No. NA100695)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed with directions.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant Pulupaki Fifita.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant Lee Eastwood Manako.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Scott A. Taryle, Supervising Deputy Attorneys General, and Kathy S. Pomerantz, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Pulupaki Fifita (Fifita) and Lee Eastwood Manako (Manako) (collectively, Defendants) of the following felonies: attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, 187, subd. (a)[1]); assault with a firearm (§ 245, subd. (a)(2); and shooting at an inhabited dwelling (§ 246). In addition, the jury convicted Manako of a misdemeanor, exhibiting a concealable firearm in public (§ 417, subd. (a)(2)(A)). The jury also found true certain gang and firearm allegations. As a result, the trial court sentenced each defendant to a lengthy prison term—seven years to life, plus 20 years.

On appeal, Defendants, individually and jointly, raise almost a dozen separate arguments, only one of which we find meritorious. The trial court, in light of the recent amendments to sections 12022.53 and 12022.5, is directed to reconsider the firearm enhancements to Defendants'

---

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

sentences—both imposed and stayed. In all other respects, the judgment is affirmed.

BACKGROUND

I. The crimes

A. THE INCIDENT AT BIG 5

On October 27, 2014, at approximately 4:00 p.m., Manako entered a Big 5 sporting goods store in San Pedro, California. While speaking with a uniformed security guard at the front of the store, Manako took a revolver from his pocket, showed it to the security guard and then returned it to his pocket. A few minutes after Manako entered the store, Fifita entered and asked Manako for a receipt from Rite-Aid. Manako checked his pockets but did not find the receipt. Defendants then walked out of the store and got into a "big," white, four-door vehicle—Fifita in the driver's seat and Manako in the front passenger seat—and drove away.

B. THE INCIDENT AT PIZZA HUT

At or around the same time that the Defendants were at the Big 5 store, Frank Kuaea (Kuaea) went to a nearby Rite-Aid drug store where he met a group of friends. After Kuaea and his friends left the Rite-Aid, they crossed a nearby street at a cross-walk; as they did so, a white SUV stopped in the crosswalk nearly hitting Kuaea. Some words were "exchanged" between one of Kuaea's friends and the occupants of the white SUV. Kuaea started running because he got "spooked" and was "afraid" and because one of his friends started running.

Kuaea ran toward a nearby Pizza Hut restaurant. At first, he tried to enter the Pizza Hut through the locked delivery driver's door. Then he went around the side of the building and entered the Pizza Hut through the customer entrance. Once inside, Kuaea jumped the counter, telling the Pizza Hut employees that " 'somebody's chasing me' " and that they should call the police. According to one of the Pizza Hut employees, Kuaea looked "panicked."

Once inside the Pizza Hut, Kuaea heard pounding on the locked driver's door that he had first tried to use. As he hid in the back of the restaurant, Kuaea heard a gunshot and the sound of one of the restaurant's windows shattering. As he fled from the Pizza Hut, Kuaea saw the same white SUV that had nearly hit him in the crosswalk.

C. DEFENDANTS' ARREST

Shortly after receiving a radio call regarding a possible assault with a deadly weapon at the Pizza Hut by suspects in a white Chevy Tahoe, a Los Angeles police officer spotted and stopped such a vehicle. Inside the Chevy Tahoe were the Defendants: Fifita was in the driver's seat, and Manako was in the front passenger seat.

After taking the Defendants into custody, the police searched the vehicle, first at the scene of the stop and then at the impound yard. At the scene, the police found, among other things, a shotgun on the vehicle's backseat that had a spent round in the gun's chamber and smelled as though it has recently been fired. As the police removed the shotgun from the car, Manako said to the police, "Be careful with

that. That's my baby." The next day, after learning about the incident at the Big 5 store, the police conducted a more thorough search of the vehicle at the impound yard and discovered a loaded .32 caliber revolver hidden in an air conditioning vent with four live rounds and one spent cartridge in the gun's cylinder.

II. The trial

On March 21, 2016, just before the parties were to begin voir dire, Manako's counsel, pursuant to section 1368, declared doubt as to his client's competency. As a result, the trial court suspended the criminal proceeding as to Manako and the trial proceeded against Fifita alone. On March 28, 2016, the trial ended in a mistrial due to the jury being hung on all counts against Fifita.

On May 12, 2016, after hearing testimony from a court-appointed psychiatrist, the trial court reinstated criminal proceedings against Manako, finding that Manako "presented absolutely no evidence to indicate his incompetence."

Prior to the second trial, Fifita filed a motion to sever, which the trial court denied on June 24, 2016.

On July 8, 2016, after deliberating for almost six hours over the course of two days, the jury returned its guilty verdict against the Defendants on all counts.

On July 27, 2016, the trial court sentenced each Defendant to seven years to life, plus 20 years for the firearm enhancements. Defendants timely appealed.

DISCUSSION

On appeal, Defendants, both individually and jointly advance a number of arguments as to why the judgment must be reversed.

Fifita argues that the trial court improperly denied his motion to sever, the trial court improperly admitted unduly prejudicial and confusing evidence, and that the jury's findings with respect to the firearm enhancements were not supported by substantial evidence. Manako contends that the trial court erred when it found him competent to stand trial and that his misdemeanor conviction on exhibiting a concealable firearm in public was not supported by the evidence.

Jointly, Defendants assert the following arguments: the People used racially discriminatory challenges during jury voir dire; their right to a fair trial was violated by the presence of seven uniformed officers in the courtroom; the People's gang expert based his testimony on inadmissible hearsay; the jury's finding that the attempted murder was premeditated and deliberate was not supported by substantial evidence; and that the jury's findings with respect to the gang enhancements were not supported by substantial evidence. In addition, Defendants argue that due to recent amendments to the Penal Code, their case should be remanded to the trial court for reconsideration of the firearm enhancements.

As discussed below, with the exception of their argument concerning the recent amendments to the firearm

enhancement statutes, we do not find any of Defendants' arguments to be persuasive.

I. Manako's competence to stand trial

Manako contends that the trial court erred in finding him competent "despite the strong evidence to the contrary."

The evidence at the hearing on Manako's competency came from testimony and a report by Ronald Markham, "a board-certified psychiatrist," who is also "an attorney at law licensed to practice in the State of California." Dr. Markham was defense counsel's "first choice" to evaluate Manako.

In his two-page report dated April 13, 2016, Dr. Markham stated that from the beginning of the evaluation, Manako was "unresponsive, appeared preoccupied and acted in a bizarre, detached manner." According to Dr. Markman, Manako avoided eye contact, spoke in a low voice, and conversed with imaginary people. "He grimaced repeatedly, wrung his hands often, spit on the floor, began laughing for no reason, rocked back and forth, spoke, screamed in a foreign language . . . . He then began banging on the glass partition with his fist repeatedly, with a force that could have broken it, if it had been regular glass." The evaluation had to be terminated after only 30 minutes to due to Manako's uncooperative and bizarre behavior.

At the hearing, Dr. Markham, consistent with his report, testified that Manako behaved in a "very bizarre manner" during his evaluation session and explained that during the evaluation Manako "began talking to an

imaginary person to his side and began getting verbally abusive to that person."

As discussed below, we find Manako's argument that the trial court erred in finding him competent to be unconvincing.[2]

A. RELEVANT LAW AND STANDARD OF REVIEW

" 'The criminal trial of a mentally incompetent person violates due process.' " (*People v. Blacksher* (2011) 52 Cal.4th 769, 797 (*Blacksher*).) A defendant is mentally incompetent to stand trial if, as a result of mental disorder or developmental disability, the defendant is "unable to understand the nature of the criminal proceedings *or* to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a), italics added.)

"A defendant is presumed competent unless the contrary is proven by a preponderance of the evidence by the party contending he or she is incompetent." (*Blacksher*, *supra*, 52 Cal.4th at p. 797.) In other words, "[t]he

---

[2] Manako also argues on appeal that the entire competency proceeding was procedurally flawed because Dr. Markham "was unable to complete a proper mental status examination." However, Manako never objected to the purportedly incomplete medical evaluation and/or the arguably flawed judicial proceeding that followed. By failing to object to the hearing on procedural grounds, Manako failed to preserve the issue for appellate review. (See generally, *People v. Fudge* (1994) 7 Cal.4th 1075, 1108; *People v. Boyette* (2002) 29 Cal.4th 381, 459.) Accordingly, we decline to address it.

defendant has the burden of proving incompetency by a preponderance of the evidence." (*People v. Marshall* (1997) 15 Cal.4th 1, 31.)

As our Supreme Court has held, "[m]ore is required than just bizarre actions or statements by the defendant to raise a doubt of competency." (*People v. Marshall*, *supra*, 15 Cal.4th at p. 33.) For example, in *People v. Ramos* (2004) 34 Cal.4th 494, our highest court held that the defendant's death wish, history of psychiatric treatment, planned suicide attempt, propensity for violence, and psychiatric testimony that defendant was physically abused as a child and suffered from a paranoid personality disorder did not constitute substantial evidence of incompetence. (*Id.* at pp. 508–511.)

"In reviewing on appeal a finding of competency, 'an appellate court must view the record in the light most favorable to the verdict and uphold the verdict if it is supported by substantial evidence.' " (*Blacksher*, *supra*, 52 Cal.4th at p. 797.) Under the substantial evidence standard, we may not reweigh evidence or reappraise the credibility of witnesses. Under this standard, " 'the power of an appellate court *begins* and *ends* with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support [the trial court's decision], and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trial court]. It is of no consequence that the [trial court] believing other evidence, or drawing different inferences,

might have reached a contrary conclusion.' " (*People v. Ghipriel* (2016) 1 Cal.App.5th 828, 832.) Reversal under this standard "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the trial court's decision].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

Here, the trial court did not abuse its discretion because Dr. Markham's report and testimony provided substantial evidence of Manako's ability to understand the nature of the criminal proceedings against him.

Dr. Markham stated in his report that there was "a significant possibility that [Manako] [was] feigning a psychiatric condition" because he was " 'too crazy' " and had a "highly exaggerated group of signs and symptoms." At the hearing, Dr. Markham testified that Manako behaved in a way that "psychotic people do not." Manako's behavior during the evaluation was "almost too bizarre to be psychotic as a result of a mental disorder, but an attempt by someone to feign a condition." Dr. Markham also observed in his report and in his testimony that Manako responded "normally" to the deputies and that he "behaved in a very acceptable constructive manner" by following the deputies' directions.

Critically, Dr. Markham opined "to a high degree of probability" that Manako did understand the nature of the criminal proceedings against him and that he was

"competent under the circumstances." Accordingly, we affirm the trial court's decision.

II. Fifita's motion to sever

In his written motion to sever and during oral argument before the trial court, Fifita argued that severance was required due to "disparity"—disparity in the charges brought against each Defendant and disparity in the weight of evidence against each Defendant. Fifita argued that his association with the purportedly much more disreputable Manako—"Manako admitted to being affiliated with the Tongan Crips,"—would "spill over" to him and compromise his defense. On appeal, Fifita has returned to his disparity theme, arguing that the trial court erred in denying his motion to sever because "[t]he case against Manako was much stronger than the case against [him]."

A. RELEVANT LAW AND STANDARD OF REVIEW

There is, as our Supreme Court has noted, "a statutory preference for joint trials of jointly charged defendants." (*People v. Masters* (2016) 62 Cal.4th 1019, 1048.) In fact, section 1098 provides that "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they *must* be tried jointly, unless the court order[s] separate trials." (Italics added.) Under section 1098, "a trial court *must* order a joint trial as the 'rule' and *may* order separate trials only as an 'exception.' " (*People v. Alvarez* (1996) 14 Cal.4th 155, 190; accord, *People v. Mackey* (2015) 233 Cal.App.4th 32, 99.)

The reason for this preference is self-evident: joint trials are favored because they promote efficiency and avoid the potential for inconsistent verdicts. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 378–379*; People v. Letner and Tobin* (2010) 50 Cal.4th 99, 150.) The " ' " 'classic' case for joint trial is presented when defendants are charged with common crimes involving common events and victims." ' " (*People v. Cleveland* (2004) 32 Cal.4th 704, 725.) However, refusal to sever may be an abuse of discretion where " ' "a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges." ' " (*People v. Kraft* (2000) 23 Cal.4th 978, 1030.)

" 'We review a trial court's denial of a severance motion for abuse of discretion based on the facts as they appeared when the court ruled on the motion. [Citation.] If we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial. [Citations.] If the court's joinder ruling was proper when it was made, however, we may reverse a judgment only on a showing that joinder " 'resulted in "gross unfairness" amounting to a denial of due process.' " ' " (*People v. Homick* (2012) 55 Cal.4th 816, 848.)

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

Here, severance was not required due to the disparity in either the charges or the evidence. With one exception, all

of the charges against the Defendants were identical; the lone exception was a comparably less serious and less violent misdemeanor charge against Manako.

As for the alleged disparity in the evidence, there was little difference in the evidence in connection with the shooting at the Pizza Hut—both Defendants were seen in a white SUV shortly before the shooting outside the Big 5 and both were apprehended in a white Chevy Tahoe moments after the shooting with a shotgun containing a spent cartridge in the chamber on the backseat of the vehicle. The one significant difference in the evidence—Manako's statement that the shotgun was his "baby"—favored Fifita's defense. While it is true, more photographs from Facebook were introduced of Manako "throwing" gang signs than of Fifita, the disparity was not overwhelming: Manako appeared in all four photographs, while Fifita appeared in only one. Moreover, on October 4, 2014, three weeks before the charged crimes, both Manako and Fifita were seen in a white Chevy Tahoe attending a funeral for a gang member and Fifita was arrested after the funeral because a concealed weapon and illegal narcotics were found in the Tahoe that he was driving. In other words, the principal cases against each Defendant were of relatively equal strength.

In short, the joint trial was not an example of two different cases, one weak and one strong, being tried together. Instead, the Defendants were charged with common crimes involving common events and a common victim and the evidence against both Defendants on the

common crimes was evenly balanced. In short, the case against Defendants was a " ' " 'classic case' " ' " for a joint trial. (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 725.) Accordingly, the trial court did not err by denying Fifita's motion to sever.

In addition, even if (as we conclude) the trial court did not abuse its discretion in denying severance pretrial, we must also determine " 'whether events *after* the court's ruling demonstrate that joinder actually resulted in "gross unfairness" amounting to a denial of defendant's constitutional right to fair trial or due process of law.' " (*People v. Simon* (2016) 1 Cal.5th 98, 129.) "In determining whether joinder resulted in gross unfairness," our Supreme Court has observed "that a judgment will be reversed on this ground only if it is reasonably probable that the jury was influenced by the joinder in its verdict of guilt." (*Id.* at pp. 129–130.) As discussed above, the evidence of Fifita's culpability for the attempted murder of Kuaea was as strong as that against Manako. Consequently, there was no violation of Fifita's due process right to a fair trial.

III. The People did not use racially discriminatory challenges during jury voir dire

During jury selection, the People used peremptory challenges to excuse two African-Americans from the panel: a single African-American woman who worked as a plant

supervisor for a school district (Juror No. 12[3]); and a single African-American man who worked part-time in retail and as a disc jockey and who was a sophomore in high school (Juror No. 8[4]). Defendants objected to the challenges pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).[5] The trial court denied both objections.

With regard to Juror No. 12, the trial court found that the objection was not supported by a prima facie showing of racial discrimination, noting that Juror No. 12 had expressed "some concerns about police officers in the past which would justify a peremptory." When asked to volunteer an explanation for the challenge, the prosecutor stated that it was Juror No. 12's "expression of being leery of the police." Having considered the prosecutor's explanation, the trial court overruled the objection.

As for Juror No. 8, the court, noting that the prospective juror was a "fairly young person," found that there was not a prima facie showing of racial discrimination.

---

[3] Juror No. 12 was originally Juror No. 18. However, she eventually became Juror No. 12 after other prospective jurors were dismissed.

[4] Juror No. 8 was originally Juror No. 13. However, he eventually became Juror No. 8 after other prospective jurors were dismissed.

[5] Although Manako joined in Fifita's objection to the dismissal of Juror No. 8, he did not join in the objection to Juror No. 12's dismissal.

The prosecutor, when asked to volunteer an explanation for the challenge, stated as follows: "He is young. I think counsel even pointed out in voir dire that he appears to be much younger than the other jurors. He has little, if no life experience." Having considered the prosecutor's explanation, the trial court overruled the objection, finding that Juror No. 8 had a deficit of life experiences.

On appeal, Defendants contend that the People's dismissal of Jurors No. 12 and 8 violated their constitutional right to a jury drawn from a representative cross-section of the community. As discussed below, we reject Defendants' argument, holding that Defendants failed to meet their burden of showing an inference of discriminatory purpose in the People's exercise of peremptory challenges.

A. RELEVANT LAW AND STANDARD OF REVIEW

"Both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race or gender. [Citations.] Such a use of peremptories by the prosecution '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 California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution.' " (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.)

"The now familiar *Batson*/*Wheeler* inquiry consists of three distinct steps. First, the opponent of the strike must

make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose in the exercise of peremptory challenges. Second, if the prima facie case has been made, the burden shifts to the proponent of the strike to explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications. Third, if the party has offered a nondiscriminatory reason, the trial court must decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination." (*People v. Scott* (2015) 61 Cal.4th 363, 383 (*Scott*).) "The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*People v. Lenix* (2008) 44 Cal.4th 602, 612–613 (*Lenix*).)

Where, as here, "(1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson*/*Wheeler* motion with a review of the first-stage ruling." (*Scott*, *supra*, 61 Cal.4th 363, 391, fn. omitted.) "If the appellate court agrees with the trial court's first-stage ruling, the claim is resolved. If the appellate court disagrees, it can proceed directly to review of the third-stage

ruling, aided by a full record of reasons and the trial court's evaluation of their plausibility." (*Id*. at p. 391.)

"Review of a trial court's denial of a *Wheeler*/*Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges " 'with great restraint.' " [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.' " (*Lenix*, *supra*, 44 Cal.4th at pp. 613–614.)

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

1. Juror No. 12

Our Supreme Court has "repeatedly upheld peremptory challenges made on the basis of a prospective juror's negative experience with law enforcement." (*People v. Turner* (1994) 8 Cal.4th 137, 171.) As our highest court has explained, "A negative experience with the criminal justice system is a valid neutral reason for a peremptory challenge." (*People v. Booker* (2011) 51Cal.4th 141, 167, fn. 13.) Moreover, a prospective juror's negative experience with police need not be directly personal. (See, e.g., *People v. Garceau* (1993) 6 Cal.4th 140, 172 [juror's family members

had "run afoul of the law"]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282 [same].) In *People v. Walker* (1988) 47 Cal.3d 605, 626, our Supreme Court upheld a peremptory challenge to an Africa-American woman, who was generally skeptical with regard to the "credibility of police officers" and who "believed the San Jose Police Department had followed her husband [not her] home every night for a protracted period of time."

Here, Juror No. 12 plainly indicated her concerns about the police during voir dire. When the prospective jurors were asked if they had any positive or negative feelings about police officers that could affect them as jurors in the case, Juror No. 12 volunteered that she was "[j]ust a little leery, not to say I don't trust them. Just a little leery." Later, when counsel for Fifita asked Juror No. 12 to explain why she was leery of the police, she stated: "You know, I grew up trusting police officers. Officer Bill—we have Officer Bill, we used to call them back in the day, but just some of the actions I see on TV I am not comfortable with. That doesn't mean that I don't trust all police officers. I'm just a little leery. I just wanted to make sure if I were on the jury that everyone would line up." When counsel for Fifita pressed Juror No. 12 on whether she thought that some police officers do a "great job and others "don't do such a great job," Juror No 12 responded, "Just like anything, just good people, bad people, good officers, bad officers. I'm just a little skeptical at times depending on what the situation is."

2. Juror No. 8

Extreme youth, when expressed as limited life experience and little education, is also a proper basis for peremptories. (See *People v. Sims* (1993) 5 Cal.4th 405, 429–430; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328.) In *Sims*, our highest court upheld a peremptory challenge to Hispanic man because "the trial court expressly found that Mr. Mandujano 'appeared quite young to the court.' " (*Sims*, at p. 430.) In *Perez*, the Court of Appeal upheld peremptory challenges to two Hispanic college students due to "limited life experience": "During voir dire, both Garcia and Salazar responded to the question in the questionnaire regarding occupation by saying they were college students. Both also said they did not have children, had never served on a jury, been a crime victim, or a party to a law suit and had no involvement in law enforcement." (*Perez*, at p. 1328.) Here, Juror No. 8 not was not even a college student, but merely a sophomore in high school.

In short, Defendants failed to meet their threshold burden under *Wheeler*/*Batson*—making a prima facie case of racial discrimination with respect to the dismissals of Juror Nos. 12 and 8. Accordingly, we affirm the trial court's decision to deny Defendant's objections.

IV. Defendants' right to a fair trial was not undermined by a "large" number of officers in the courtroom

During the trial, Defendants repeatedly objected to the number of uniformed police officers in the courtroom.

The first such objection occurred prior to opening statements. At that time, there were two bailiffs, two uniformed officers sitting in the back of the courtroom observing, and a fifth officer waiting to testify as a witness. Among other things, Defendants asserted that the presence of so many uniformed officers was a violation of their due process rights in that "it puts a light on [them suggesting] that there's some type of danger involved here, where we need five and six police officers in the courtroom." The trial court overruled Defendants' objections. However, after the jurors took their seats for opening statements, the trial court first invited the prosecutor to introduce the officers sitting with her (the investigating officer and an expert witness on gangs) and then, after the prosecutor did so, the trial court explained to the jury that the two officers sitting in the back of the courtroom were "just like civilians" observing the trial and told the jury that they can "ignore them."

On the following day, the Defendants renewed their objection to the number of officers in the courtroom, adding to their prior objection that the two officers observing the proceedings from the back of the courtroom stood up with the attorneys when the jurors exited the courtroom, and requesting that the observers be directed by the trial court not to stand. According to the Defendants, the standing by the observing officers "sends a false light that this is a big entity that's helping to prosecute these men." Defendants also argued that "the presence of the two uniformed officers could give the jurors the false impression that [Defendants]

were really dangerous and we need extra cops in here just because something could happen, which could in turn indicate to a juror or jurors that, hey, these guys are probably guilty because look at all the additional law enforcement that we've got here in the courtroom to prevent any problems that might arise." The trial court denied Defendants' renewed objection, explaining that it had informed the jurors that the two officers in the audience were just there to observe, and that the other uniformed officer was an expert witness.

On appeal, Defendants argue that the presence of the additional uniformed officers (i.e., the observing officers) "created an oppressive atmosphere," which violated their right to receive a fair trial by "creating an impression that the defendants were dangerous and guilty." We are not convinced by Defendants' argument.

A. RELEVANT LAW

One of the touchstone cases in this area is *Holbrook v. Flynn* (1986) 475 U.S. 560 (*Holbrook*), a case which our Supreme Court has acknowledged and followed. (See *People v. Hayes* (1999) 21 Cal.4th 1211, 1268–1269). *Holbrook* is also a case upon which Defendants rely.

In *Holbrook*, *supra*, 475 U.S. 560, the United States Supreme Court held that that a prisoner was not denied his constitutional right to a fair trial when, at his trial with five codefendants, the customary courtroom security force was supplemented by four uniformed state troopers sitting in first row of the courtroom's spectator section: "We do not

minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial. [Citation.] But we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section. Even had the jurors been aware that the deployment of troopers was not common practice in Rhode Island, we cannot believe that the use of the four troopers tended to brand respondent in their eyes 'with an unmistakable mark of guilt.' " (*Id.* at pp. 570–571, fn. omitted.)

In reaching its decision, the court in *Holbrook* observed, "The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. . . . [T]he presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. . . . Indeed*, it is entirely possible that jurors will not infer anything at all from the presence of the guards*. . . . Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm. [Citation.] [¶] To be sure, it is possible that the sight of a security force within the courtroom might under certain conditions 'create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.'

[Citation.] However, 'reason, principle, and common human experience,' [citation], counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate." (*Holbrook*, *supra*, 475 U.S. at p. 569, italics added.)

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

Defendants' argument is undermined by several facts. First, the officers were not additional security, but merely observers and the trial court addressed their presence at the very outset of the trial. Moreover, the court expressly instructed the jury to ignore them. "Absent evidence to the contrary, a jury is presumed to follow the instructions of the trial court." (*People v. Harper* (1986) 186 Cal.App.3d 1420, 1429.)

Second, there is no evidence in the record before us that the jurors disregarded the court's instruction. For example, defense counsel, after making its objections, never subsequently advised the trial court that some or all of the jurors were watching and reacting to the observing officers.

Third, there is no evidence in the record that the observing officers actually affected any of the jurors. For example, there are no posttrial declarations or affidavits in which one or more jurors stated they felt intimidated by the observing officers or otherwise pressured by their presence into finding the Defendants guilty.

Finally, there is no evidence in the record before us that the observing officers, who, as members of the public had a right to attend the trial (see *People v. Cummings* (1993) 4 Cal.4th 1233, 1298–1299) acted in a manner that was anything other than respectful and appropriate.

In the absence of any evidence of prejudice, we hold that the trial court did not abuse its discretion in permitting the observing officers to stay and stand when the jury entered and left the courtroom.

V. The trial court properly admitted gang evidence over Fifita's unduly prejudicial objection

Fifita contends that the trial court erred when, over his objection, it refused to exclude certain gang-related evidence: (a) field identification cards for two members of the Tongan Crips who shared the same last name as the Defendants, Nicholas Manako and Lebanon Fifita (not the defendants herein); and (b) evidence that a gun belonging to Nicholas Manako was found in Fifita's SUV following a gang funeral.[6] We disagree.

---

[6] Fifita also argues that the trial court erred by admitting a certified docket relating to additional evidence regarding Lebanon Fifita (a certified docket sheet and photographs) and certain Facebook photographs. We decline to consider those arguments, because Fifita forfeited those arguments. With regard to the docket sheet and photographs of Lebanon Fifita, Fifita failed to object to that evidence in the proceedings below. (See Evid. Code, § 353; *People v. Partida* (2005) 37 Cal.4th 428, 434–435; *People v. Holford* (2012) 203 Cal.App.4th 155, 168-169.) As for the

A. RELEVANT LAW AND STANDARD OF REVIEW

"[A]s general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. [Citation.] . . . Nonetheless, even if the evidence is found to be relevant, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223–224 (*Albarran*).)

"[T]he decision on whether evidence, including gang evidence, is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court. [Citation.] 'Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal *except* on a

---

Facebook photographs, Fifita objected to their admission on grounds different than those he asserts on appeal—at trial he objected on grounds of hearsay and lack of foundation. On appeal, however, he challenges their admission on authenticity only. "A ' "defendant's failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable.' [Citation.] A proper objection must ' " 'fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling.' " ' " (*People v. Jackson* (2016) 1 Cal.5th 269, 328.)

showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" [Citations.]' It is appellant's burden on appeal to establish an abuse of discretion and prejudice." (*Albarran*, *supra*, 149 Cal.App.4th at pp. 224–225.)

B. NO ABUSE OF DISCRETION

1. Field identification cards

During an Evidence Code section 402 hearing and then later during the trial, Fifita objected to the admission of two field identification cards for Nicholas Manako and one field identification card for Lebanon Fifita on the ground that the introduction of such evidence was irrelevant and, in any event, would be confusing to the jurors and unduly prejudicial to the Defendants under Evidence Code section 352. The trial court overruled the objections on the ground the cards were relevant to the People's burden with respect to the gang enhancement allegations and the probative value outweighed any prejudicial effects. Ultimately, the People elected not to introduce the field identification card for Lebanon Fifita and to use only one of the cards for Nicholas Manako.

The admission of the field identification card for Nicholas Manako was damaging to Fifita's defense as it linked him directly to the Tongan Crips.[7] First, the card

---

[7] The officer who interviewed Nicholas Manako and who memorialized the content of that interview on the field identification card testified at trial.

showed that Nicholas Manako was a self-admitted member of the Tong Crips. Second, the People later established that, three weeks before the shooting at the Pizza Hut, Fifita was arrested because Nicholas Manako, who was riding in Fifita's car during a gang-related funeral, had a loaded, concealed pistol.

For Evidence Code section 352 purposes, however, unduly " 'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that ' "uniquely tends to invoke an emotional bias against the defendant' " without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) Here, the field identification card for Nicholas Manako did not tend to invoke an emotional bias against Fifita distinct from its evidentiary relevance. Moreover, even if the admission of the field identification card was unduly prejudicial, its admission was harmless error because there was substantial evidence of predicate crimes committed by Tongan Crips other than Nicholas Manako. In other words, even if the trial court had excluded the field identification card, it is not reasonably probable that the verdict would have been more favorable to Fifita absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. Nicholas Manako's concealed pistol

Fifita moved to excluded testimony by an Inglewood police officer regarding Fifita's arrest due to Nicholas Manako's possession of a loaded, concealed weapon while riding in Fifita's SUV during a gang-related funeral. The

trial court denied the motion, because "[i]t's clear that association with a gang is relevant here." On appeal, Fifita argues that the trial court abused its discretion "because the slight probative value of unrelated actions on a different day was clearly outweighed by the significant prejudice."

"Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative." (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) Here, all of the challenged gang funeral evidence was directly relevant to Fifita's membership in the Tongan Crips and it did not tend to invoke an emotional bias against Fifita, as it was more probative than prejudicial.

VI. Testimony by the People's gang witnesses was not based on inadmissible hearsay

During the trial, our Supreme Court issued *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which held that state hearsay law permits an expert witness to refer generally to hearsay sources of information as a basis for the expert's opinion, but precludes experts from "rely[ing] on case-specific hearsay to support their trial testimony." (*People v. Williams* (2016) 1 Cal.5th 1166, 1200.)

A. DEFENDANTS' *SANCHEZ-BASED OBJECTIONS AT TRIAL*

Shortly after *Sanchez*, *supra*, 63 Cal.4th 665, was published, defense counsel brought the case to the attention of the trial court. Based on *Sanchez* and prior to the testimony of the People's gang expert, Jonathan Calvert

(Calvert), Defendants objected generally to his testimony on hearsay grounds, and moved for the case to be dismissed or, alternatively, for a mistrial. The trial court denied the motions, noting that "we haven't heard any gang testimony yet" and stating that it would not allow any testimonial hearsay in the trial. After the jury rendered its verdict, Defendants made oral motions for a new trial based generally on *Sanchez*, which the trial court denied.

B. DEFENDANTS' *SANCHEZ-BASED ARGUMENTS ON APPEAL*

On appeal, Defendants argue generally that "*most* of the prosecution's gang evidence and motive evidence was hearsay." (Italics added.) However, it is unclear from Defendants' briefing exactly which witnesses, which portion of their testimony, and which exhibits (if any) are alleged to be inadmissible hearsay. This is a significant failing, because the People developed their gang enhancement case through the admission of a wide array of documents and the testimony of several witnesses, not just through Calvert, the People's designated gang expert. Those witnesses included the following: the case's investigating officer, John Hayes (Hayes); Samuel Bailey, an Inglewood police officer, who testified about a gang funeral that the Defendants attended; Andrew Bastone, a former Hawthorne police officer, who testified about a Tongan Crip who admitted his status as a gang member directly to Bastone; and Mark Hultgren, a current Hawthorne police officer, who testified about his arrest of Lebanon Fifita and his status as a member of the

Tongan Crips, as well as another self-admitted member of the gang, Nicholas Manako.

It is also unclear from Defendants' briefing exactly which rulings by the trial court are at issue. The Defendants cite to four hearsay objections (three relating to testimony by Calvert, one to another gang-related witness) that the trial court overruled but do not discuss any of them. Similarly, Defendants' briefing contains only a fleeting reference to their midtrial motions for mistrial/dismissal and their posttrial motions for a new trial.

In other words, there is no meaningful factual or legal discussion of the trial court's actual rulings. This is patently insufficient. A touchstone legal principle governing appeals is that "the trial court's judgment is presumed to be correct, and the appellant has the burden to prove otherwise by presenting legal authority on each point made and factual analysis, supported by appropriate citations to the material facts in the record; otherwise, the argument may be deemed forfeited. [Citations.] [¶] It is the appellant's responsibility to support claims of error with citation and authority; this court is not obligated to perform that function on the appellant's behalf." (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655–656.) "[A]n appellant must present argument and authorities on each point to which error is asserted or else the issue is waived." (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867.) Matters not properly raised or that are lacking in adequate legal discussion will be deemed forfeited. (*Keyes*, at pp. 655–656.)

Out of an abundance of caution, we will address Defendants' general objection to Calvert's testimony, because, according to Defendants, "Calvert . . . gave the most gang testimony."

C. *SANCHEZ*

In *Sanchez*, *supra*, 63 Cal.4th 665, as in many gang-related prosecutions, the gang expert testified to his background and experience "investigating gang-related crime; interacting with gang members, as well as their relatives; and talking to other community members who may have information about gangs and their impact on the areas where they operate. As part of his duties, [he] read reports about gang investigations; reviewed court records relating to gang prosecutions; read jail letters; and became acquainted with gang symbols, colors, and art work." (*Id.* at p. 671.) He also testified about the gang to which the defendant allegedly belonged, including its primary activities and the convictions of two gang members demonstrating the gang's pattern of criminal activity. (*Id.* at p. 672.) And the gang expert testified about the defendant and his relationship with the gang. Specifically, the expert testified about five contacts defendant had with police reflected in a so-called STEP notice,[8] police reports, and a field identification card. The expert was not present during any of the contacts and

---

[8] "This acronym is a reference to the California Street Terrorism Enforcement and Prevention Act. (Pen. Code, § 186.20 et seq.)" (*Sanchez*, *supra*, 63 Cal.4th at p. 672, fn. 3.)

only related the information recorded by other officers. Based on this information, the expert opined the defendant was a gang member. (*Id.* at pp. 572–673.)

The defendant in *Sanchez* challenged the admission of the gang expert's testimony describing the defendant's prior contacts with police, arguing it was testimonial hearsay that violated his confrontation clause rights. (*Sanchez*, *supra*, 63 Cal.4th at p. 674.) The defendant, however, did *not* challenge the admission of the background testimony from the expert, such as his description of "general gang behavior or descriptions of the . . . gang's conduct and its territory." (*Id.* at p. 698.)

Our Supreme Court observed that traditionally "an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds," but experts have not been permitted to convey case-specific hearsay about which the expert has no personal knowledge. (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) The court defined case-specific facts as "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid.*) An expert may "testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge." (*Ibid.*) The Supreme Court gave several examples of this distinction, one of which pertained

directly to gang experts: "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*Id.* at p. 677.)

The court in *Sanchez* ultimately held that some of the case-specific hearsay statements recited by the expert, such as statements contained in police reports and the STEP notice, were "testimonial hearsay" and should have been excluded under *Crawford v. Washington* (2004) 541 U.S. 36, (*Crawford*). (*Sanchez*, *supra*, 63 Cal.4th at pp. 694–697.) The court could not determine whether statements in the field identification cards were improper under *Crawford*, because it was not clear whether they were prepared during an investigatory stop or for a more general purpose. (*Sanchez*, at pp. 697–698.) Because of the improper admission of this evidence, the court reversed the jury's findings on the defendant's gang enhancements.

D. CALVERT'S TESTIMONY

As the People's gang expert, Calvert supplied much of the basic background information necessary for the gang

enhancements, including information on predicate gang offenses.[9]

Calvert, who at the time of trial had more than a decade's experience working on gang-related matters and whose specialty was Pacific Islander gangs, such as Samoan and Tongan gangs, testified about the gang that the People alleged the Defendants were either members of and/or did the charged crimes for the benefit of—the Tongan Crip Gang. Among other things, Calvert discussed the size of the

---

[9] The gang enhancement allegations were alleged pursuant to section 186.22. " 'Section 186.22, subdivision (b)(1) imposes additional punishment when a defendant commits a felony for the benefit of, at the direction of, or in association with a criminal street gang. To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity.' [Citation.] 'A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons.' " (*People v. Ocho* (2017) 7 Cal.App.5th 575, 581.)

Tongan Crip Gang, its organization, common signs and symbols, territory, and primary criminal activities. Calvert also discussed the rivalry between the Tongan Crips and Samoan gangs. Calvert testified further that there was a rivalry between the Samoan Bloods and the Tongan Crips, and that the rivalry had recently escalated at the time of the Pizza Hut incident. Kuaea, who is of Samoan heritage, was wearing a red shirt, which, according to Calvert, was indicative of being a rival of the Tongan Crips. In addition, the People showed Calvert various pictures of Manako "throwing up" what Calvert testified were "classic" hand signs and symbols for the Tongan Crips.

With regard to the predicate offenses, Calvert testified that he personally assisted the Inglewood police department in its investigation of an attempted murder of a police officer by two "documented, self-admitted" members of the Tongan Crips, Manitisa Sekona (Sekona) and Semisi Latu (Latu).

Based on a hypothetical mirroring of the facts of the case, Calvert opined that the charged crimes were committed in association with, for the benefit of, and in furtherance of the Tongan Crips' agenda. Calvert's testimony differed significantly from that of the gang expert in *Sanchez*, *supra*, 63 Cal.4th 665. Unlike the expert in *Sanchez*, Calvert did not testify about Defendant's prior contacts with the police—Calvert, in other words, did not relate to the jury the content of police reports or field identification cards or STEP notices relating to the Defendants. Instead, Calvert's testimony, based on his personal experience, was largely confined to

background testimony about the Tongan Crip Gang and why the charged crimes would be for the benefit of that gang—testimony of the category that is admissible under *Sanchez*. (See *Sanchez*, at pp. 676–677; *People v. Meraz* (2016) 6 Cal.App.5th 1162. 1174–1175.) Even Calvert's testimony about the photographs showing Manako making various gang signs, was admissible under *Sanchez* in light of that court's diamond tattoo illustration. (*Sanchez*, at p. 677.)

In short, Defendants' general objection to Calvert's testimony based on *Sanchez*, *supra*, 63 Cal.4th 665, is without merit.

VII. Substantial evidence supports the gang enhancements

Defendants argue that the gang enhancements must be reversed because there was insufficient evidence that the charged crimes were gang-related and that the crimes were committed with the specific intent to further the Tongan Crips. We are unpersuaded.

A. RELEVANT LAW AND STANDARD OF REVIEW

There are two "prongs" to the gang enhancement under section 186.22, subdivision (b)(1). (*People v. Albillar* (2010) 51 Cal.4th 47, 59 (*Albillar*).) The first prong requires that the prosecution prove the underlying felony was "gang related." (*Id.* at p. 60.) The second prong "requires that a defendant commit the gang-related felony 'with the specific intent to promote, further, or assist in any criminal conduct by gang members.' " (*Id.* at p. 64; § 186.22, subd. (b)(1).)

The standard of appellate review for determining the sufficiency of the evidence supporting an enhancement is the same as that applied to a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) In other words, "we examine the whole record in the light most favorable to the judgment, drawing all reasonable inferences in favor of the verdict, and presuming 'in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*People v. Weddington* (2016) 246 Cal.App.4th 468, 479.) " 'It is not the role of the appellate court to reweigh the evidence or reevaluate witnesses' credibility. [Citation.] 'An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence.' [Citation.] Indeed, reversal for lack of substantial evidence is warranted only if ' "upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' " (*Id*. at p. 479.)

B. THE SHOOTING WAS GANG-RELATED

Section 186.22, subdivision (b)(1) provides three alternatives for establishing the first prong—that the underlying offense was "gang related." The offense may be committed (1) for the benefit of a gang; (2) at the direction of a gang; or (3) in association with a gang. (See *Albillar*, *supra*, 51 Cal.4th at pp. 59–60.) Here, the record in this case amply supports the jury's finding that Defendants committed the offenses related to the shooting at the Pizza Hut for the benefit of a gang.

Calvert and Hayes, the case's investigating officer, testified about a number of photographs that supported a finding that the Defendants were Tongan Crips. In all four photographs, Manako was making Tongan Crip gang signs. Manako and Fifita were together in one photograph, and they were making gang signs that were "significant" to Hayes with respect to their gang affiliation. In addition, there was evidence that Defendants attended a Tongan Crip funeral less than a month before the charged crimes with a self-admitted member of the Tongan Crips.

The evidence also showed that the charged crimes relating to the Pizza Hut shooting benefited the Tongan Crips. Testimony established that attempted murder and shooting at people and structures are some of the Tongan Crips' primary activities. Moreover, Kuaea wore a red shirt on the day of the shooting; red is associated with the Pirus, a rival of the Tongan Crips. As Calvert explained, the killing of a perceived rival would enhance the gang's standing in the community. " 'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support [a] . . . gang enhancement." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

From this evidence, the jury could reasonably find that the shooting at the Pizza Hut was gang-related.

C. THE SHOOTING WAS DONE WITH SPECIFIC INTENT

"[S]ection 186.22(b)(1) encompasses the specific intent to promote, further, or assist in *any* criminal conduct by gang members—including the current offenses—and not

merely *other* criminal conduct by gang members." (*Albillar*, *supra*, 51 Cal.4th at p. 65.) " 'Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime.' " (*People v. Miranda* (2011) 192 Cal.App.4th 398, 412.) Moreover, as our Supreme Court has held, "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar*, at p. 68.)

Here, there was strong evidence that the Defendants were members, or at least, associates of the Tongan Crips and knew each other as such—they were photographed making classic Tongan Crip signs together and they attended a Tongan Crip funeral just weeks before the shooting. In addition, there was sufficient evidence from which the jury could infer that Defendants intended to shoot Kuaea—after the confrontation in the crosswalk, Defendants pursued Kuaea—not anyone else—to the Pizza Hut, where Kuaea, panic-stricken, took refuge; once inside, Kuaea heard pounding on the locked side-door that he initially tried to use to enter the restaurant, followed by a shotgun blast at the front of the restaurant. Consequently, we hold that Defendants' substantial evidence challenge to the jury's gang enhancement determination is without merit.

VIII. The firearm use enhancement against Fifita was supported by substantial evidence

As to the attempted murder and the shooting at an occupied building counts, the jury found true that a principal intentionally discharged and intentionally used a shotgun (§ 12022.53, subds. (b), (c), (e)(1)), and that Fifita personally, intentionally used a shotgun (§ 12022.53, subds. (b), (e)(1)), but found not true that Fifita personally, intentionally discharged a firearm (§ 12022.53, subd. (c), (e)(1)). As to the assault with a deadly weapon count, the jury found true that Fifita personally used a shotgun (§ 12022.5, subd. (a)).

On appeal, Fifita claims that the firearm enhancements must be reversed "because there was at most a 50% probability [that he] was the defendant who used the shotgun." Fifita's argument is not persuasive.

A. RELEVANT LAW AND STANDARD OF REVIEW

Section 12022.53, subdivision (b) provides that any person who, in the commission of a felony, such as attempted murder, "personally *uses* a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply." (Italics added.) Our Supreme Court has broadly construed "use" for purposes of a firearm enhancement: " 'Use' means, among other things, 'to carry out a purpose or action by means of,' to 'make instrumental to an end or process,' and to 'apply to advantage.' " (*People v. Chambers* (1972) 7 Cal.3d 666, 672.)

Whether a defendant used a weapon in committing a crime is a question "for the trier of fact to decide." (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1007.) We review such findings only to determine if they are supported by substantial evidence. (*People v. Snow* (2003) 30 Cal.4th 43, 66; accord, *People v. Johnson* (1980) 26 Cal.3d 557, 578.) As previously noted, reversal under this standard "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331.)

B. SUBSTANTIAL EVIDENCE SUPPORTS THE FINDING

Here, there was evidence from which the jury could reasonably conclude that there was more than a 50 percent probability that Fifita used the shotgun.

Shortly after the shooting at the Pizza Hut, Kuaea was interviewed by Hayes, the investigating officer. According to Hayes, Kuaea told him that while he was in the crosswalk, the driver of the white SUV had a shotgun and the passenger had a pistol and both men pointed their guns at him. After interviewing Kuaea, Hayes took him to the traffic stop and conducted a "field showup" during which Kuaea identified the car and both Defendants, adding that Manako was the passenger who pointed the pistol at him.[10] In

---

[10] At trial, Kuaea subsequently denied having told Hayes that the Defendants pointed guns at him and denied identifying Defendants and their vehicle at the field showup. However, Kuaea also testified that at the time of the

addition, a number of other witnesses—both civilian and law enforcement—saw Fifita in the driver's seat of the SUV on the day of the incident. Moreover, just a few minutes before the shooting, the security guard at the Big 5 saw Manako carrying a pistol, not a shotgun. And finally, the evidence was undisputed that the window and the drink dispenser at the Pizza Hut were damaged by a shotgun blast, not a pistol shot.

Fifita's reliance on *People v. Allen* (1985) 165 Cal.App.3d 616 is misplaced. In that case, a single gun was used in a residential shooting and the evidence failed to establish which of two defendants fired the weapon. *Allen* held it was "purely a matter of conjecture" as to whether the appellant, as opposed to the codefendant, had used the gun. (*Id.* at p. 626.) The *Allen* court stated that the situation belonged "to that class of cases where proven facts give[ ] *equal* support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other.' " (*Ibid.*, italics added.) Here, in contrast to *Allen*, the evidence does not give equal support to the inference that Manako used the shotgun. Although Manako claimed that the shotgun was his, there is no evidence of Manako

---

shooting he was a gang member and that as a gang member it is dangerous to be regarded as a snitch, and that he had been beaten after testifying at Fifita's first trial.

ever being the driver of the SUV or holding or displaying the shotgun.

Accordingly, we hold that the firearm enhancement against Fifita was supported by substantial evidence.

IX. Substantial evidence supports the finding that the attempted murder was premeditated and deliberate

Defendants contend that that the jury's true finding of premeditation and deliberation as to the attempted murder charge must be reversed because the evidence showed that this was a "spontaneous" attack. We find Defendants' argument unconvincing.

A. RELEVANT LAW AND STANDARD OF REVIEW

As summarized in *People v. Elliot* (2005) 37 Cal.4th 453, " 'Generally, there are three categories of evidence that are sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method. [Citations.] When evidence of all three categories is not present, "[a reviewing court] requires either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing." ' " (*Id.* at p. 470.) " 'But these categories of evidence . . . "are descriptive, not normative." [Citation.] They are simply an "aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." ' " (*Id.* at pp. 470–471.)

Although planning is the "most important prong" (*People v. Alcala* (1984) 36 Cal.3d 604, 627), a plan may be "rapidly and coldly formed" just before a killing. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1070 (*Mendoza*).) In *Mendoza*, for example, our Supreme Court affirmed the defendant's conviction for premeditated murder of a police officer even though the defendant formed his plan only after the officer indicated he would conduct a pat-down search. (*Id.* at p. 1070.) Similarly, in *People v. Brady* (2010) 50 Cal.4th 547, 563–564), the defendant shot a police officer only a few minutes after the officer first shined his patrol vehicle's spotlight on the defendant's car.

"In assessing the sufficiency of the evidence supporting a jury's finding of premeditated and deliberate murder, a reviewing court considers the entire record in the light most favorable to the judgment below to determine whether it contains substantial evidence . . . . When the circumstances reasonably justify the jury's findings, a reviewing court's opinion that the circumstances might also be reasonably reconciled with contrary findings does not warrant reversal of the judgment." (*Mendoza*, *supra*, 52 Cal.4th at pp. 1068–1069.)

B. SUBSTANTIAL EVIDENCE SUPPORTS JURY'S FINDING

Here, there was substantial evidence of both motive and a planned or deliberate attempt at killing Kuaea.

First, although Kuaea was not a member of a Samoan gang, he was of Samoan heritage and was wearing a red shirt, which was consistent with being a rival of the Tongan

Crips. In fact, the term "Samoans on sight" meant that Tongan Crips members had a green light to kill a Samoan person on sight. In addition, not only was there "general animosity" between Tongans and Samoans, but tensions between the two groups had escalated in the month before the shooting. As a result, the jury could reasonably infer that Defendants had a motive to kill Kuaea due to his appearance and ethnicity.

Second, Defendants did not fire until after Kuaea began running away, after he had fled to the Pizza Hut, after they were unable to gain entry to the restaurant via the locked driver's door. In other words, the chain of events shows that Defendants had time to rapidly and coldly form a plan to deliberately kill Kuaea. Accordingly, we hold that the jury's finding of premeditation and deliberation was supported by substantial evidence.

X. Substantial evidence supports Manako's conviction for exhibiting a concealable firearm in public

Manako argues that there was insufficient evidence that he exhibited a gun in a "rude, angry, or threatening manner." We disagree.

A. RELEVANT LAW AND STANDARD OF REVIEW

Pursuant to section 417, subdivision (a)(2), "[e]very person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner" may be punished. (§ 417, subd. (a)(2).) The focus of the crime

thus is not on the other person or on their perception, but is "complete on *exhibition* of the weapon in a rude, angry, or threatening manner." (*People v. McKinzie* (1986) 179 Cal.App.3d 789, 794.) "The thrust of the offense is to deter the public exhibition of weapons in a context of potentially volatile confrontations." (*Ibid*.)

We review the evidence under the familiar and deferential substantial evidence standard. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

B. SUBSTANTIAL EVIDENCE SUPPORTS THE FINDING

Yevette Simmons (Simmons), the uniformed security guard at the Big 5 store, testified that Manako entered the store in a "real quick" manner. Then, right before he pulled the pistol from his pocket, Manako told Simmons that one of his friends had been hurt. Without any warning or explanation to Simmons, Manako then removed the revolver from his pocket and showed it to Simmons. As soon as Defendants left the store, Simmons reported this menacing act to her supervisor who shortly thereafter called the police. When asked whether she was frightened by the gun, Simmons responded, "Anyone would be frighten[ed] by someone with a gun."

From these facts, the jury could reasonably infer that Manako's brandishing of a weapon to a uniformed security guard moments after entering the store was an inherently threatening action. Accordingly, we find that substantial evidence supports Manako's conviction.

XI. Amendment of Sections 12022.5 and 12022.53

As a result of the jury's firearm enhancement finding, the trial court imposed a 20-year to life prison term on each Defendant pursuant to section 12022.53, subdivision (c) for the attempted murder of Kuaea. With regard to the assault with a firearm and shooting at an inhabited dwelling convictions, the trial court stayed the firearm enhancements imposed, respectively, by sections 12022.5 and 12022.53.

On October 11, 2017, the Governor signed Senate Bill No. 620, which amended sections 12022.5 and 12022.53. (Stats 2017, ch. 682.) Effective January 1, 2018, trial courts will have the discretion under sections 12022.5 and 12022.53 to strike a firearm enhancement or finding. (Stats 2017, ch. 682, §§ 1–2 [no urgency clause for either statute]; *People v. Camba* (1996) 50 Cal.App.4th 857, 865–866 [operative date in absence of urgency clause is "January 1 of the year following" enactment].) Specifically, Senate Bill No. 620 added the following language to both statutes: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats 2017, ch. 682, §§ 1–2.) The parties requested the opportunity to submit supplemental briefing on what effect, if any, Senate Bill 620 would have on this appeal, which we allowed.

The parties agree that the amendments to sections 12022.5 and 120022.53 will apply retroactively. Where the parties disagree is on the need for remand. The People argue that remand is not appropriate because no reasonable trial court, given the circumstances of this case, would strike any of the firearm enhancements. In support of their position, the People cite to *People v. Gutierrez* (1996) 48 Cal.App.4th 1894. In that case, the defendant argued to the Court of Appeal that his case should be remanded for resentencing so that the trial court could take advantage of a recent decision by our Supreme Court holding that trial courts have the discretion to strike Three Strikes prior convictions in the furtherance of justice. (*Id.* at p. 1896.) The Court of Appeal rejected defendant's argument because "the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence. It stated that imposing the maximum sentence was appropriate. It increased appellant's sentence beyond what it believed was required by the three strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements." (*Ibid.*) Consequently, the Court of Appeal concluded that under such circumstances "no purpose would be served in remanding for reconsideration." (*Ibid.*)

Here, we face a very different situation. The trial court did not comment one way or the other about the appropriateness of imposing the firearm enhancements. Instead after listening to oral argument, the trial court very

matter-of-factly pronounced Defendants' sentences and wished them "good luck."

As our Supreme Court has observed, "a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal." (*People v. Vieira* (2005) 35 Cal.4th 264, 305) " 'The key date' " in determining whether a defendant is entitled to the benefit of an amendment " 'is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies.' [Citation.] 'In *Pedro T.* [(1994) 8 Cal.4th 1041] we cited with approval a case holding that, for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.' " (*Vieira*, at pp. 305–306.)

Since there is no final judgment in this case and in order to give the change in legislative policy "full effect" (*People v. White* (1969) 71 Cal.2d 80, 84), we remand the case to the trial court for the sole purpose of conducting a new sentencing hearing limited to the issue of the firearm enhancements. (*People v. Francis* (1969) 71 Cal.2d 66, 75–79.)

DISPOSITION

The trial court is directed to reconsider the firearm enhancements—both imposed and stayed. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.