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Court of Appeal, Second District, Division 3, California.

The PEOPLE, Plaintiff and Respondent,
v.
Joseph Edward CARRINGTON,
Defendant and Appellant.

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APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed in part and remanded with directions. (Los Angeles County Super. Ct. No. BA361912)

Attorneys and Law Firms

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Opinion

STONE, J.[*]

***1** Appellant Joseph Edward Carrington appeals from the judgment entered following his conviction by jury of first degree murder, including findings he intentionally discharged a firearm causing death (Pen. Code, § 12022.53, subds. (d) & (e)(1)[1]), and committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Appellant's prison sentence included a section 12022.53, subdivision (d) enhancement of 25 years to life.

Appellant claims the trial court (1) permitted the prosecution's gang expert to relay inadmissible hearsay to the jury in violation of the confrontation clause and state law; (2) abused its discretion by denying appellant's motion for a new trial alleging new evidence had been discovered; and (3) violated the multiple conviction rule and double jeopardy principles by imposing the section 12022.53, subdivision (d) firearms enhancement.

We requested supplemental briefing on the additional issue whether the case should be remanded for resentencing in light of Senate Bill 620, which provides that effective January 1, 2018, the trial court has discretion to strike firearm enhancements under section 12022.53 in the interest of justice. We remand the case so the trial court can exercise its discretion in this regard, and otherwise affirm.

FACTUAL SUMMARY

I. PEOPLE'S EVIDENCE.

A. Rivalry Between the Bloods and the Crips.

Inglewood Police Officer Kerry Tripp testified that he was assigned to the gang intelligence unit as an investigator. Part of his duties was to "conduct and collect gang intelligence." Tripp was one of two lead gang officers for Inglewood. He kept intelligence on Inglewood gang members, and tried to learn their background and nature. In his 24 years as a police officer, he had had "thousands of contacts and interviews with gang members" and had conducted thousands of gang-related crime investigations, including crimes by and against the Avenue Piru Bloods gang (Bloods).

Tripp had detained appellant in the mid- to late-1990's and continued to have contact with him until approximately 2004 or 2005. During at least one of those contacts, appellant admitted he was a member of the Bloods. In 2002 or 2003, Bloods member Dwayne Williams (Dwayne) was shot and killed. Appellant had a tattoo depicting Dwayne. The slogan "Inglewood's Finest" appeared above the tattoo. The slogan was used by gang members in Inglewood.

Tripp further testified that, on August 21, 2009, Otis Williams (Otis), Dwayne's brother, was shot and killed as he stood on his parents' porch in Inglewood. Otis was a Bloods member. The shooting occurred in Bloods territory, about 50 yards from the territory of a rival gang, the 111 Neighborhood Crips (Crips). Tripp testified that an ongoing rivalry between

the two gangs had existed since at least 1988 and "[t]here ha[d] been several shootings and homicides both ways." Crips identified themselves with the color blue and frequently wore New York Yankees memorabilia, while Bloods identified with the color red.

***2** Tripp testified that he spoke to a person in the neighborhood regarding the Otis killing. The unidentified person told Tripp he heard there had been "a lot of shootings going on" between the Crips and the Bloods, and that he had heard that the "Crips were responsible" for Otis's murder.

Tripp testified that in his experience, it was "enough if a gang suspects that a rival gang has shot at them ... for [the gang] to retaliate." It was also "enough for a gang to retaliate if people in the neighborhood are talking about ... it being a rival gang member" who committed the preceding crime. A gang entering rival territory did not have to find a rival gang member to retaliate; it was sufficient if the gang found someone who "fits the description."

B. The Present Offense.

At approximately 8:00 p.m. on August 22, 2009, Leonard Samuels (the decedent) drove his girlfriend, Akila Green, to a liquor store on West Century Boulevard in Los Angeles. Tripp testified the store was located in Crips territory. Samuels—who was not associated with the Crips—was wearing a New York Yankees baseball cap and blue clothing.

Samuels parked his Pontiac in the store's parking lot and entered the store. Green remained in the car with her passenger window slightly open. While Samuels was in the store, a red pickup truck parked next to the passenger side of the Pontiac. The truck's driver, an African–American male, exited the truck and walked toward the store's entrance. Another African–American male remained in the truck's passenger seat.

About two minutes later, the driver of the truck returned to his vehicle. Before entering the truck, he loudly said, "Oh, man, I left my wallet." According to Green, the driver's hairstyle had "twisties at the bottom." Green testified a "twisty" was twisted hair, either "a braided twist or it could be a regular ... twist." The hair on the side and top of the driver's head was "patted down" as if he had just removed a stocking cap from his head. She described the driver's hair as being "a few inches off the neck" and "[halfway] touching the shoulder." The driver entered the truck and backed it away from the parking lot.

About three to five minutes later, Samuels left the store and returned to the Pontiac. As he grasped the car door handle, Green heard what sounded like fireworks. She looked back and saw a person approaching Samuels from behind. The person appeared to be an African–American male but Green testified she could not see his face. Green saw Samuels run towards an alley behind the store. Green ducked down and remained there for one or two minutes, before moving to the driver's seat and driving after Samuels. She found Samuels on the ground outside the McDonald's restaurant next door. He had been shot five times and was mortally wounded.

Police arrived at the store at approximately 8:10 p.m. They recovered six shell casings, one copper bullet, and copper fragments from the store's parking lot. Ballistics evidence established these items and a bullet recovered from Samuels's body were fired from the same gun. This same gun was also linked by ballistics evidence to a May 19, 2007 shooting at the Defiant Ones Motorcycle Club, where appellant was documented to have been present.

The liquor store had five surveillance cameras, including one monitoring the parking lot, another monitoring the store's entrance and the area just outside the entrance, and another monitoring the sidewalk adjacent to the store's entrance. Surveillance video footage was played in court and Los Angeles Police Detective Young Mun testified it showed the following. At 8:07 p.m., the Pontiac entered the store's parking lot. At 8:10 p.m., the driver of the truck headed towards the store's entrance. His hair was in "some sort of rows or braids." About a minute later, he returned to the truck, backed it out of its parking space, and parked it on Hobart Street, just north of the store's parking lot. Samuels exited the store. The video showed movement outside the truck and a person walking from the truck and approaching Samuels.

***3** As Samuels walked towards the parking lot, the person from the truck confronted him and a muzzle flash appeared near the person's arm. Samuels ran from his car towards an alley leading to the McDonald's restaurant. The suspect ran across Hobart Street, apparently returning to the truck, which then drove away.

On September 1, 2009, Mun went to appellant's workplace. Although a red Dodge Ram pickup truck was registered to appellant and his wife at the time, Mun saw appellant walking to a nearby white Chevrolet Suburban, which was registered to two women. Mun testified appellant's hairstyle was "long,

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down to his shoulder ... and [appeared] to be cornrows or braids.” In a photograph of appellant taken in August 2004, he sported a very similar hairstyle.

On September 5, 2009, Otis's funeral was held. Mun went to the location and saw appellant there. The printed program listed appellant as an honorary pallbearer. Appellant's hairstyle was then short and clean cut, and he was driving the white Suburban.

On September 9, 2009, Mun showed Green a photographic lineup containing six photographs, with appellant's photograph as No. 5. Green testified she circled appellant's photograph as “look[ing] similar to the guy that [was] driving the pick-up truck.” Green had the detective write for her on the lineup admonition form, “It looks like the guy I saw walk to the red pick-up. He said, ‘Oh, man. I forgot my wallet.’ He got into the pick-up and drove away.”

On September 10, 2009, Mun located the red truck and observed that appellant's wife was driving it. Appellant was found that day driving the white Suburban, and was arrested.

The police recovered appellant's cell phone from the Suburban. According to cell phone records, at 8:12 p.m. and 8:13 p.m. on August 22, 2009, the phone received two incoming calls, both using a cell tower approximately two miles from the location of the crime. Appellant concedes “[p]hone records indicated several calls had been placed from that phone both prior to and after the Samuels shooting from locations in the approximate area of the liquor store.”

Kiowa Torkay testified she knew appellant in connection with her real estate business; appellant worked in construction and she had considered hiring him. She testified he drove a “red work truck.” When she last saw him just before his September 2009 arrest, however, he was driving a white truck.

Mun testified that on September 12, 2009, appellant made a telephone call to Torkay from jail. A recording of the call was played to the jury. During the conversation, appellant told Torkay the matter was a case of “mistaken identity”; the shooter was “somebody who looks likes me,” and that was all he knew. The conversation continued: “[Torkay:] ... I'm gonna keep it real with you. [¶] [Appellant:] What? [¶] [Torkay:] When you wanted to tell me you was in jail—[¶] [Appellant:] Uh-huh. [¶] [Torkay:] ... and what the charge was for,—[¶] [Appellant:] Uh-huh. [¶] [Torkay:]—I had thought to myself, I said ‘Is that why he cut his hair? Is that why he—[’] [¶] [Appellant:] Aah. [¶] [Torkay:] [‘]—is that why he was in a different truck? Is that why he told me recently him and his family was stressing out and going through the same issues me and my family were going through? I just started putting —.’ ” At that point, the line went dead.

***4** Mun testified that in January 2010, he and his partner, Los Angeles Police Detective Weber, conducted a recorded interview of Torkay. During the interview, Weber asked if Torkay had noticed anything different about appellant. She indicated that “probably ... close to a month or maybe three weeks” prior to appellant's arrest, he had long hair, but “probably two weeks” before his arrest, he had short hair. She asked appellant what made him cut his hair, and he said, “Oh, you know, ... I'm just stressed out.” Torkay also noticed that appellant had started driving a white truck.

Weber showed Torkay a portion of the surveillance video on a laptop computer. Weber asked, “Do you know that person there?” She replied, “Yeah, that's him,” referring to appellant. Torkay said she remembered appellant's hair was braided like the hairstyle on the man in the video. Twice more she said, “Yeah, that's him.”

During Tripp's testimony, the prosecutor asked him the following hypothetical question: “On August 21st, an Avenue Piru [Blood] gang member is killed. There's word on the street that ... the shooting was done by 111 Neighborhood Crips. The following day, an Avenue Piru Blood gang member who has an association directly with the individual who was shot and killed on August 21st goes into Neighborhood Crips territory, shoots and kills an individual who's wearing a navy blue hat with ‘New York Yankees’ on it, wearing blue pants and blue shoes. [¶] Do you have an opinion as to whether or not that crime was committed for the benefit or, at the direction of, or in association with a criminal street gang?”

Tripp testified his opinion was “the crime was committed for the benefit of Avenue Piru Blood gang members.” He based his opinion on “the fact that an Avenue Blood gang member committed the crime the day after one of his own homies got murdered by suspected Neighborhood Crips gang members and the person that was killed [in the present case] was killed in a Neighborhood Crips territory, dressed like somebody who could be mistaken for a Neighborhood Crip.”

II. Defense and Rebuttal Evidence.

Appellant, through his stepdaughter, presented a misidentification defense. His stepdaughter testified that she

had watched the surveillance video, which was "hard to see," but she did not believe the man standing outside the liquor store's entrance was appellant, because the man in the video was not wearing a watch, and appellant always wore one. She also testified that appellant frequently visited a friend who lived near the liquor store, and he kept his motorcycle at her grandmother's house that was nearby.

In rebuttal, Mun testified that Torkay had identified appellant from the same video.

DISCUSSION

I. NO PREJUDICIAL *SANCHEZ* ERROR OCCURRED.

A. Pertinent Facts.

During Tripp's direct examination, he testified that it is common for non-gang members who live in gang territory to talk about crimes that are committed within that area. The prosecutor then asked, "Regarding Otis Williams' shooting, did you speak to an individual in the neighborhood regarding that particular crime?" Tripp responded, "Yes. ... The person told me that he heard there's been a lot of shootings going on between neighborhood Crips and Avenue Piru Bloods. He told me he believed [the Otis] homicide was a result of Neighborhood Crips shooting at Avenue Piru Bloods."

Appellant's counsel posed a multiple hearsay objection and argued expert opinion could not be based on such hearsay. The court ruled the testimony about what was being discussed on the streets was not hearsay.

The questioning continued: "[Prosecutor]: ... This individual that you spoke to in the neighborhood, did he state that he had heard that 111 Neighborhood Crips were responsible? [¶] [Tripp:] That's the conversation I remember. This has been a couple years back; but from what I can remember, he said it was—he heard [it was] 111 Neighborhood Crips that were responsible for this homicide." Appellant's counsel posed a belated "[s]ame objection" and moved to strike.

***5** The court instructed the jury that "this evidence is not being offered to prove that in fact the crime of the murder of Mr. Williams was committed or was not committed by the Neighborhood Crips. It's being offered as circumstantial evidence of possible motivation and intent. It's up to you to decide whether it's believable and whatever weight to give to it."

On cross-examination, Tripp testified that he did not ask for the name or address of the neighbor with whom he spoke about the Otis killing, and did not remember ever speaking to him again.

B. Analysis.

Appellant claims the trial court erroneously allowed Tripp to testify regarding case-specific hearsay, in violation of state law. Further, appellants contends the error implicated the confrontation clause of the Sixth Amendment, and thus the error was of a federal dimension. He contends we must set aside the murder verdict and reverse the true finding on the gang enhancement.

Although we conclude Tripp relayed some hearsay statements, we conclude the statements were not testimonial, and thus we do not find a confrontation clause violation. Further, even assuming the hearsay was case-specific, the admission of the hearsay statements did not prejudice appellant.

1. Sanchez *Rule for Experts' Testimony Relaying Hearsay.*

In *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, [158 L.Ed.2d 177] (*Crawford*), the high court "held that the Sixth Amendment bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.' [Citations.]" (*People v. Hopson* (2017) 3 Cal.5th 424, 431, 219 Cal.Rptr.3d 717, 396 P.3d 1054.) In *People v. Sanchez* (2016) 63 Cal.4th 665, 204 Cal.Rptr.3d 102, 374 P.3d 320 (*Sanchez*), our Supreme Court considered "the degree to which the *Crawford* rule limits an expert witness from relating case-specific hearsay content in explaining the basis for his opinion." (*Sanchez*, at p. 670, 204 Cal.Rptr.3d 102, 374 P.3d 320.) The court held that "[i]f an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Id.* at p. 684, 204 Cal.Rptr.3d 102, 374 P.3d 320, fn.omitted.)

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"Ordinarily, an improper admission of hearsay would constitute statutory error under the Evidence Code" and be assessed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 299 P.2d 243. (*Sanchez, supra,* 63 Cal.4th at p. 685, 204 Cal.Rptr.3d 102, 374 P.3d 320; *People v. Duarte* (2000) 24 Cal.4th 603, 618–619, 101 Cal.Rptr.2d 701, 12 P.3d 1110.) However, under *Crawford*, "if that hearsay was testimonial and *Crawford's* exceptions did not apply, ... [i]mproper admission of such prosecution evidence would also be an error of federal constitutional magnitude," reviewable for prejudice under the "harmless beyond a reasonable doubt" standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. (*Sanchez*, at pp. 685, 698, fn., 204 Cal.Rptr.3d 102, 374 P.3d 320omitted; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1247, 222 Cal.Rptr.3d 706 (*Iraheta*).)

2. *The Out-of-Court Statements at Issue Included a Layer of Inadmissible Hearsay.*

Appellant complains that Tripp related hearsay to the jury when he testified that an unidentified person from the neighborhood told him that this person had heard there had been "a lot of shootings going on" between the Crips and the Bloods, and he had heard that the Crips were responsible for shooting Otis. These statements were offered to prove that the Bloods had undoubtedly heard through the "word on the street" that the Crips were responsible for the death of Otis, a Blood. From this, the jury could infer that appellant, a Blood, reacted by killing Samuels, who was perceived to be a Crip because he was in Crips territory wearing a Yankees hat and wearing blue.

***6** Testimony that the "word on the street" is that a rival gang killed a member of the defendant's gang can be admissible for the nonhearsay purpose of proving that the defendant had a motive to murder someone he perceived to be a member of the rival gang. (*People v. McKinnon* (2011) 52 Cal.4th 610, 654–656, 130 Cal.Rptr.3d 590, 259 P.3d 1186 [finding trial court did not err in admitting testimony by a gang member that "the word out on the street" was that the defendant's fellow Crip was killed by a Blood].) "[T]he purpose of testimony about the 'word on the street' ... [is] not to establish that this street gossip was true." (*Id.* at p. 656, 130 Cal.Rptr.3d 590, 259 P.3d 1186.) Rather, " 'it is the hearer's reaction ... that is the relevant fact sought to be proved ....' " (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907, 179 Cal.Rptr. 61.)

However, there were two levels to the challenged testimony: the individual in the neighborhood *told Tripp* that he had *heard* there had been a lot of shootings going on between the Crips and the Bloods, and he had *heard* the Crips were responsible for Otis's killing. Although the second level was the "word on the street" evidence that is properly considered nonhearsay, the first level—involving what the unidentified individual from the neighborhood told Tripp—was offered to prove that the individual had heard from others that the Crips were responsible. The first level was thus offered for its truth and was hearsay.

3. *The Hearsay Statements Were Not Testimonial.*

Admission of the challenged hearsay statements would only violate the confrontation clause if the statements were testimonial hearsay. (*Sanchez, supra*, 63 Cal.4th at p. 680, 204 Cal.Rptr.3d 102, 374 P.3d 320; see *Iraheta, supra,* 14 Cal.App.5th at p. 1247.) Appellant contends the statements were testimonial because "[t]hey were made to Tripp while investigating the Samuels shooting in order to determine whether that event was in any way related or connected to the shooting of Otis Williams and, if so, whether the Samuels killing may have been retaliatory." However, we conclude the statements at issue lacked the necessary solemnity and formality to be deemed testimonial.

In *Sanchez*, the court traced the evolving test employed by the United States Supreme Court for determining whether a hearsay statement is testimonial. The *Sanchez* court synthesized and applied the standard in the context of deciding whether a gang expert had relied upon testimonial hearsay in opining the defendant was a gang member and possessed a firearm, and narcotics for sale, for the benefit of the gang, such that a gang enhancement should be found true. (*Sanchez, supra,* 63 Cal.4th at pp. 671, fn. 1, 673, 698–699, 204 Cal.Rptr.3d 102, 374 P.3d 320.) As the basis for his testimony, the expert in *Sanchez* relied on hearsay contained in three sources—police reports, a "STEP" notice, and a field identification (FI) card, all reflecting police contacts with the defendant where the gang expert was not present. (*Id.* at pp. 672–673, 694, 696–697, 204 Cal.Rptr.3d 102, 374 P.3d 320.)

In discussing whether these three types of hearsay statements were testimonial, *Sanchez* held that "[w]hen the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness, *Crawford* teaches those

hearsay statements are generally testimonial unless they are made in the context of an ongoing emergency ... or for some primary purpose other than preserving facts for use at trial." (*Sanchez, supra,* 63 Cal.4th at p. 694, 204 Cal.Rptr.3d 102, 374 P.3d 320; see *Ohio v. Clark* (2015) ––– U.S. ––––, 135 S.Ct. 2173, [192 L.Ed.2d 306, 315] ["a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial."].) The court also noted that a statement must bear some degree of formality in order to be considered testimonial. (*Sanchez*, at p. 692, 204 Cal.Rptr.3d 102, 374 P.3d 320; see *People v. Dungo* (2012) 55 Cal.4th 608, 619, 147 Cal.Rptr.3d 527, 286 P.3d 442 ["the statement must be made with some degree of formality or solemnity"]; *People v. Vega–Robles* (2017) 9 Cal.App.5th 382, 413, 224 Cal.Rptr.3d 19 (*Vega–Robles*) ["As *Sanchez* makes clear, to violate *Crawford*, the out-of-court statement must be made under circumstances that entail some formality or solemnity."].)

***7** Because the *Sanchez* gang expert's testimony revealed that the police reports on which he relied were authored by an investigating officer as part of an official police investigation of a completed crime, those reports were properly considered testimonial. (*Sanchez, supra,* 63 Cal.4th at p. 694, 204 Cal.Rptr.3d 102, 374 P.3d 320.) Similarly, *Sanchez* held that the STEP notice completed by another nontestifying officer constituted testimonial hearsay because that officer gathered the information from the defendant for the primary purpose of establishing facts to be later used against him or his companions at trial, and recorded it on "an official police form containing the officer's sworn attestation that he issued the notice on a given date and that it accurately reflected the attendant circumstances, including defendant's statements." (*Id.* at pp. 696–697, 204 Cal.Rptr.3d 102, 374 P.3d 320.) Concerning the FI card, *Sanchez* observed that the expert's "testimony regarding the origins of the FI card here was confusing. ... [¶] If the card was produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial. Because the parties did not focus on this issue, the point was not properly clarified, leaving the circumstances surrounding the preparation of the FI card unclear." (*Id.* at p. 697, 204 Cal.Rptr.3d 102, 374 P.3d 320.) The court concluded it was unnecessary to determine whether the content of the FI card was testimonial. (*Id.* at p. 698, 204 Cal.Rptr.3d 102, 374 P.3d 320.)

In *People v. Valadez* (2013) 220 Cal.App.4th 16, 162 Cal.Rptr.3d 722 (*Valadez*), the appellate court further examined the requirement of formality for hearsay statements to be deemed testimonial. There, the prosecution's gang expert, a police officer, testified to hearsay statements from gang members and other police officers with respect to the history of two rival gangs. (*Id.* at pp. 27–28, 162 Cal.Rptr.3d 722.) The testifying expert was a member of the gang enforcement division, who routinely gathered intelligence on local gangs and particular gang members, conducted searches on gang members, and investigated gang-related crimes. (*Id.* at p. 29, 162 Cal.Rptr.3d 722.)

The *Valadez* court noted the California Supreme Court's holding in *People v. Cage* (2007) 40 Cal.4th 965, 984, 56 Cal.Rptr.3d 789, 155 P.3d 205, that " 'though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony.' " The *Valadez* court concluded there was no evidence to suggest that the background information the gang expert obtained from "casual, consensual encounters" with gang members "bore any degree of solemnity or formality ... or resembled in any way formal dialogue or interrogation ...." (*Valadez, supra,* 220 Cal.App.4th at pp. 35–36, 162 Cal.Rptr.3d 722; see *People v. Ochoa* (2017) 7 Cal.App.5th 575, 585, 212 Cal.Rptr.3d 703 (*Ochoa*) [where individuals' admissions to gang membership "were made in the course of informal interactions" between the individuals and police officers, their statements were not testimonial hearsay]; *Iraheta, supra*, 14 Cal.App.5th at p. 1249 ["Statements made to officers in the course of informal interactions, and not gathered for the primary purpose of use in a later criminal prosecution, are not generally testimonial."]; *Vega–Robles, supra,* 9 Cal.App.5th at p. 413 ["[E]ven if we assume the information [the gang expert] learned from his gang informants was part of an ongoing investigation into the activities of the [ ] gang, there is no indication it was gathered as part of the investigation of completed crimes, and none of the information was sworn. As *Sanchez* makes clear, to violate *Crawford*, the out-of-court statement must be made under circumstances that entail some formality or solemnity."].)

Tripp's testimony demonstrates that the encounter between him and the "person from the neighborhood" was a casual one. There was no indication that Tripp believed this neighbor to be associated with either the Bloods or the Crips. Moreover, Tripp did not even bother to take down this person's name or address. There was no evidence the conversation was memorialized in any official way. We conclude that the statements by the person from the neighborhood to Tripp were

not testimonial.[2] Thus, their admission did not violate the confrontation clause.

4. *Hearsay Statements as "Case–Specific."*

***8** We now turn to whether the admission of the hearsay constituted statutory error. The admission of an expert's testimony relating hearsay statements is problematic only when the statements concern "case-specific" facts as opposed to background information, and the case-specific statements are not independently proven by competent evidence or covered by a hearsay exception. (*Sanchez, supra,* 63 Cal.4th at pp. 670, 676, 686, 204 Cal.Rptr.3d 102, 374 P.3d 320.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676, 204 Cal.Rptr.3d 102, 374 P.3d 320.) Appellant alleges in conclusory fashion that the challenged hearsay statements to which Tripp testified concerned case-specific facts.

People v. Meraz (2016) 6 Cal.App.5th 1162, 212 Cal.Rptr.3d 81, review granted March 22, 2017, S239442 (*Meraz*)[3] is instructive. The defendants, alleged members of the Pacoima Terra Bella gang, were accused of shooting several members of their rival gang, the Pacoima Project Boys, in September 2009. (*Id.* at p. 1166.) The prosecution's gang expert testified that the rivalry between Terra Bella and Project Boys had become heated approximately one year earlier after a Project Boys member murdered Alejandro Villa, a member of Terra Bella. The expert opined that the subsequent shooting of the Project Boys members was retaliatory for Villa's murder and committed for the benefit of Terra Bella. (*Id.* at pp. 1173–1174.)

On appeal, the defendants invoked *Sanchez* and attacked the source of the expert's testimony—namely " 'out-of-court statements made by both police officers and other gang members.' " (*Meraz, supra*, 6 Cal.App.5th at p. 1174.) The *Meraz* court found that the defendants "fundamentally misunderstand the scope and import of *Sanchez*" and held that the challenged hearsay was not case-specific: "Under *Sanchez*, facts are only case specific when they relate '*to the particular events and participants* alleged to have been involved in the case being tried,' which in *Sanchez* were the defendant's personal contacts with police reflected in the hearsay police reports, STEP notice, and FI card. [Citation.] The court made clear that an expert may still rely on general 'background testimony about general gang behavior or descriptions of the ... gang's conduct and its territory,' which is relevant to the 'gang's history and general operations.' [Citation.] This plainly includes the general background testimony [the gang expert] gave about Terra Bella's operations, primary activities, and pattern of criminal activities, which was unrelated to defendants or the current shooting and mirrored the background testimony the expert gave in *Sanchez*. It also falls in line with the *Sanchez* court's hypothetical example that an expert may testify that a diamond tattoo is 'a symbol adopted by a given street gang' and the presence of the tattoo signifies the person belongs to the gang. [Citation.] By permitting this type of background testimony, the court recognized it may technically be based on hearsay, but an expert may nonetheless rely on it and convey it to the jury in general terms. [Citation.] Thus, under state law after *Sanchez*, [the gang expert] was permitted to testify to non-case-specific general background information about Terra Bella, *its rivalry with Project Boys*, its primary activities, and its pattern of criminal activity, even if it was based on hearsay sources like gang members and gang officers." (*Id.* at pp. 1174–1175, last set of italics added.)

Like the gang expert in *Meraz*, Tripp related hearsay that described background information, namely the active rivalry between the Bloods and the Crips which was evidenced by a recent spate of shootings between the rival gangs and the murder by the Crips of Otis, a Blood. None of the hearsay statements at issue concerned appellant or tied him individually to the crime at issue here, and thus arguably did not relate "to the particular events and participants alleged to have been involved" in the instant case. On the other hand, the hearsay statements concerned a gang murder that took place only one day before the present offense and was highly relevant to appellant's motive and intent. As further discussed below, because we find any error in admitting the hearsay statements did not prejudice appellant, we need not decide whether the statements should be deemed "case-specific" under *Sanchez*.

5. *No Prejudicial Error.*

***9** Even assuming *arguendo* that the hearsay statements at issue should be deemed case-specific, we conclude reversal is not required because it is not reasonably probable the defendant would have obtained a more favorable result had the hearsay been excluded. (*Ochoa, supra,* 7 Cal.App.5th at p. 589.)

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As discussed above, the hearsay was relevant to prove appellant's motive to commit the murder, i.e., retaliation for the Crips' murder of appellant's fellow Bloods member, Otis. The statements were also relevant to prove appellant had the specific intent required by the gang enhancement.[4] However, the challenged evidence did not link appellant personally to the charged murder. The evidence merely supported the inference that, given the murder of Otis, Bloods members had a motive to kill someone perceived to be a Crip. But there was ample other evidence presented at trial supporting the inference that someone associated with the Bloods likely committed the murder.

Independent evidence established the Bloods and the Crips had long been locked in a violent rivalry. Evidence was introduced that Otis was a member of the Bloods, and that the day before the instant offense, Otis had been shot and killed while he was on the front porch of his parents' home. That shooting was described to the jury as a "typical gang crime," with no other likely explanation. The shooting took place in the Bloods' territory, but only 50 yards from Crips territory. This evidence alone leads to a fair assumption that Otis was killed by the Crips.

The following day, the victim Samuels was at a liquor store in Crips territory. He was wearing a Yankees hat and blue clothing that could be mistaken for that worn by a Crips member. There was no evidence introduced of any possible motive for his shooting *other* than that he was perceived to be a Crip. Even without the challenged hearsay, the evidence pointed strongly to vengeance for the Bloods being the shooter's motive.

Moreover, independent evidence confirmed a connection between appellant and Otis and a personal motivation for appellant to avenge Otis's death. Appellant was a self-admitted Bloods member who had a tattoo depicting Dwayne, Otis' brother and another Bloods member, who was killed in 2002 or 2003. Appellant was listed as an honorary pallbearer in the program for Otis's funeral. Given this evidence introduced at trial, we do not find a reasonable probability that appellant would have been acquitted, or that the gang enhancement would have been found to be untrue, if only the hearsay had been excluded.

We also note there was ample evidence personally tying appellant to the crime. Samuels' girlfriend picked appellant out of a six-pack line-up as looking like the person who got out of the red pickup truck at the liquor store, and she also identified his red truck. Further, she was able to describe the shooter's braided hairstyle which matched appellant's, prior to his new haircut. Appellant was also identified from the liquor store surveillance video by Torkay, his friend, who also recognized his braids. After appellant was arrested, he told Torkay that it was a case of mistaken identity, but told her the culprit was "somebody who looks like me."

***10** In addition, cell phone records established a person using appellant's cell phone placed a call that utilized a cell tower located within two miles of the location of the crime. Further, ballistics evidence established the gun used to shoot Samuels was used during a 2007 shooting outside the Defiant Ones Motorcycle Club, where appellant had been present.

Evidence also was introduced supporting an inference that appellant sought to cover his tracks after the crime. After the date of the offense, appellant stopped driving the red truck registered to him and began driving a white Suburban. He also cut off his braids and sported a short haircut. When his friend Torkay asked him why he cut his hair, his only explanation was that he was "just stressed out."

We conclude that, independent of the challenged evidence, there was ample evidence to support the murder conviction and to support the gang enhancement under section 186.22, subdivision (b)(1).

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S NEW TRIAL MOTION.

Appellants argues that the trial court abused its discretion in denying his motion for a new trial based on newly-discovered evidence. The alleged "new evidence" was the liquor store surveillance video, which had now been "enhanced" with the aid of new technology, permitting appellant's expert witness, Dr. Paul Wallace, to opine that appellant was not the shooting suspect captured by the video. Appellant contends that the new, improved technology "allowed refinement of the existing surveillance video viz a slowing the original video so as to take numerous stills at a faster rate and then essentially magnifying those stills (enhancing what is already there) to obtain more detail. That process enabled Wallace, a trained clinician (facial reconstructive surgeon and facial recognition expert) to make a personal visual comparison of those magnified images, compare them to the high resolution photographs he had taken of appellant, and then reach his clinical conclusion that the person depicted in the surveillance video was not appellant."

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The trial court denied the motion for a new trial, finding that (1) appellant failed to establish that the "new technology" was unavailable at the time of trial; (2) the "enhanced" still images from the surveillance video used by Wallace for his comparison were "completely unreliable"; and, (3) given this lack of reliability, the probative value of Wallace's testimony was outweighed by its potential prejudice and thus should not be admitted pursuant to Evidence Code section 352. We find no abuse of discretion in the trial court's ruling.

A. Trial Court Proceedings on Motion for New Trial.

On March 11, 2011, the jury reached its verdict. In September 2012, appellant filed his motion for a new trial, followed by a supplemental new trial motion on December 20, 2012.

In support of his new trial motions, appellant submitted several declarations from Wallace. Wallace declared that he had evaluated the surveillance video before appellant's trial, but the video was difficult to discern and thus he could not offer a definitive conclusion on whether the suspect in the video was appellant. However, after the trial, Wallace conducted a second evaluation using "current digital High Definition Technology" which made it possible "to tease out and enhance the images." He declared that the "new state of the art software" was similar to facial-recognition software used by law enforcement agencies and permitted him "to enhance image files for matches."[5] Sixty-four facial images taken of appellant were used to match 22 still pictures from the surveillance video. "The result was no match on any software program," leading Wallace to conclude the suspect in the video was not appellant.

***11** During a March 21, 2014 hearing on appellant's motion, the court asked Wallace how the still images taken from the surveillance video had been enhanced to make them clearer. Wallace conceded he was unsure of the mechanism or technology used to enhance their quality.

The prosecution opposed the motion on the grounds that the new evidence was not sufficiently scientifically reliable under the *Kelly/Frye*[6] test. Los Angeles County Sheriff's Deputy Manuel Cuevas testified for the prosecution that he was assigned to the Los Angeles County Regional Identification System, and he was the project lead for Los Angeles County's mugshot database, which was used as a facial recognition system. Cuevas testified that "facial recognition is the automated means of searching for a face through a known [database]." According to Cuevas, facial recognition technology was "kind of in its infancy." The technology was evolving and its reliability and accuracy were not equivalent to the reliability and accuracy of fingerprint analysis, for example. Currently, law enforcement did not use facial recognition technology as the sole basis to identify or eliminate a suspect.

Cuevas testified that, based on the standard recommended by the National Institute of Standards and Technology and based on his own experience, "you need somewhere between 60 and 120 pixels between the eye[s]" for facial recognition. Cuevas had examined the still photographs from the surveillance footage that were the subject of Wallace's analysis. He testified there were only seven pixels between the eyes of the person depicted in those photographs, an insufficient number to generate an accurate template for facial recognition. He stated that comparing low resolution images from the surveillance video to high resolution photos taken afterwards was like comparing apples and oranges.

Appellant subsequently filed a declaration from Lindsay Mejia, a digital artist who worked at Samy's Camera and who "trained in photoshop work and digital imaging for four years." Mejia stated she had been involved in taking the still photos from the surveillance video. She stated that she had used a "Black Magic" (BM) high resolution camera to take pictures from the video. She declared that "[t]he camera does not ADD any material that was not present in the video. Instead it enhances what is ALREADY present. My role was to put the exhibits together."

At an April 17, 2015 hearing, the court observed, "As far as the initial testimony of [Wallace], I would have never allowed any of that in. [¶] ... The enhancement that was done by ... the computer program [Wallace] used, is really the bottom line. The testimony was that there were seven pixels ... between the eyes. ... And that the program ... used an algorithm to take very blurry, very indistinct photos from which one could tell ... very little in terms of detail, and created more distinct photos. [¶] [Wallace] looked at them with his expertise. He's clearly an expert in facial recognition. He's not an expert in the technology. ... [¶] [H]e looked at those photos and then floated the absence of certain characteristics that were present on [appellant] and opined that it couldn't be the same person. [¶] But ... I have absolutely no faith in the integrity of those photos, because I heard absolutely nothing that would establish that they were reliable, that they weren't simply photos ... where a computer predicted what the likely detail on what a person's face would be based on very limited

[pixilation]. [¶] ... I have absolutely no faith that they didn't create a clearer image that just excluded potential features because it couldn't pick them up."

***12** The court further stated, "It was apparent to me throughout the entire hearing, from the very beginning, that *Kelly–Frye* wasn't being addressed. [¶] ... It was apparent to me through the whole hearing that [Wallace] didn't have any expertise in the actual details of the computer program. [¶] He knew how to use it, much as I know how to drive my car, but I don't know how to go into the engine and fix what's wrong .... [¶] ... He knows how to look at images and know whether or not they match. But he doesn't know how that program works."

The court continued the matter, stating, "I want to know what happened at Samy's Camera, and I want to know about it in sufficient detail so that I can know whether or not that is based on technology that didn't exist at the time of trial. And ... if that's the case, whether or not the images were altered or whether they had integrity. ..."

Appellant's counsel subsequently filed a brief supplemental declaration from Mejia, in which she stated that "[n]o pixels were added or subtracted to the exhibits produced." She added that "[t]he video player that came with the surveillance footage had limited playback options and was not playable on my computer, so I decided to reshoot it with a camera that can produce a file with which I can view on my own computer."

The prosecution also submitted a supplemental declaration from Mejia, in which she further described the process of taking still photos from the surveillance video. She declared that "[t]he BM camera was placed on a tripod in front of Dr. Wallace's computer laptop monitor and it recorded that surveillance video that was being displayed on Dr. Wallace's computer laptop monitor. [¶] ... [W]hatever image can be seen on the laptop screen with your naked eye is the same thing you could look at with the recording being captured by the BM camera. [¶] ... To clarify, if the original surveillance video recorded at a rate of six frames per second, the BM camera is simply recording those same six frames over and over at a rate of 24 frames per second; you cannot get more information from the surveillance video by recording it with the BM camera. ... [¶] ... The original surveillance video is very pixilated and nothing can be done to improve that quality without manipulating the original recording. The BM camera does not increase the sharpness or the quality of the original surveillance video."

On May 21, 2015, the prosecution also filed a declaration of George Reis[7], who had 25 years of experience in forensic photography and video and photographic analysis, and who provided training in these disciplines to police and government agencies. Reis declared that the surveillance video was recorded at a resolution of 352 x 240 pixels and a low frame rate of seven frames per second. By way of comparison, a typical cell phone has a minimum resolution of 720 x 1280 pixels, which results in 11 times more resolution. The frame rate of a standard video recording is 30 frames per second.

The declaration stated, "In Dr. Wallace's declaration of March 21, 2015 he states that, '... I refrained from using any enlargement or other type of enhancement to improve resolution.' This statement is misleading. The original video is 352 x 240 pixels in dimension. By photographing them at a resolution any higher than that, one is by definition enlarging, resampling, and magnifying them. [¶] ... Next, ... Dr. Wallace states that, '... we were able to obtain far more stills from the surveillance video ....' In reviewing these stills, many of them are duplicates of the same frames. The camera used to photograph the screen was simply capturing the screen at a faster frame rate than the [seven frames per second] that the [surveillance] video played at.[8] This results in duplicate frames being recorded, not in additional frames being recorded."

***13** The declaration also stated, "the security camera video in this case only captured the most general of class characteristics such as approximate skin tone, gender, and approximate height to weight ratio. [¶] ... Dr. Wallace's conclusion that the individual in the video is not [appellant] is not supported by the video evidence. The low resolution and high level of compression prevent such a conclusion from being possible." Appellant's particular features that Wallace sought to compare in his analysis were not "reliably recorded" on the video, as "[e]ach of them [is] affected by the low resolution and the severe artifacting from the strong compression."

Reis noted Wallace's and Mejia's declarations contained no indication either of them had training or experience in the field of forensic video analysis, and there was no indication either of them was familiar with the best practices in this forensic science. Reis opined that "based on the methodology used, it is evident that they are not familiar with this field."

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On May 26, 2015, appellant filed yet another declaration of Wallace, in which he stated, "[R]e-examining the case using the new generation MacPro with Retina allowed me to make more digital "still" images without enhancing the images. The multiple still photos have made it unequivocally certain that the person on the video is not [appellant]."

On June 16, 2015, during the final hearing on the matter, the court ruled that Wallace's testimony was inadmissible, as the proposed testimony did not meet the *Kelly/Frye* standard and was based on computer-generated images that were so unreliable that they rendered the testimony inadmissible under Evidence Code section 352. Wallace did not understand how the images were created. The court denied that anything such as the "absence of a tattoo [in a computer-generated image] could be attributed to anything other than the very poor quality of the original video." The court indicated Reis's declaration provided "by far, the most persuasive" information as to why there was an "absolute lack of reliability." The court also indicated it did not believe the "Mac computer" was new technology "such that it would be evidence that couldn't have been discovered in time." The court concluded that, for all of those reasons, it would not grant a new trial.

B. Analysis.

Appellant claims the trial court abused its discretion by denying his new trial motion. He argues that (1) expert opinion testimony is not generally subject to *Kelly/Frye* standards, and (2) the court abused its discretion when it concluded that the evidence was unreliable and therefore excludable under Evidence Code section 352.[9] For the reasons below, we reject appellant's claim.

" ' "In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: ' "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." ' " ' [Citation.]" (*People v. O'Malley* (2016) 62 Cal.4th 944, 1016–1017, 199 Cal.Rptr.3d 1, 365 P.3d 790.) A trial court has broad discretion when ruling on a new trial motion. (*People v. Verdugo* (2010) 50 Cal.4th 263, 308, 113 Cal.Rptr.3d 803, 236 P.3d 1035 (*Verdugo*).) A new trial motion based on newly-discovered evidence is looked upon with disfavor. (*People v. McDaniel* (1976) 16 Cal.3d 156, 179, 127 Cal.Rptr. 467, 545 P.2d 843; *People v. Shoals* (1992) 8 Cal.App.4th 475, 485–486, 10 Cal.Rptr.2d 296.)

***14** In reviewing the trial court's ruling, we accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. (*Verdugo, supra,* 50 Cal.4th at p. 308, 113 Cal.Rptr.3d 803, 236 P.3d 1035.) The ruling will be disturbed only for a clear abuse of discretion. (*Ibid.*) We also evaluate a trial court's ruling under Evidence Code section 352 for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 723–724, 94 Cal.Rptr.2d 396, 996 P.2d 46.)

The *Kelly/Frye* test "renders inadmissible evidence derived from a 'new scientific technique' unless the proponent shows that (1) 'the technique is generally accepted as reliable in the relevant scientific community'; (2) 'the witness testifying about the technique and its application is a properly qualified expert on the subject'; and (3) 'the person performing the test in the particular case used correct scientific procedures.' [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 315–316, 205 Cal.Rptr.3d 386, 376 P.3d 528 (*Jackson*).) The purpose of the *Kell*y test is "to protect the jury from techniques which, though 'new,' novel, or ' "experimental," ' convey a ' "misleading aura of certainty." ' [Citations.]" (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155–1156, 265 Cal.Rptr. 111, 783 P.2d 698 (*Stoll*) "Appellate courts review de novo the determination that a technique is subject to *Kelly*." (*Jackson*, at p. 316,.)

Appellant cites *Stoll* for the proposition that "absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly/Frye*." (*Stoll, supra,* 49 Cal.3d at p. 1157, 265 Cal.Rptr. 111, 783 P.2d 698.) In that case, the prosecution objected to expert psychological testimony regarding standard psychological testing that was proffered by the defense. The court held that this proposed expert testimony raised none of the concerns underlying the *Kelly* test, because "[t]he methods employed are *not* new to psychology or the law, and they carry no misleading aura of scientific infallibility." (*Stoll,* at p. 1157, 265 Cal.Rptr. 111, 783 P.2d 698.)

This case is distinguishable from *Stoll*. Appellant concedes the essence of his new trial motion pertained to "new computer software and video screen retina technology," and his counsel conceded below that "the use of experts in

this manner was virgin territory." Further, there was a real danger that Wallace's proposed testimony—which relied on still photographs created and enhanced via a methodology he could not explain, the reliability of which was subject to serious question—*would* carry a "misleading aura of scientific infallibility." Thus, we reject appellant's contention that the *Kelly/Frye* test did not apply to determining whether Wallace's expert testimony was admissible.

Kelly/Frye's first requirement that a " 'technique is generally accepted as reliable in the relevant scientific community' " (*Jackson, supra,* 1 Cal.5th at p. 315) is usually established by expert testimony on the subject. (*Stoll, supra,* 49 Cal.3d at p. 1155, 265 Cal.Rptr. 111, 783 P.2d 698.) Although Wallace was a facial recognition expert, appellant failed to demonstrate that Wallace was an expert in the new technology employed to produce and enhance the still photographs derived from the low-resolution surveillance video, which photographs Wallace subsequently compared to high-resolution photographs of appellant. Wallace admitted he was "not a specialist" regarding this alleged new technology and that he was not "exactly sure of the actual mechanism" the technology used to make a photograph clearer. The trial court expressly found Wallace was not an expert in the alleged new technology. Moreover, Cuevas's testimony and the declaration of Reis affirmatively demonstrated that the technique employed to enhance the poor-quality surveillance video was *not* generally accepted as reliable in the relevant scientific community, and that still photographs derived from the low-resolution, highly-compressed surveillance video could not serve as a reliable basis for comparison with high-resolution photos taken of appellant.

***15** Appellant failed to demonstrate that the technique upon which Wallace's testimony would be based met the first and second requirements of the *Kelly/Frye* test—that the scientific community accepted the technique as reliable and that the witness testifying about the technique and its application is a properly qualified expert on the matter.[10] (*Jackson, supra,* 1 Cal.5th at pp. 315–316.) Further, the court did not abuse its discretion by finding, pursuant to Evidence Code section 352, that Wallace's proposed testimony should not be admitted because the technique underlying his opinion had not been shown to be reliable. The court properly denied appellant's disfavored new trial motion based upon Wallace's proposed testimony.

III. REMAND IS REQUIRED AS TO SECTION 12022.53, SUBDIVISION (d) FIREARMS ENHANCEMENT.

The jury found true a section 12022.53, subdivision (d) enhancement as to the murder. The trial court imposed an additional term of 25 years to life pursuant to that subdivision, finding it lacked discretion under the sentencing laws.

Appellant first claims imposition of that term violated the multiple conviction rule, double jeopardy principles, and section 654. We reject the claim. (*People v. Izaguirre* (2007) 42 Cal.4th 126, 134, 64 Cal.Rptr.3d 148, 164 P.3d 578; *People v. Sloan* (2007) 42 Cal.4th 110, 123, 64 Cal.Rptr.3d 137, 164 P.3d 568; *People v. Palacios* (2007) 41 Cal.4th 720, 727–728, 62 Cal.Rptr.3d 145, 161 P.3d 519; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.)[11] We also reject his related contention that United States Supreme Court decisions "suggest" federal double jeopardy principles bar imposition of the enhancement.

In post-argument briefing, appellant also contends that, as a result of Senate Bill No. 620, signed by the Governor on October 11, 2017, this matter must be remanded for the trial court to exercise discretion as to whether to strike the section 12022.53, subdivision (d) enhancement. As relevant here, Senate Bill No. 620 provides that effective January 1, 2018, section 12022.53 is amended to permit the trial court to strike a sentencing enhancement under that section. The new provision states as follows: "[t]he 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, § 2.)

Senate Bill No. 620 went into effect January 1, 2018. Because appellant's conviction is not yet final, appellant is eligible to have the matter remanded for resentencing because the amended statute granting discretion to the trial court has the potential to lead to a reduced sentence. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–745, 748, 48 Cal.Rptr. 172, 408 P.2d 948 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; *People v. Francis* (1969) 71 Cal.2d 66, 75–78, 75 Cal.Rptr. 199, 450 P.2d 591 [where statute enacted during pending appeal gave trial court

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discretion to impose a lesser penalty, remand was required for resentencing].) Accordingly, we remand the matter to the trial court to exercise its discretion as to whether to strike the enhancement pursuant to section 12022.53, subdivision (d).

DISPOSITION

***16** The case is remanded so that the trial court can exercise its discretion as to whether to strike the sentencing enhancement pursuant to section 12022.53, subdivision (d). The judgment is otherwise affirmed.

We concur:

EDMON, P. J.

LAVIN, J.

All Citations

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Footnotes

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

1 Subsequent section references are to the Penal Code.

2 Because we conclude that the statements lacked the requisite solemnity or formality of testimonial statements, we need not address whether the statements were obtained as part of an ongoing investigation into a completed crime or for another purpose, such as routine collection of gang intelligence by Tripp. We merely note that, contrary to appellant's representation, the record demonstrates that Tripp was *not* part of the investigation of Samuels' murder, which was conducted by the Los Angeles Police Department, not the Inglewood police.

3 The Supreme Court has granted review in *Meraz*, but ordered that the Court of Appeal's opinion "remain precedential." (*People v. Meraz* (2017) 215 Cal.Rptr.3d 3, 390 P.3d 782.)

4 Section 186.22, subdivision (b)(1), applies, in pertinent part, to any person convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang "with the specific intent to promote, further, or assist in any criminal conduct by gang members."

5 The declaration stated, inter alia, "The new software allows for facial recognition to identify facial features by extracting landmarks, or features, from an image of the subject's face utilizing and analyzing the relative position, size, and/or shape of the eyes, nose, cheekbones, and jaw. These features are then used to search for other images with matching features."

6 (*People v. Kelly* (1976) 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.)

7 We hereby grant respondent's motion to augment the record on appeal to include the Reis declaration.

8 Reis also disputed that the BM camera used at Samy's Camera was new technology, noting that multiple camera models with the same or higher resolution and frame rate existed prior to 2009.

9 Evidence Code section 352 states, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury."

10 Similarly, there was no substantial evidence satisfying *Kelly/Frye's* third requirement that " 'the person performing the test in the particular case used correct scientific procedures' " to produce those enhanced images and photographs. (*Jackson, supra,* 1 Cal.5th at pp. 315–316.)

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11 *Smith v. Hedgpeth* (9th Cir. 2013) 706 F.3d 1099, cited by appellant, does not compel a contrary conclusion. *Smith* (1) acknowledged our Supreme Court has determined that, for purposes of applying the multiple conviction rule, an enhancement is not considered an element of an offense; (2) acknowledged it was not the Ninth Circuit's role to determine whether our Supreme Court's judgment in that regard was correct but simply whether it violated clearly established federal law; and (3) concluded the judgment did not. (*Id.* at pp. 1102–1103.) In any event, appellant concedes a decision of an intermediate federal appellate court is not binding on this court. (*People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1587, 4 Cal.Rptr.2d 40.) Appellant argues *Izaguirre* and *Sloan* were wrongly decided and his objection to those cases "must be raised in this Court in order to preserve his claims for subsequent review."

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