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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BYRON JEROME BROOKFIELD, Defendant and Appellant.	F048767 (Super. Ct. No. BF107031B) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Kern County. James M. Stuart, Judge.

Corinne S. Shulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Stephen G. Herndon and Peter W. Thompson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

After jury trial, appellant Byron Jerome Brookfield was convicted of discharging a firearm at an inhabited dwelling (count 1) and conspiracy to commit this offense (count

2); gang and firearm use enhancements were found true. (Pen. Code, §§ 246, 182, subd. (a); 186.22, subd. (b)(1); 12022.53.)[1] Appellant was sentenced to an aggregate term of 25 years to life imprisonment.

Appellant raises the following claims: (1) *Wheeler* error; (2) improper refusal to suppress evidence of a photographic lineup; (3) insufficiency of the evidence supporting the gang enhancement; and (4) unauthorized sentence imposed on count 1. Respondent also argues the sentence imposed on count 1 is unauthorized, but on a different basis. It is respondent's position that the firearm enhancement must be stricken. Although none of appellant's arguments are persuasive, we agree with respondent that the firearm enhancement is unauthorized. We will modify the judgment and affirm.

FACTS

On the evening of June 14, 2004, Freddie Mae Jackson attended a casual social gathering in front of an apartment complex consisting of two buildings located at 328 Monterey Street in Bakersfield. Around 8:00 p.m., she observed a small gray car pull up and park across the street from the complex, at the corner of Monterey and Inyo Streets. The vehicle was occupied by two men, the driver and a passenger. Jackson described the passenger as a young Black man. The passenger's hair was styled in an afro and he was wearing a red shirt. She did not get a good look at the driver. The occupants sat in the gray car for approximately five minutes. Ebony Johnson approached the gray car and asked its occupants "what you all want." A dark blue Ford LTD slowly drove up Monterey Street and passed the gray car.[2] The driver of the gray car leaned over and

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[1] Unless specified all statutory references are to the Penal Code and all dates refer to 2004.

[2] Nichols testified the driver of the LTD looked in the direction of the gray car, nodded his head up and down and honked his horn immediately before the driver of the gray car began shooting at the apartment complex. These actions were alleged as overt

[Fn. continued.]

began firing a medium sized, black handgun. The driver was pointing the gun toward Jackson's sons, Casanova and Christopher, who were standing by the mailbox. Jackson heard seven or eight shots. She does not know if the passenger was armed. The gray car immediately drove away. Jackson telephoned for emergency assistance.

Bakersfield City Police Officers Jay Wells and Mike Thompson were dispatched to the scene at approximately 8:15 p.m. Nichols informed them that two people in a gray car that was parked on the north side of Inyo Street had fired a handgun at the apartment complex. Wells found two or three bullet holes in an exterior wall of the complex's west building. Nichols suggested to the officers that they look for the suspects at an apartment complex located at the intersection of Oregon and Kern Streets.

Just as the officers arrived at this location, appellant walked in front of their patrol car. Appellant matched Nichols's description of the passenger. The officers detained appellant and another man, Curtis Epperson.[3] Thompson found a dark blue Ford LTD parked in a nearby alley.

Jackson was transported to appellant's location. She identified appellant as the passenger in the gray car. She did not recognize Epperson.

Bakersfield City Police Officer Herman is assigned to a special enforcement unit primarily involved in criminal street gang suppression. He conducted the follow-up investigation. Herman observed bullet holes in the southwest wall of the apartment building, in a wrought iron fence and in a tree. He believes the bullet holes in the wall were recent because the stucco around the holes was not discolored.

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act numbers 3, 4 and 5 supporting the conspiracy count. The jury found these three overt acts *not* true.

[3] The jury found true overt act number 2, which stated "Curtis Epperson drove a dark blue vehicle at a slow speed on Monterey Street, Bakersfield."

Herman contacted Jackson and Nichols. On July 14, he showed them three photographic lineups each. Jackson identified appellant in one of the photographic lineups as an occupant of the gray car. She identified Epperson in another photographic lineup as the driver of the LTD.

It was stipulated that the Bloods were an ongoing criminal street gang operating in Bakersfield. Herman opined that appellant and Epperson were active Blood members on June 14. He further opined that the shooting was committed for the benefit of the Bloods. (Evidence pertaining to the gang enhancement will be set forth in greater detail at part II, *post*.)

Appellant presented an alibi defense. Al Saleh, a clerk at the Alfarooq Market located at 800 Kentucky Street, testified that appellant came into the store between 7:00 p.m. and 8:00 p.m. to purchase cigars and chips. Saleh believes appellant was in the store for a total of four to five minutes. Appellant's sister-in-law, Brandi Callahan, testified appellant was home during the day on June 14. He left the residence around 8:00 p.m. on foot, heading south on Kern Street. She believes appellant walked to the store.

DISCUSSION

I. Denial of the *Wheeler* motion and failure to grant a mistrial were proper.

A. Facts

Prior to appellant's unsuccessful *Wheeler* motion, two Black prospective jury panelists were examined: prospective juror number 592213 (juror 592213) and prospective juror number 678992 (juror 678992).

Juror 592213 disclosed that she knew potential witness Mac Mosley. When asked if there was anything about her relationship with him "or [a] family relationship" that would cause her to view Mosley different than any other witness, juror 592213 replied, "I don't think so." Juror 592213 was not further examined by counsel.

Juror 678992 was a 21-year-old, unmarried student at Bakersfield College, studying to become a sportscaster. He had worked as a coach and official for a local park district. He was a life-long Bakersfield resident, residing in west Bakersfield by the fairgrounds. When asked what he thought of when he heard the term "criminal street gang," juror 678992 responded "Just, uh, bad company." He denied "ever run[ning] into any people in [his] neighborhood that are in any gangs" and he did not know any gang members. When asked what he thought of when he heard the term "law enforcement," juror 678992 responded "It's needed." He believed he could be fair and impartial and that he was a good listener.

The prosecutor exercised his third peremptory challenge to excuse juror 592213 and his fifth peremptory challenge to excuse juror 678992. After the prosecutor challenged juror 678992, appellant made a *Wheeler* motion. In support of this motion, defense counsel stated: "We believe the prosecution is systematically excluding a protected class, specifically persons, African Americans. [¶] There have been two called up so far, and both have been excused by the prosecution."

The court immediately responded that it "fully understood the prosecutor kicking off 678992." The court explained:

> "He's young, says he never saw gangs, this is where he lives, said those things.
>
> "Based on what he said, and how he said it, from where I sit, that young man was scared to death.
>
> "That young man figured that there was a life after jury duty, and there was no way that he was going to say or do anything that was going to cause him to get involved in this particular case.
>
> "I was struck by what he said and how he said it, and, quite frankly, I would have been disappointed at the prosecutor not to have excused him.
>
> "Not because I'm favoring the prosecution or the defense, but, because, he would not, from my perspective, have been a juror who could have objectively evaluated what's going to be presented in this case."

The court found that a prima facie case had been established with respect to juror 592213 and asked the prosecutor to disclose the reason why he challenged this juror. The prosecutor responded that this juror was the former wife of Stan Mosley, who was the brother of prosecution witness Mac Mosley. The prosecutor explained: "… Stan Mosley, I can represent, as an officer of the Court, which I did not ask 592213 about, because, I was not aware, is a person who was fired under a suspicious cloud from the [Bakersfield Police Department], and also works for the defense, um, and has testified in defense cases, and has testified in defense gang cases, and, based on that information, um, I made the decision to excuse her."

The court stated: "… I did recognize 592213, and I have no reason to dispute that which [the prosecutor] has said." The court further stated "that Stan Mosley [worked at the Bakersfield Police Department] when I started on the bench, did narcotics, did all kinds of things, then he got fired from [the Bakersfield Police Department] because it was alleged that he stole a whole bunch of drugs that were in property, there were some other allegations also, then he ultimately resurfaced as an investigator …." In light of the "fact that there was the divorce, given the fact that there were all of those things going on in Stan Mosley's life, at various periods of time, I think that, probably, it was the prosecution being on the safe side in excusing her." Therefore, the court concluded the prosecution had stated a "non ethnic, non gender, non Wheeler basis for the exercise of that particular peremptory challenge."

The record does not indicate whether other members of the jury panel were Black and it does not indicate the racial composition of the jury.

B. The applicable legal standard is undisputed.

In *Johnson v. California* (2005) 545 U.S. 162, [125 S.Ct. 2410] (Johnson), the United States Supreme Court recently reiterated the applicable legal standard:

> "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory

> purpose.' [Citations]. Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide … whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Johnson, supra*, 545 U.S. at p. ___ [125 S.Ct. at p. 2416, fn. omitted].)

The trial court's ruling on a *Wheeler* motion is reviewed for substantial evidence. (*People v. Jones* (1998) 17 Cal.4th 279, 293.) "'"'Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with "considerable deference" on appeal.'"' [Citation.] We also bear in mind that peremptory challenges are not challenges for cause -- they are *peremptory*. We have said that such challenges may be made on an 'apparently trivial' or 'highly speculative' basis. [Citation.]" (*Id.* at p. 294.)

C. Trial court's determination that a prima facie case had not been made with respect to juror 678992 was not erroneous.

Relying on the fact that juror 678992 and juror 592213 were the only Black prospective jurors examined prior to the *Wheeler* motion, appellant argues the trial court erred by concluding he did not make the required prima facie showing with respect to juror 678992. We disagree.

Observations of trial judges are given "considerable deference" on appeal. (*People v. Sanders* (1990) 51 Cal.3d 471, 501.) The court observed that juror 678992 appeared to be "scared to death" and it stated that the juror's answers did not appear sincere. While the record does not reflect the juror's demeanor, it does support the court's observation that some of the juror's answers did not appear sincere. Juror 678992 was a young Black male who lived by the fairgrounds in west Bakersfield. He denied ever encountering a gang member in his neighborhood. At best, this is highly unlikely. We therefore defer to the trial judge's observations concerning juror 678992.

Appellant's reliance on *Johnson* is misplaced. There, defendant was a Black man charged with murdering his white girlfriend's child. The prosecutor used three

peremptory challenges to excuse all of the Black prospective jurors in the venire panel and an entirely white jury was chosen. After the second Black juror was challenged, the trial judge denied a *Wheeler* motion but stated that it was "'"very close."'" (*Johnson*, *supra*, 125 S.Ct. at p. 2414.) After the third Black juror was challenged, another *Wheeler* motion was made. The judge denied it, stating that the strikes could be justified because the venire members had offered equivocal or confused answers in their written questionnaires. The United States Supreme Court reversed the judgment, concluding that California's "'more likely than not'" (*Johnson* at p. 2419) standard for determining whether a prima facie case of discrimination had been established was too onerous. In contrast, here, the charged offense did not involve a highly charged racial situation and racial compositions of the venire panel and of the jury are not part of the appellate record. Furthermore, the judge articulated a specific, nondiscriminatory justification for the challenge of juror 678992--i.e., it was apparent that he was terrified and had not sincerely responded to the venire questions. Thus, *Johnson* is factually distinguishable.

Several California cases are relevant. In *People v. Turner* (1994) 8 Cal.4th 137, counsel's statement that all of the prospective jurors were Black and either had indicated that they could be fair and impartial or in fact favored the prosecution was deemed insufficient to establish a prima facie case. (*Id*. at p. 167.) And in *People v. Davenport* (1995) 11 Cal.4th 1171, counsel's statement that the prosecutor had used three of his first six peremptory challenges to excuse jurors with Hispanic surnames was deemed insufficient. (*Id*. at p. 1201.) Finally, in *People v. Rousseau* (1982) 129 Cal.App.3d 526, the prosecutor exercised peremptory challenges to excuse the only two Blacks in the jury panel. Defense counsel made a *Wheeler* motion on this basis. The trial court concluded a

prima facie case had not been established and this determination was upheld on appeal. (*Id*. at p. 537.)[4]

Accordingly, we agree with the trial court that appellant failed to make a prima facie showing that the totality of the circumstances gave rise to a reasonable inference of discrimination with respect to juror 678992.

Since the burden did not shift to the prosecutor with respect to juror 678992, we summarily reject appellant's complaint concerning the court's failure to ask the prosecutor why he challenged this juror. (*People v. Howard* (1992 1 Cal.4th 1132, 1157 [no explanation necessary absent finding of prima facie case of group bias].)

D. The prosecutor's reason for challenging juror 592213 was valid and nondiscriminatory.

Appellant also challenges the sufficiency of the prosecutor's explanation why he challenged juror 592213, arguing that another prospective juror indicated that he knew a potential witness and the prosecutor did not excuse this juror. This argument fails because it is premised on a misunderstanding of the prosecutor's explanation. The prosecutor did not challenge juror 592213 because she knew a potential witness. He challenged juror 592213 because he was concerned that she would be biased against the prosecution since her ex-husband, Stan Mosley, had been fired by the Bakersfield Police Department and subsequently worked as a defense investigator. Bakersfield police officers were key prosecution witnesses in this matter. Obviously, the prosecutor did not want to run the risk of retaining a juror who might harbor animosity against the Bakersfield Police Department. The trial court stated that it remembered the

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[4] We recognize that to the extent these cases conflict with *Johnson*, they do not reflect current law.

circumstances of Stan Mosley's dismissal. The prosecutor's reason for challenging juror 592213 was reasonable, valid and race neutral.

II. The photographic lineup was not impermissibly suggestive.

A. Facts

Appellant moved in limine to suppress evidence of the photographic lineup in which he was selected by Jackson (lineup number 5248), arguing this lineup was impermissibly suggestive because he was depicted wearing the same shirt that he wore during the in-field identification and he was the only person who was wearing a shirt with any red on it.

Officer Herman testified at the in limine hearing. He stated that lineup number 5248 consists of six photographs. Appellant's photograph is in position number three. Herman created this lineup by accessing the county's Picture Link System, which is a database of photographs of individuals who have been arrested. He selected appellant and then entered a set of criteria into the program. The criterion consists of race, gender, height, weight, facial hair and age. Clothing is not one of the criteria. The computer program selected five similar individuals based on the criteria. Herman had two photographs of appellant from which to choose: a photograph that was taken on the night he was arrested in connection with the drive-by shooting and a photograph that was taken a few years earlier. Appellant had a shaved head or extremely short hair in the older photograph. Since Jackson had stated that the suspect had an afro hairstyle, Herman selected the more recent photograph; his decision had nothing to do with the shirt appellant was wearing. When Herman selected this photograph he did not know that appellant wore this shirt when Jackson identified him shortly after the shooting. When Herman showed this lineup to Jackson, she pointed to the picture of appellant and said, "he was one of the guys in the gray car." She did not refer to appellant's clothing.

Before Herman showed Jackson the lineup, he gave her the standard "lineup admonition."

Appellant is the only individual in the photo lineup wearing a shirt that has any red in it. The court described appellant's shirt for the record, as follows: "It is not pure red …. [¶] It is a shirt that has the red collar, has red in it, but, it is also white, and … looks like it has a black stripe going across the chest, and also black stripes going across the shoulders, but[] it does not appear to be a distinctive shirt."

The motion was denied. The court carefully explained the basis for this ruling. First, it determined that the compilation process was fair, explaining:

> "I'm well satisfied from the evidence that I received here in court today, that the compilation process was, indeed, fair.
>
> "And, in particular, I have no quarrel with the officer's decision to go with the booking photograph in the current case, as opposed to an earlier case, given the considerable difference in hair style."

Next, the court concluded that the lineup was not suggestive, explaining:

> "In this particular case, as I look at these six photographs, 3 and 6 depict individuals who have the same facial style.
>
> "They are both looking down.
>
> "1 and 3 have the afros.
>
> "All seem to have some facial hair, even though the lineup search criteria asks for no facial hair. [¶] …
>
> "But I'm looking at it, and a couple of these people, Numbers 2 and 4, don't look like anybody else, but clearly to me, as I'm looking at this, I'm looking at photos 1, 3, 5 and 6, and particularly 3 and 6, and I'm saying, this is a pretty fair lineup. [¶] …
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> "… [W]hen I take a look at it, these are really much better photographs than the ones I used to see in the old days, because … I can almost draw a horizontal line, right across each of these and the eyes lineup, the chins lineup, just about everything lines up, so that, when you

are looking at these, it's not highlighting any one portion of the individual's face, chin, shoulders, from another.

"It's really a good, fair depiction."

At trial, Jackson positively identified appellant as the passenger in the gray car. She said, "I know that for a fact that he was in the passenger's seat." Later, the prosecutor asked her, "[W]hen you sit here today, are you certain that the individual that is seated over here, [appellant], is the same individual that you saw in the gray car on the night of the shooting?" Jackson responded, "Yes, I am." Jackson testified that when she identified appellant in the photo lineup, she said to Herman, "[T]hat's him, because, he had his hair like that with a red and white shirt on."

B. The lineup was not unfairly suggestive.

Appellant reiterates on appeal his argument that the lineup was unfairly suggestive because he was depicted wearing the same shirt he wore during the field show-up. Also, he is the only person in the lineup wearing a shirt with red on it and when Jackson testified she listed his red and white shirt as one of the characteristics that led her to select his photo. We are not convinced.

The United States Supreme Court established the applicable test: "[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (*Simmons v. United States* (1968) 390 U.S. 377, 384.) "Due process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable. [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 123.) The court must determine whether the identification procedure was suggestive and, if so, whether the identification was nonetheless reliable under the totality of the circumstances. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242.) The defendant bears the burden of

showing that the identification procedure resulted in such unfairness that it abridged his due process right. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1051.)

"'It is unsettled whether suggestiveness is a question of fact (or a predominantly factual mixed question) and, as such, subject to deferential review on appeal, or a question of law (or a predominately legal mixed question) and, as such, subject to review de novo.'" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1216.)

In *People v. Floyd* (1970) 1 Cal.3d 694, our Supreme Court concluded that it is not unfairly suggestive to require a suspect to participate in a lineup wearing the clothes in which he was arrested, even though the witness remembered the suspect's pants "more than anything else about him." (*Id*. at p. 714.) Our high court explained that "no authority [supported] the proposition that it is a denial of due process to require a suspect to wear the clothes in which he was arrested." (*Id*. at p. 713.) The police are not obligated "to match the outfits of everyone in the lineup anymore than the police were required to match the physical proportions of the other men with scientific exactitude." (*Ibid*.)

Our Supreme Court also has rejected claims that a lineup was unfairly suggestive because the defendant was wearing a particular article of clothing that was similar to an article of clothing described by the witness. In *People v. DeSantis* (1992) 2 Cal.4th 1198, defendant challenged a lineup because he was wearing a red or orange shirt and the witness remembered the suspect as wearing a red jacket. The high court characterized defendant's shirt as "hardly uncommon apparel" that "cannot be termed a badge of identity here." (*Id*. at p. 1222.) And in *People v. Johnson* (1992) 3 Cal.4th 1183, the fact defendant was the only person in the lineup pictured wearing jail clothing was held not to render a photo lineup unfairly suggestive. (*Id*. at pp. 1217-1218.)

We do not believe Jackson's testimony that she selected appellant's photo in part because of his red and white shirt compels a different result than that reached in *Floyd*, *DeSantis* and *Johnson.* Appellant does not contend his appearance was distinctive in any

other respect and we do not believe this single article of clothing is sufficiently unusual to render the lineup unfairly suggestive. "[T]here is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance." (*People v. Brandon*, *supra*, 32 Cal.App.4th at p. 1052.)

C. Jackson's identification of appellant was reliable.

Additionally, the totality of the circumstances establishes the reliability of Jackson's identification. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989-990.) Jackson identified appellant on occasions other than the contested photo lineup. She identified appellant as one of the occupants of the gray car in a field show-up shortly after the shooting. She positively identified appellant at trial, testifying that she was certain he was the passenger in the gray car. Her trial identification was not based on the photographic lineup but upon her independent recollection. Also, before Jackson viewed the photographic lineup she was given the standard admonition instructing her that she was not to assume the person who committed the crime was pictured and that she did not have any obligation to identify anyone.

III. The gang enhancement is supported by substantial evidence.

A. Facts

It was stipulated that on June 14, the Bloods were an ongoing criminal street gang operating in Bakersfield within the meaning of section 186.22, subdivision (b)(1). Officer Herman testified that Bloods typically wear articles of red clothing. Epperson is a known Blood member. On two occasions in 2004, appellant was stopped by police while riding in a dark blue Ford LTD driven by Epperson. On three separate occasions when booked into jail, appellant requested housing with Blood members. Herman reviewed 11 transcripts of phone calls appellant made from the Kern County Jail while awaiting trial. During these calls, appellant made numerous gang-related references.

Based on the foregoing, Herman opined that appellant and Epperson were active Blood members on June 14.

Herman has investigated approximately 50 drive-by shootings. "[A]lmost all of them" have been gang related. In his opinion, drive-by shootings are done in furtherance of and for the benefit of street gangs. Drive-by shootings elevate the status of the participants within the gang by demonstrating a willingness to commit crimes. Furthermore, the gang benefits from a drive-by shooting because it intimidates rival gangs and citizens. A drive-by shooting demonstrates that the gang is willing to engage in violent and aggressive behavior, thereby increasing fear of the gang.

B. There is sufficient proof that this drive-by shooting was committed in furtherance of and for the benefit of the Bloods.

Appellant argues the People failed to prove that this particular drive-by shooting was gang related because Herman only testified that in general drive-by shootings are gang related. Not so.

The applicable standard of appellate review is undisputed. When assessing the sufficiency of the evidence, a reviewing court considers the entire record in the light most favorable to the judgment below to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Hawkins* (1995) 10 Cal.4th 920, 955.) "The California Supreme Court has held, 'Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' [Citations.]" (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1430.) The reviewing court presumes in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence, including reasonable inferences based on the evidence. (*People v. Tran* (1996) 47 Cal.App.4th 759, 771-772.) We do not reweigh evidence or determine if other inferences more favorable to the defendant could have been drawn from it. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

In this case, a jury reasonably could infer that this particular drive-by shooting was committed in furtherance of and for the benefit of the Bloods from testimony establishing the following: (1) appellant and Epperson were Bloods; (2) the color red is associated with the Bloods and appellant was wearing a shirt that was partially red when he participated in the crime; (3) Epperson drove by in the LTD immediately before the shooting started; (4) drive-by shootings elevate the status of the participants within the gang; (5) drive-by shootings benefit the gang by enhancing fear of the gang and by intimidating rivals and citizens; and (6) almost all of the 50 drive-by shootings Herman has investigated were gang related. Since appellant was a Blood and was wearing clothing featuring a Blood-associated color (red) when he participated in the drive-by shooting, one could reasonably infer that this drive-by shooting was intended to enhance the Bloods' reputation for violence. Because Epperson, who is a fellow Blood, drove by immediately before the shooting began, one could also reasonably infer the shooting was intended to enhance appellant's status within the gang by demonstrating his willingness to participate in violent crimes.[5]

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[5] By letter dated August 28, 2006, appellant's counsel brings to our attention a very recent Fifth District case, *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank S.*), in which we reversed a true finding on a gang enhancement. *Frank S.* is not analogous to this matter and does not advance appellant's argument that the gang enhancement in this instance lacks substantial evidence. First, in *Frank S.*, the gang expert "informed the judge of her belief of the minor's intent with possession of the knife, an issue reserved to the trier of fact." (*Id.* at p. 1199.) Here, Herman did not offer an opinion whether the specific drive-by shooting at issue was committed to further or promote the Blood's interests. Second, in *Frank S.*, the prosecution did not produce any evidence to prove the gang enhancement other than the expert's opinion regarding gangs in general and an improper opinion on the ultimate issue. Here, the prosecution offered testimony establishing appellant's gang membership, Epperson's gang membership, Epperson's driving of the LTD past Monterey Street immediately prior to the drive-by shooting, appellant's wearing of gang-related colors during the crime and expert testimony explaining why drive-by shootings further the purposes of gangs and benefit them.

IV. The section 12022.53 enhancement is unauthorized and must be stricken.

Appellant was sentenced on count 1 (drive-by shooting in violation of section 246, plus section 186.22 gang enhancement) to 15 years to life imprisonment. (§ 186.22, subds. (b)(C)(4) & (b)(C)(4)(B).) A consecutive 10-year term was imposed for the section 12022.53 firearm enhancement (§ 12022.53, subds. (b) and (e)(1).)

Appellant argues the term of 15 years to life imprisonment that was imposed pursuant to section 186.22 is unauthorized because section 12022.53, subdivision (e)(2) precludes sentencing under section 186.22 unless the defendant personally used or discharged a firearm. Respondent replies that it is the 10-year section 12022.53 enhancement that is unauthorized because a drive-by shooting in violation of section 246 is not one of the offenses enumerated in section 12022.53, subdivision (a). We agree with respondent.

In relevant part, section 12022.53, subdivision (a) provides that the section applies to 16 enumerated felonies and to "[a]ny felony punishable by death or imprisonment in the state prison for life." (§ 12022.53, subd.(a)(17).) Violation of section 246 is not an enumerated offense and this crime is punishable by three, five or seven years' imprisonment. Thus, section 12022.53 does not apply to this crime.

We are not persuaded by appellant's unsupported assertion that violation of section 246 falls within section 12022.53, subdivision (a)(17) because his sentence for this crime was enhanced under section 186.22 to a term of 15 years to life imprisonment. In *People v. Montes* (2003) 31 Cal.4th 350, our Supreme Court rejected this line of reasoning in an analogous context. *Montes* held that an enhancement under subdivision (b)(5) of section 186.22[6] does not apply unless "the underlying felony itself provides for

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[6] Subdivision (b)(5) of section 186.22 precludes parole until a minimum of 15 calendar years have been served for "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life."

a life sentence, ruling out any enhancement not included in the definition of the underlying felony." (*Montes, supra,* 31 Cal.4th at p. 353.) By parity of reasoning, we conclude subdivision (a)(17) of section 12022.53 is only applicable where the underlying felony itself provides for a life sentence, without regard to enhancements that are not included within the definition of the felony.

Thus, the section 12022.53 enhancement must be stricken. This determination renders appellant's challenge to his sentence moot.

DISPOSITION

The section 12022.53 enhancement is stricken. The clerk of the superior court is directed to prepare an amended abstract and to transmit it to the appropriate agencies. As modified, the judgment is affirmed.

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Levy, Acting P.J.

WE CONCUR:

_____
Gomes, J.

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Kane, J.