People v. Shelman

COURT OF APPEAL, FOURTH APPELLATE DISTRICT DIVISION ONE STATE OF CALIFORNIA Jul 31, 2019

D075365 (Cal. Ct. App. Jul. 31, 2019)

HALLER, Acting P. J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115. (Super. Ct. No. FSB1501258) APPEAL from judgments of the Superior Court of San Bernardino County, J. David Mazurek, Judge. Affirmed in part, reversed in part, and remanded with directions. Eric S. Multhaup, under appointment by the Court of Appeal, for Defendant and Appellant Willie Shelman. Thomas E. Robertson, under appointment by the Court of Appeal, for Defendant and Appellant Raequan J. Tuggle. Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Lynne G. McGinnis and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Willie Shelman and Raequan Jamell Tuggle of attempted premeditated murder (Pen. Code,[1] §§ 187, subd. (a), 664), street terrorism (§ 186.22, subd. (a)), shooting at an inhabited dwelling (§ 246), and assault with a firearm (§ 245, subd. (a)(2)), and found true various gang and firearm enhancement allegations. The trial court sentenced defendants to indeterminate prison terms of 55 years to life.

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

Defendants challenge their judgments of conviction on numerous grounds. In particular: (1) defendants contend the evidence was insufficient to support the attempted premeditated murder convictions; (2) Shelman claims the trial court improperly permitted the prosecution's gang expert to relay hearsay to the jury and opine on the significance of the lyrics to an unduly prejudicial rap song performed by members of a gang to which defendants belong; (3) Tuggle argues his trial counsel was ineffective for failing to object to the expert testimony and rap lyrics just described; (4) Shelman argues the trial court's use of Judicial Council of California Criminal Jury Instruction (CALCRIM) Nos. 1400 and 1401 impermissibly relieved the prosecution of proving essential elements of the street terrorism and gang enhancement charges; and (5) defendants argue that recent legislative amendments vesting trial courts with discretion to strike firearm enhancements apply retroactively to their sentences and require us to remand for resentencing.

to defendants' sentences. Accordingly, we affirm in part, reverse in part, and remand for the limited purpose of allowing the trial court to resentence defendants.

I

BACKGROUND

A. *The Shooting*

A resident of San Bernardino County was speaking with a friend in the driveway of her multi-unit residence after midnight when she noticed a man standing near the steps of the residence. She approached the man, who raised a gun and fired multiple shots at her or in her direction. A bullet struck the victim in her chin, causing her to fall to the ground and crawl for protection behind a vehicle parked in her driveway. The shooter fired several more shots, many of which struck the parked vehicle and the garage of the residence.

The victim fled to the back of the residence and tried to seek refuge inside the residence, but the back door was locked. As the victim banged on the locked door for someone to let her in, she noticed a second man standing by the fence in her backyard. The victim's daughter unlocked the door and, as the victim ran inside, she heard and saw gunfire coming from the area where the second man was standing. Police arrived soon after and the victim was taken to a hospital, where she was treated for her injuries. B. *The Trial*

The district attorney filed an amended information charging Shelman and Tuggle with
4 attempted premeditated murder (count 1), street terrorism (count 2), shooting at an *4
inhabited dwelling (count 3), and assault with a firearm (count 4) in connection with the shooting. The information also alleged gang enhancements for counts 1, 3, and 4 (§ 186.22, subd. (b)(1)(C)) and firearm enhancements for counts 1 and 4 (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a), 12022.53, subds. (a)-(e)(1)).

1. *The Prosecution Case*

The victim testified that she had been a resident of San Bernardino County for 19 years and lived across from an apartment complex where members of the 59 East Coast Crip and Touch Money gangs convened. The victim identified Shelman as a member of Touch Money and testified that Shelman had been in altercations with the victim's son in the past, including a fight that had occurred one day before the shooting. The victim further testified that her daughter had challenged defendants to a fight the day before the shooting. The victim identified Shelman as the man she had seen in the driveway and testified that she had approached Shelman to ask why he had been fighting with her son, at which point Shelman "raised the gun and started shooting."

The victim identified Tuggle as the man she had seen standing by the fence in her backyard. She testified that Tuggle initially stood "like a deer in the headlights" when she fled to the back of the residence. She further testified that Tuggle shot "into the house" as she ran inside, but never shot "directly" at her. She opined that if Tuggle had "wanted to hit [her], he could have hit" her.

The investigating officer, Detective Nick Oldendorf of the San Bernardino County Police Department, testified about content obtained from defendants' social media accounts. One
5 post obtained from Shelman's social media account was time-stamped two *5 and a half hours after the shooting and stated, "3:35 in the a.m. on foot through these dirty Dino Streets. Why? Cuz no Niga pump fear in my heart and I need a Swisher LMAO." Oldendorf

account, a third party sent Tuggle a message three days before the shooting stating, "If you got tho thangs, need one," and Tuggle responded, "I need one, too." Oldendorf opined that "thang" was coded language for a firearm.

Detective Lanier Rogers of the San Bernardino County Police Department testified as the prosecution's gang expert. Rogers previously served as a member of the department's gang unit and, at the time of trial, had investigated "several hundred" gang cases. While he was a member of the gang unit, Rogers responded "almost every other day" to shootings and murders perpetrated by Touch Money members. Due to his firsthand experience investigating Touch Money and responding to offenses perpetrated by Touch Money members, Rogers was considered to be "the expert in Touch Money" for the department. At trial, Rogers identified by sight a dozen different Touch Money members in photographic exhibits shown to him and, as to many of those members, testified about their gang monikers, instances in which the Touch Money members were killed or injured, and the individuals who perpetrated those acts of violence against them.

Rogers testified that 59 East Coast Crip is a Los Angeles gang with approximately 500 members. 59 East Coast Crip members associate with the color blue, baseball teams with
6 blue logos, the numbers 5 and 9, and abbreviations including "NY" (New York), *6 "LA" (Los Angeles), "EC" (East Coast), and "ECC" (East Coast Crip). Rogers testified that 59 East Coast Crip members co rder, assault with a deadly weapon, grand theft auto, robbery, cri ssession of firearms.

Rogers testified that Touch M n Bernardino gang that was founded in the mid-2000's b Crip. According to Rogers, Touch Money has approximately 30 members and Touch Money members associate with a baseball team with a blue logo, abbreviations including "T" (touch) and "$" (money), and the acronym "INIA" (I Need It All). Rogers testified that Touch Money members commit offenses including burglary, robbery, criminal threats, grand theft auto, murder, attempted murder, possession of stolen property, and felony possession of firearms.

To establish a pattern of criminal gang activity necessary to prove the street terrorism and gang enhancement charges, Rogers opined about predicate offenses committed by purported members of 59 East Coast Crip and Touch Money. In particular, he testified as follows:

• Antwaun Banks was a member of 59 East Coast Crip and was convicted of robbery. Rogers based his testimony on an "investigation" that he conducted, certain unidentified officer reports, and Banks's gang-related tattoos.

• Thad Paul was a member of 59 East Coast Crip and was convicted of making criminal threats. Rogers based his testimony on an "investigation" he conducted and Paul's gang-
7 related tattoos. *7

• Samuel Harris was a member of 59 East Coast Crip and was convicted of possession of a firearm by a felon. Rogers based his testimony on his review of an unidentified "report" and conversations with investigators familiar with Harris.

• Marshawn Stewart was a member of Touch Money and was convicted of unlawfully driving or taking a vehicle. Rogers based his testimony on Stewart's "criminal history," Rogers's "research into [Stewart's] past," the fact that Stewart was a victim of a shooting perpetrated by a rival gang, and conversations with other individuals "who mentioned that he's also Touch Money."

conversations that Rogers had "with other agencies [that] ha[d] dealt with [Brown] in the past," the fact that Brown self-associated with Touch Money, Brown's tattoos, and Brown's use of gang signs in photographs.

• Tyren Griffin was a member of Touch Money and was convicted of attempted first degree residential burglary. Rogers based his testimony on Griffin's "criminal history" and conversations that Rogers had with other officers.

Certified records of conviction were introduced into evidence for each of the predicate offenses to which Rogers testified.

Rogers opined that defendants were members of both 59 East Coast Crip and Touch Money. Rogers based his opinion regarding Tuggle on Tuggle's tattoos (which included "T" and "$"), photographs in which he made gang signs, the fact he congregated in neighborhoods
8 claimed by Touch Money, his association with Touch *8 Money members, and the fact that his older brother was a founding member of Touch Money. Rogers based his opinion regarding Shelman on Shelman's tattoos (which included "NY," "LA," "T," and "INIA"), photographs in which he made gang signs, conversations Rogers had "with other agencies [that] ha[d] dealt with him," and Shelman's association with members of both gangs.

While Rogers was on the stand, the prosecution played an audio file and supplied the jury with transcripts for a rap song performed by the founding members of Touch Money, including Tuggle's older brother. The lyrics stated, in pertinent part, as follows: "I swear to God, we're really serious about this touch money shit. Touch! . . . On my life, man, I really love my Day Ones Cuz . . . Imma go kill for em, they gone go kill for me, that's on Crip . . . Man, I do this for my Day 1's and my Day 1's only, (my Day 1's), the niggas that I know (unintelligible) . . . gonna spray some for me, (my Day 1's) . . . On T's, what you mean these niggers, won't beef, when you huddle up and rush these niggers on three, fuck a nigger mean, what a free-bee, G, for I catch your a, my circle real smll, ain't no extra space, they better free all my Tugs . . . [F]irst off let's state facts. I'm from 59 Neighborhood crip and I bang that, . . . Touch Money still a team, nigger, (what?) I've been solid . . . I'll let them
9 thangs fly, if niggers fuckin with my cousin. . . ."[2] *9

[2] Elsewhere, the lyrics stated: "[S]hout out Killa Tug, all he do is shoot. . . ." In his appellate brief, Shelman states that this lyric refers to Tuggle. However, the gang expert testified that monikers for several Touch Money members includes the word "Tug" and, in particular, the gang moniker "Killa Tug" belongs to a gang member named Charles Sanford. Shelman cites no evidence in the record to support his statement that "Killa Tug" refers to Tuggle.

After the prosecution played the audio file, it questioned Rogers regarding the significance of lyrics from the song. Based on the lyrics, Rogers opined that members of Touch Money were willing to perpetrate gun violence ("spray" bullets) for the gang. Further, Rogers agreed with the prosecution's suggestion that the lyrics demonstrated that Touch Money "stands for" guns, violence, and shootings. Finally, Rogers opined that the lyrics demonstrated Touch Money consists of members of 59 East Coast Crip.

2. *The Defense Case*

Shelman called his mother as an alibi witness. She testified that Shelman had been in a fight with the victim's son the day before the shooting, but had been present at her home when the victim was shot and for the remainder of the morning.

Tuggle's girlfriend testified that she picked Tuggle up from his brother's girlfriend's house shortly after the time of the shooting.

3. *The Verdict*

The jury found defendants guilty of the charged offenses and returned true findings on each of the enhancement allegations. The trial court sentenced each defendant to an indeterminate prison term of 55 years to life, calculated as follows: (1) for count 1 (attempted premeditated murder), an indeterminate term of 15 years to life due to the gang enhancement, plus a consecutive indeterminate term of 25 years to life for discharging a firearm causing serious bodily injury; (2) for count 2 (street terrorism), a concurrent term of
10 two years, stayed; (3) for count 3 (shooting at an inhabited *10 dwelling), a consecutive indeterminate term of 15 years to life due to the gang enhancement; and (4) for count 4 (assault with a firearm), a concurrent term of three years, stayed.

II

ANALYSIS

A. *Sufficiency of the Evidence*

Defendants contend the evidence in this case is insufficient to support their convictions of attempted premeditated murder. " 'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*People v. Perez* (2010) 50 Cal.4th 222, 229.)

1. *Attempted Murder*

" '[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.] Hence, in order for defendant[s] to be convicted of . . . attempted murder . . . the prosecution had to prove [they] acted with specific intent to kill [the victim].' " (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) " 'There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions.' " (*Id.* at p. 741.) "[T]o be guilty of attempted murder as an aider and abettor, a
11 person must give aid or encouragement with knowledge of the direct *11 perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing—which means that the person guilty of attempted murder as an aider and abettor must intend to kill." (*People v. Lee* (2003) 31 Cal.4th 613, 624 (*Lee*).)

Shelman contends the evidence was insufficient to support a finding that he intended to kill the victim because the evidence did not establish that he aimed his firearm directly at the victim before firing. Shelman further argues that the location of the victim's bullet wound (under her chin) demonstrated that he "fired at the ground," the bullet ricocheted in an "unpredictable and uncontrollable" manner, and he "accidentally" shot the victim. These arguments are unavailing. The prosecution presented uncontradicted testimony from the victim that Shelman "raised the gun" and "pointed the gun at [her] face" as she approached

with the intent to kill.

Further, the victim testified that after she was struck by a bullet, Shelman "walk[ed] towards" her and continued firing the gun. Forensic evidence corroborates the victim's testimony. For instance, police identified bullet strike marks in the rear window of the parked vehicle in the victim's driveway, bullet fragments in the trunk of the vehicle, and bullet holes in the garage door, including lower to the ground near the victim's position. Thus, even if we assume Shelman initially struck the victim with an "accidental" ricochet bullet aimed at the ground, the jury reasonably could have concluded that Shelman intended
12 to kill the victim based on the testimony and forensic *12 evidence suggesting that he continued to unleash a fusillade of shots at the vehicle behind which she cowered for protection. (*Smith*, *supra*, 37 Cal.4th at p. 744 ["[Defendant's] very act of discharging a firearm into the car from close range and narrowly missing [the victim] could itself support . . . an inference" of an intent to kill].)

Like Shelman, Tuggle challenges the sufficiency of the evidence supporting his attempted murder conviction. Tuggle argues the evidence did not support a finding that he intended to kill the victim, primarily because the victim testified that Tuggle did not shoot "directly" at her and, furthermore, if he had "wanted to hit [her], he could have hit" her. The prosecution argues that, irrespective of whether Tuggle shot directly at the victim, he intended to aid Shelman in killing her because Tuggle positioned himself at the back of the residence to block the victim's escape route during the shooting.

Reviewing the evidence in the light most favorable to the judgment, we conclude the record contains substantial evidence from which a reasonable jury could have accepted the prosecution's theory and found that Tuggle intended to kill the victim. The victim testified that Tuggle was armed and standing by her backyard fence in the middle of the night, such that defendants surrounded her during the shooting. Further, while there was no evidence that Tuggle fired directly at the victim, she did testify that he was armed and fired a bullet into her home—one of the few apparent escape routes available—as she ran inside. From this evidence, a jury reasonably could have inferred, in accordance with the prosecution's theory of liability, that Tuggle armed and positioned himself by the fence in the victim's backyard with the intent to block her escape and assist Shelman, a fellow gang member, in
13 killing the victim. *13

2. *Deliberation and Premeditation*

Tuggle contends substantial evidence did not support the jury's special finding that the attempted murder was deliberate and premeditated. Tuggle emphasizes that Shelman did not initiate contact with the victim and instead refrained from firing at her until she approached him, asking why he had been fighting with her son. Tuggle further contends that Tuggle's procurement of a firearm prior to the shooting does not invariably support an inference of deliberation or premeditation because Touch Money had been engaged in ongoing retaliation shootings with a rival gang and the gun could have been procured for purposes related to the gang rivalry. Shelman does not specifically challenge the sufficiency of the evidence supporting the jury's special finding that the attempted murder was deliberate and premeditated, but files a generic joinder to Tuggle's arguments.

If a trier of fact finds true an allegation that an attempted murder was willful, deliberate, and premeditated, "a defendant's sentence for attempted murder increases from a determinate term of five, seven, or nine years to an indeterminate life term with the possibility of

premeditated, "*not* that the attempted murderer *personally* . . . acted willfully and with deliberation and premeditation." (*Lee*, *supra*, 31 Cal.4th at p. 622.) Put differently, a defendant convicted of attempted murder, even under an aiding and abetting theory, may be sentenced to an indeterminate life term with the possibility of parole if the jury finds true a special allegation that the underlying offense of attempted murder was willful, deliberate, and premeditated. (*Id.* at p. 627.) *14

"A crime is premeditated when it is considered beforehand and deliberate when the decision to commit the crime is formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. [Citations.] [¶] The process of deliberation and premeditation does not require any extended period of time: ' "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." ' [Citations.] The requirement of premeditation and deliberation excludes acts that are the 'result of mere unconsidered or rash impulse hastily executed.' " (*People v. Gonzalez* (2012) 210 Cal.App.4th 875, 887.)

In *People v. Anderson* (1968) 70 Cal.3d 15, 26-27, our high court identified three categories of evidence that are typically sufficient to sustain a finding of premeditation and deliberation: (1) planning evidence; (2) motive evidence; and (3) a manner of killing from which the jury could reasonably infer a deliberate intent to kill. These factors need not be present in "some special combination" or "accorded a particular weight" (*People v. Pride* (1992) 3 Cal.4th 195, 247 (*Pride*)), and "it is not essential that there be evidence of each category to sustain a conviction." (*Gonzalez*, *supra*, 210 Cal.App.4th at p. 887.) Rather, the factors are "simply intended to guide an appellate court's assessment whether the evidence supports an inference that the [attempted] killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse." (*Pride*, at p. 247.)

There was ample evidence of the type identified in *Anderson* from which the jury in this case could have found that defendants acted with premeditation and deliberation. With respect to planning evidence, police obtained a message from Tuggle's social media *15 account indicating that he desired a firearm just three days prior to the shooting. From the temporal connection between Tuggle's message and the shooting, a jury reasonably could have inferred that Tuggle sought a firearm to further a considered plan of attack on the victim. Further, planning may be inferred from the fact that defendants "brought . . . loaded handgun[s] with [them] on the night [of the shooting], indicating [they] had considered the possibility of a violent encounter" with the victim. (*People v. Lee* (2011) 51 Cal.4th 620, 636; *People v. Williams* (1995) 40 Cal.App.4th 446, 455 ["[p]lanning was evidenced by 'the fact that defendant brought his loaded gun' "].)

Tuggle insists there was a plausible alternative explanation for why he procured a firearm and why defendants carried firearms on the night of the shooting—namely, to attack or defend against a rival gang. But, "[b]ecause the circumstances reasonably justify the jury's findings, we may not reverse the judgment simply because the circumstances might also reasonably be reconciled with defendant's alternative theories." (*People v. Farnam* (2002) 28 Cal.4th 107, 144; see *People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054 [" ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' "].)

daughter had also challenged defendants to a fight one day before the shooting. Further, the gang expert testified in response to a series of hypothetical questions that a shooting of this
16 nature by members of a gang would help the gang by instilling fear in the *16 neighborhood and sending a message that the gang would retaliate against anyone who disrespected the gang. It was reasonable for the jury to infer from this evidence that defendants had motive both to seek revenge against the victim's family and instill fear in the neighborhood by killing the victim. (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224 [gang member's desire to promote his gang and spread fear in the community gave him a motive to commit attempted premeditated murder].)

Finally, the manner of the attempted murder supports a finding of premeditation and deliberation. The victim approached Shelman to ask why he was fighting with her son and, without any apparent incitement or provocation, Shelman raised the gun and shot the victim at close range. Further, the victim testified that Shelman did not stop firing after he hit her, and instead moved toward her while continuing to fire his gun. Defendants positioned themselves on either side of the victim's residence as well, suggesting they were executing a prearranged plan to surround the victim. This evidence, indicative of a calculated attack, was sufficient to permit an inference of premeditation and deliberation. (*People v. Cage* (2015) 62 Cal.4th 256, 277 [" '[A] close-range gunshot to the face is arguably sufficiently "particular and exacting" to permit an inference that defendant was acting according to a preconceived design.' "].)

Viewing the evidence in the light most favorable to the judgment, there was substantial evidence from which the jury could have found that defendants committed the offense of
17 attempted murder willfully, deliberately, and with premeditation. *17 B. *Gang Charges*

The jury found defendants guilty of street terrorism and returned true findings on gang enhancements attached to three of the offenses. Defendants contend the prosecution relied on inadmissible hearsay and unduly prejudicial rap lyrics to prove the charges. Defendants further claim the trial court provided erroneous instructions to the jury regarding the street terrorism charge and the gang enhancement allegations.

1. *Background*

"The California Street Terrorism Enforcement and Prevention Act (STEP Act; § 186.20 et seq.) was enacted in 1988 'to seek the eradication of criminal activity by street gangs.' (§ 186.21.) The STEP Act creates both a substantive offense for active participation in any criminal street gang [herein referred to as street terrorism] (§ 186.22, subd. (a)) and an enhancement to be imposed where any person is convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b))." (*People v. Lara* (2017) 9 Cal.App.5th 296, 326.)

The STEP Act provision establishing street terrorism as a standalone offense provides as follows: "Any person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." (§ 186.22, subd. (a).) "One may promote, further, or assist in the felonious conduct by at least

(2014) 229 Cal.App.4th 910, 920-921.)

The gang enhancement provision of the STEP Act applies when a person is convicted of a felony committed "for the benefit of, at the direction of, or in association with [a] criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members," and establishes a sentence enhancement of two, three, or four years' imprisonment for most felonies. (§ 186.22, subd. (b)(1).)

The existence of a criminal street gang is an element of both the substantive offense of street terrorism and the gang enhancement charge. (*People v. Vasquez* (2016) 247 Cal.App.4th 909, 922.) A criminal street gang is defined as an "ongoing organization, association, or group of three or more persons" that shares a common name or common identifying sign or symbol; has as one of its "primary activities" the commission of one or more enumerated offenses; and "whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) A "pattern of criminal gang activity" may be established by proving that gang members committed, attempted commission of, or were convicted of, two or more enumerated offenses, known as predicate offenses. (*Id*., subd. (e).)

2. *Predicate Offense Testimony*

Shelman claims his rights to due process and a fair trial were violated based on the admission of testimonial hearsay in violation of state evidence law and the Sixth Amendment to the federal Constitution, as interpreted by *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). In particular, he argues the gang expert relayed inadmissible *19 hearsay to the jury while testifying about predicate offenses committed by alleged members of 59 East Coast Crip and Touch Money to establish that the gangs had engaged in patterns of criminal gang activity. Tuggle does not directly challenge the admission of testimonial hearsay regarding the predicate gang offenses, but claims his trial counsel was ineffective for failing to object to the admission of such testimony.

In *Sanchez, supra*, 63 Cal.4th 665, the California Supreme Court addressed the extent to which an expert witness may relate hearsay on which he or she bases an expert opinion. The *Sanchez* court explained that state evidence law "has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise." (*Sanchez, supra*, 63 Cal.4th at p. 676.) By contrast, "an expert has traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid*.)

As the Supreme Court recognized, however, "the line between the two ha[d] . . . become blurred" over time because of decisions in which courts "attempted to avoid hearsay issues by concluding that statements related by experts [were] not hearsay because they '[went] only to the basis of [the expert's] opinion and [were] not [to] be considered for their truth.' " (*Sanchez, supra*, 63 Cal.4th at pp. 678-681.) The *Sanchez* court rejected this line of cases and the not-for-the-truth rationale on which they relied, concluding that the value of an expert witness' opinion necessarily depends on the truth of his or her assumptions. (*Id*. at pp. 682-683.) In so doing, the *Sanchez* court announced the following rule governing expert testimony: "When any expert relates to the jury case- *20 specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Id*. at p. 686.)

state evidence law, but also by the Sixth Amendment's confrontation clause, which provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .' " (*Sanchez*, *supra*, 63 Cal.4th at pp. 679-680.) Admission of *testimonial* hearsay against a criminal defendant—i.e., statements "made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony"—generally "violates the confrontation clause unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing." (*Id.* at pp. 680, 689.) Thus, "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis"—first, determine whether the statement is hearsay that does not fall within a recognized exception and, second, decide whether the statement is testimonial hearsay that may violate the confrontation clause. (*Sanchez*, at p. 680.)

In this case, the gang expert testified on May 3, 2017, more than 10 months after the Supreme Court issued *Sanchez* (filed June 30, 2016). Nevertheless, defendants' trial counsel
21 did not object to the gang expert's testimony on hearsay grounds. By failing to *21 do so, defendants forfeited their challenge on appeal.[3] (*People v. Espinoza* (2018) 23 Cal.App.5th 317, 320 [appellant forfeited *Sanchez* arguments by failing to object].) However, Tuggle asserts an ineffective assistance of counsel argument, which requires us to address whether Tuggle has established a reasonable probability that the outcome of the trial would have been different had trial counsel made a timely objection. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).) To resolve this question, we must take up the merits of defendants' *Sanchez*-related arguments.

3 Citing *People v. Martinez* (2018) 19 Cal.App.5th 853, Shelman claims his failure to assert a hearsay objection does not preclude us from considering his challenge on appeal. In *Martinez*, the gang expert testified before the Supreme Court issued the *Sanchez* decision and, on that basis, the court elected to consider the issue despite the defendant's failure to object. (Accord, *People v. Flint* (2018) 22 Cal.App.5th 983, 996-998; *People v. Veamatahau* (2018) 24 Cal.App.5th 68, 72, fn. 7, review granted Sept. 12, 2018, S249872; but see *People v. Perez* (2018) 22 Cal.App.5th 201, 210-212 , review granted July 18, 2018, S248730 [failure to assert hearsay objection forfeits challenge to expert testimony relaying case-specific hearsay even in cases predating *Sanchez*].) By contrast, the gang expert in this case testified after the Supreme Court issued its *Sanchez* decision. Therefore, the *Martinez* case is inapposite.

As noted, defendants contend the prosecution's gang expert relayed inadmissible case-specific hearsay to the jury while testifying about predicate offenses committed by Marshawn Stewart, Tykwon Brown, and Tyren Griffin, each of whom the gang expert
22 identified as a member of Touch Money. Assuming without deciding that evidence *22 establishing a predicate offense is case-specific,[4] defendants have identified one seemingly problematic instance of hearsay relayed by the gang expert in violation of *Sanchez*. While opining that Stewart was a member of Touch Money, the gang expert testified that his opinion was based on, among other things, his conversations with other individuals "*who mentioned that he's also Touch Money*." The expert's statement recites the content of out-of-court statements and therefore runs afoul of *Sanchez* (again, assuming such testimony may be considered case-specific).

4 There is a split of Court of Appeal authority as to whether predicate offense evidence is "case-specific" for purposes of *Sanchez*. (Compare *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1249 [case-specific]; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 414 [same]; *People v.*

specific], review granted on another issue Mar. 27, 2019, S253629; *People v. Blessett* (2018) 22 Cal.App.5th 903, 945 [same], review granted on another issue Aug. 8, 2018, S249250.)

Nevertheless, the admission of this testimony was not prejudicial, under any standard of review, because the predicate offenses committed by Brown and Griffin were sufficient to establish the necessary pattern of criminal gang activity, and the gang expert did not relate hearsay regarding those individuals. As noted, the gang expert—who had investigated "several hundred" gang cases, personally responded to numerous shootings perpetrated by Touch Money, and at trial identified a dozen Touch Money members when presented with photographic exhibits—testified that Brown and Griffin were Touch Money members. Given the gang expert's investigations of Touch Money and his evident familiarity with the
23 gang's members and operations, we can readily infer that the *23 gang expert drew upon his extensive firsthand experiences when identifying Brown and Griffin as members of the Touch Money gang.

While explaining the bases for his opinion that Brown and Griffin were Touch Money gang members, the gang expert briefly noted that he had "conversations" with other officers. These conversations were indisputably out-of-court statements. But the gang expert relayed only the *type*, not the content, of the hearsay on which he relied, in part, when forming his opinion. As the *Sanchez* court explained, "[t]here is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) Whereas the latter is prohibited, the former is permissible under Evidence Code section 802. Thus, as the *Sanchez* court itself concluded, an "expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Sanchez*, at p. 685.)

These principles are dispositive. The gang expert relied on out-of-court statements, in conjunction with his extensive background and familiarity with the Touch Money gang, to form his opinion on Brown and Griffin's gang affiliations. He described the type of out-of-court statements on which he relied, in general terms, but did not relate the *content* of those statements to the jury. Accordingly, even if the expert testimony pertaining to Stewart should have been excluded, the predicate offenses committed by Brown and Griffin, standing alone, were sufficient to establish a pattern of criminal gang activity. Defendants
24 therefore were not prejudiced by the gang expert's testimony and, *24 for the same reason, Tuggle has not established a reasonable probability of a different trial outcome had his trial counsel raised a *Sanchez* objection.[5]

[5] Given our conclusion, we do not decide whether the gang expert's testimony concerning predicate offenses committed by members of 59 East Coast Crip provides an independent basis on which to conclude that the asserted *Sanchez* error was harmless. Nor do we decide whether substantial evidence established "an associational or organizational connection that unite[d] members" of Touch Money and 59 East Coast Crip. (*People v. Prunty* (2015) 62 Cal.4th 59, 67.)

3. *Rap Lyrics*

Shelman contends the trial court erred in permitting the prosecution to play the audio file of a rap song performed by Touch Money's founding members, including Tuggle's older brother, and allowing the gang expert to testify regarding the meaning of the rap song's lyrics. He claims the probative value of the lyrics and the related expert testimony were

its members as homicidal and gratuitously violent.

Evidence Code section 352 grants trial courts broad discretion to "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, of confusing the issues, or of misleading the jury." "[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." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225.) In this case, however, we need not reach Shelman's *25 argument because his trial counsel did not object to the recitation and admission of the rap lyrics in question. Accordingly, Shelman forfeited his argument of undue prejudice under Evidence Code section 352.[6] (*People v. Clark* (2011) 52 Cal.4th 856, 893 fn. 8 [defendants forfeited challenge under Evid. Code, § 352 by not objecting in trial court]; *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 408 [same].)

[6] Tuggle does not specifically challenge the admission of the rap lyrics under Evidence Code section 352, but joins Shelman's arguments. Like Shelman's trial counsel, Tuggle's trial counsel did not object to the rap lyrics. Therefore, the issue is forfeited.

In any event, the probative value of the rap lyrics was not substantially outweighed by a danger of undue prejudice. As defendants concede in their appellate briefs, the rap lyrics were relevant to a number of elements of the charged offenses and enhancement allegations. For example, the song was probative of the primary activities committed by Touch Money and the relationship between Touch Money and 59 East Coast Crip. (See *People v. Zepeda* (2008) 167 Cal.App.4th 25, 35 (*Zepeda*) [rap song was probative of defendant's membership in and loyalty to a criminal gang]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1373 (*Olguin*) [rap lyrics properly admitted because they showed defendant's gang membership, loyalty to gang, and motive and intent].)

Shelman contends the rap lyrics were irrelevant because they were written by the founding members of Touch Money, not defendants. However, " '[r]elevant evidence' means evidence . . . having *any tendency* in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210, italics added.) The prosecution was required to prove, among other things, that Touch Money *26 committed one or more statutorily-enumerated offenses to establish the existence of a criminal street gang (§ 186.22, subd. (f)), which the gang testimony and rap lyrics—performed by Touch Money's founding members, who presumably were aware of Touch Money's primary activities—tended to prove. Thus, the mere fact that the rap lyrics were written by individuals other than defendants does not render them irrelevant. (*People v. Johnson* (2019) 32 Cal.App.5th 26, 61-62 (*Johnson*) [court did not err in admitting rap lyrics written by murder victim that were relevant to show motive].)

Shelman further argues the rap lyrics were prejudicial because they suggested Touch Money members were willing to engage in violent or homicidal behavior. However, the prosecution had *already* elicited substantial testimony from the gang expert, based on his firsthand experience responding to shooting incidents while a member of the department's gang unit, that Touch Money members routinely perpetrated acts of gun violence. For instance, the gang expert opined that, "i[t] was almost every other day there was—if it wasn't a murder, it was a shooting, and we responded to those. Several drive-bys." Further, the gang expert listed the primary activities undertaken by Touch Money members, which included violent

aware.

"Unless [the] dangers [of prejudice] 'substantially outweigh' probative value, [an] objection [under Evid. Code, § 352] must be overruled." (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) Applying this standard, we conclude that "[t]he mere fact the lyrics might be interpreted as
27 reflective of a generally violent attitude could not be said *27 'substantially' to outweigh their considerable probative value." (*Olguin*, *supra*, 31 Cal.App.4th at p. 1373; see *Zepeda*, *supra*, 167 Cal.App.4th at p. 35 ["The language and substance of the [rap] lyrics, although graphic, did not rise to the level of evoking an emotional bias against the defendant as an individual apart from what the facts proved."].) Accordingly, we reject Shelman's claim that the rap lyrics were unduly prejudicial under Evidence Code section 352.

As noted, Tuggle did not directly challenge the admission of the rap lyrics and the gang expert's related testimony on grounds of undue prejudice. However, Tuggle contends that the rap lyrics constituted inadmissible hearsay that did not fall within a recognized hearsay exception. Tuggle's trial counsel did not object to the admission of the rap lyrics on hearsay grounds and, therefore, Tuggle has forfeited any challenge to their admission on appeal. (*People v. Stevens* (2015) 62 Cal.4th 325, 333.) However, Tuggle claims his trial counsel was ineffective for failing to object to the rap lyrics. Therefore, we address the merits of Tuggle's argument to assess whether counsel's representation fell below an objective standard of reasonableness and, if so, whether there is a reasonable probability the outcome of the trial would have been different had trial counsel made a timely objection. (*Strickland*, *supra*, 466 U.S. at p. 694.)

The rap lyrics clearly constitute out-of-court statements. Those out-of-court statements appear to have been introduced, at least in part, for the truth of the matter asserted—namely, to establish that Touch Money members are willing to and in fact did commit gun violence and other offenses on behalf of the gang. Further, the People do not identify any hearsay
28 exception permitting the lyrics to be admitted. Therefore, there is *28 potential merit to Tuggle's contention that a motion in limine or objection may have resulted in the successful exclusion of the lyrics (and corresponding testimony from the gang expert, to the extent such testimony may be considered "case-specific").

However, we need not definitively resolve that question because Tuggle has not established a reasonable probability that the trial outcome would have differed had his counsel opposed such evidence. For the same reasons described *ante*, substantial evidence elicited from the gang expert and victim, based on the witness's personal experiences with Touch Money, described acts of gun violence and homicides committed by members of the Touch Money gang. Although this evidence rendered the rap lyrics and related expert testimony potentially cumulative, it substantially diminished any possible prejudice arising from the admission of such evidence.

For all these reasons, we conclude that defendants have not established reversible error based on the admission of the rap lyrics and corresponding gang expert testimony opining on those lyrics, or on trial counsel's failure to object to such evidence.

4. *Jury Instructions*

The trial court instructed the jury with CALCRIM No. 1400 for the street terrorism charge and CALCRIM No. 1401 for the gang enhancement allegations. Shelman contends these instructions violated his rights to due process and a fair trial in two respects. First, he claims

underpinning the charges were "gang-related." Second, he contends the instructions
29 erroneously permitted the jury to find a pattern of criminal *29 gang activity without finding that the individuals who committed the predicate offenses were gang members *at the time* the predicate offenses were committed.[7] Tuggle joins Shelman's instructional error arguments.

[7] The People assert Shelman forfeited his argument by not objecting to or requesting modification of the jury instructions in the trial court. We disagree. Where, as here, allegedly improper instructions on the elements of charged offenses or enhancement allegations affect the "substantial rights" of defendants, they may be considered on appeal in the absence of an objection in the trial court. (§ 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.) --------

a. *Instructional Error No. 1: Gang-related Offense*

As noted, Shelman claims the trial court erred in instructing the jury with CALCRIM Nos. 1400 and 1401 for the street terrorism and gang enhancement charges because the instructions did not require the jury to find that the People proved "the charged offense was gang related" to convict defendants and return true findings.

There is no merit to Shelman's argument with respect to CALCRIM No. 1400. The statutory provision governing street terrorism criminalizes active participation in a gang by a person who has "knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . ." (§ 186.22, subd. (a).) As the Supreme Court has explained, this provision forbids the willful promotion, furtherance, or assistance of "*any* felonious criminal conduct by gang members," not merely "gang-related felonious criminal conduct." (*People v. Albillar* (2010) 51 Cal.4th 47, 54, 59 (*Albillar*).) As such, the trial
30 court was not obligated to instruct—and indeed would have *30 misstated the law had it instructed—that the jury could convict defendants only if it found they had promoted, furthered, or assisted felonious *gang-related* conduct. Accordingly, we reject the first of Shelman's two challenges to CALCRIM No. 1400. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1334 [no error in using CALCRIM No. 1400 on grounds that it did not "instruct that the crime itself must be gang related"].)

Shelman's argument regarding CALCRIM No. 1401 fares no better. The provision of the STEP Act governing gang enhancements subjects a defendant to increased punishment if he or she "is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) Gang enhancements "appl[y] only to gang-related offenses . . . ." (*People v. Rios* (2013) 222 Cal.App.4th 542, 561.) Thus, under appropriate circumstances, an instruction *may* be deficient if it fails to charge the jury that it can return a true finding only if the defendant is convicted of a gang-related felony. (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 37-41 [error not to instruct "jury that it *must* find that the charged [offenses] were gang related" to find gang enhancements true].)

However, this is not such a case. Using CALCRIM No. 1401, the trial court expressly instructed the jury it could find the gang enhancement true only if the prosecution proved "[t]he defendant committed the crime for the benefit of or in association with a criminal street gang. . . ." This instruction adequately informed the jury it could return a true finding only if it found that the underlying felony offense was (using Tuggle's words) "gang-

"clear that [the] criminal offense . . . is 'gang-related' "].)

Shelman argues that CALCRIM No. 1401 improperly alleviates the prosecution's burden of proving the charged offense was gang-related based on the following excerpt from the instruction: "The crimes, if any, that establish a pattern of criminal gang activity need not be gang related. [¶] . . . [¶] If you find a defendant guilty of a crime in this case, you may consider that crime in deciding [whether] one of the group's primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved." This language does not relieve the prosecution of its burden of proof. On the contrary, it merely conveys—consistent with Supreme Court authority (*Gardeley*, *supra*, 14 Cal.4th at pp. 620-626)—that the predicate offenses used to establish a pattern of criminal gang activity need not be gang-related. On this basis, we find the trial court's use of CALCRIM No. 1401 adequately informed the jury it could return true findings on the gang enhancements only if it found the underlying offenses were gang-related.

b. *Instructional Error No. 2: Contemporaneous Gang Membership*

Shelman also challenges the trial court's use of CALCRIM Nos. 1400 and 1401 on the basis that the instructions did not advise the jury it could find a "pattern of criminal gang activity" only if it found that the individuals who committed the predicate offenses giving rise to such a pattern were gang members *at the time* the predicate offenses were committed. Shelman does not claim that the language of the STEP Act expressly requires the prosecution to make such a showing, but urges us to impose such a requirement into the
32 STEP Act to effectuate the Legislature's "intent." *32

As discussed in *People v. Augborne* (2002) 104 Cal.App.4th 362, "none of the elements of the gang enhancement statute require the two or more persons committing the two predicate crimes be gang members *at the time* the offenses were committed." (*Augborne*, at p. 375.) Nor do the terms of the statutory provision governing street terrorism. (§ 186.22, subd. (a).) In the absence of express statutory language imposing a requirement that an individual must be a gang member *at the time* of the predicate offense, we decline Shelman's invitation to add or impliedly read this requirement into the STEP Act. (Code Civ. Proc., § 1858; *Stirling v. Brown* (2018) 18 Cal.App.5th 1144, 1156 [" ' "It is . . . against all settled rules of statutory construction that courts should write into a statute by implication express requirements which the Legislature itself has not seen fit to place in the statute." ' "].) Likewise, and for the same reason, we reject Shelman's argument that the trial court erred in instructing the jury with CALCRIM Nos. 1400 and 1401. C. *Firearm Enhancements*

Defendants' sentences include enhancements of 25 years to life under section 12022.53 for discharging a firearm causing serious bodily injury, as well as numerous additional firearm enhancements stayed by the trial court. At the time of sentencing, the trial court was statutorily precluded from striking these enhancements. However, after sentencing, the Legislature enacted Senate Bill No. 620, effective January 1, 2018, which granted courts discretion to strike such enhancements. (§§ 12022.5, subd. (c) & 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, §§ 1-2.) Tuggle contends that the legislative amendments
33 implemented by Senate Bill No. 620 apply retroactively to his *33 judgment, which was not final on the effective date of the legislation. The People concede the legislative amendments apply retroactively to Tuggle's judgment, as well as Shelman's judgment, and request that we remand so the trial court may consider whether to strike the firearm enhancements from both defendants' sentences.

Woods (2018) 19 Cal.App.5th 1080, 1090-1091 [same]; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1109-1111 (*Almanza*) [same].) In accordance with this precedent, we accept the People's concession and conclude that the legislative amendments at issue apply retroactively to defendants' sentences.

In cases such as this, "[r]emand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so." (*Almanza*, *supra*, 24 Cal.App.5th at p. 1110; *People v. Chavez* (2018) 22 Cal.App.5th 663, 714 ["Absent . . . a clear indication, the appropriate remedy is to remand for resentencing to allow the trial court to consider whether to exercise its discretion to strike or dismiss the section 12022.53, subdivision (h) enhancement"].) Here, the record does not indicate the trial court would have declined to sentence defendants differently had the court possessed the discretion to do so. Accordingly, we reverse the judgments to allow the trial court to resentence defendants and, in particular, to consider whether to strike the firearm enhancements. We express no opinion regarding how the trial
34 court should exercise its discretion. *34

III
DISPOSITION

The judgments are affirmed in part, reversed in part, and remanded for the limited purpose of allowing the trial court to resentence defendants in accordance with the opinions expressed herein.

HALLER, Acting P. J. WE CONCUR: IRION, J. DATO, J.