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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JARVELL DEANDRE SMART et al., Defendants and Appellants.	C049931 (Super. Ct. No. 04F03478)

APPEAL from a judgment of the Superior Court of Sacramento County, Cheryl Chun Meegan, Judge. Affirmed as modified.

Robert Derham, under appointment by the Court of Appeal, for Defendant and Appellant Jarvell Deandre Smart.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant Sergio David Calhoun.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Carlos A. Martinez and Catherine G. Tennant, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of sections I, IIA, III, IV and V of the Discussion.

A jury convicted defendants Jarvell Deandre Smart (Smart) and Sergio David Calhoun (Calhoun), both 15 years old at the time of the crimes, of two counts of assault with a firearm and one count of shooting at an occupied vehicle. (Pen. Code, §§ 245, subd. (a)(2), 246; see Welf. & Inst. Code, § 707, subd. (d)(2)(B) [trying minors as adults when personally use firearm].)[1]

The jury found that the crimes were committed for the benefit of a criminal street gang, and that Calhoun personally used a firearm and personally inflicted great bodily injury but that Smart did not do so. (§§ 186.22, subd. (b)(1), 12022.5, subds. (a), (d), 12022.7, subd. (a).) The jury also found, under the section 12022.53 enhancement, that a principal (Calhoun) in the offense of shooting at the occupied vehicle (§ 246) personally and intentionally discharged a firearm and caused great bodily injury to both victims. (§ 12022.53, subds. (d), (e)(1).) Pursuant to this finding under section 12022.53, the trial court imposed two consecutive terms of 25 years to life (i.e., 50 years to life) on both Calhoun and Smart, resulting in total sentences of 65 years to life for Calhoun and 53 years to life for Smart.

The principal issues in this appeal involve insufficient evidence and the section 12022.53 enhancements.

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[1] Further undesignated section references are to the Penal Code.

Although we find the trial court misinstructed on the section 12022.53 enhancement, we find that error harmless. However, in the published portion of this opinion, we find that defendants were charged with and convicted of only one qualifying crime for purposes of section 12022.53, subdivision (f). That subdivision specifies that only one additional term of imprisonment under section 12022.53 can be imposed per defendant "for each crime." Consequently, we strike one of the section 12022.53 enhancements as to each defendant, reducing each defendant's sentence by 25 years. As modified, we affirm the judgment.

BACKGROUND

About 8:00 p.m. on March 29, 2004, Sabrina Norman and her brother Roy Rayford were fired upon after just entering Norman's white Ford Explorer in the parking lot of the Franklin Villa apartment complex at the G Parkway in Sacramento. Norman explained that she had just moved into a new apartment at the complex next to a friend of hers. The friend's husband, Mtula Payton, known as Big T.C. Deuce, was a member of the Garden Block Crips gang. Payton and another Crip called Capone drove vehicles similar to Norman's Explorer.

After just entering the Explorer, Norman, sitting in the driver's seat, heard a gunshot come from her right side (i.e., the passenger side). Rayford initially said he could not tell the shot's origin, but later stated he thought it came from the driver's side (i.e., the left side) and that it sounded like a

nine-millimeter handgun. Norman saw two young men--the taller of the two holding in his right hand a black handgun, pointed downward--standing approximately seven feet from the rolled-down front passenger window of the vehicle. The shorter man did not have a gun.

Norman and Rayford ducked as gunfire erupted on both sides of the vehicle. Norman was hit on her right cheek. The driver's side window shattered and Rayford suffered a bullet wound behind his left ear. The firing continued. Norman was then hit a second time, this time by a shotgun in the upper left arm.

Norman estimated that at least 10 shots were fired over a period of 30 to 40 seconds. She believed she was in a cross fire.

At one point during the barrage, Norman observed the same two young men walk in front of her car. The taller one asked the other, "[D]id you get 'em?"

Frightened and scrunched down, Norman put the Explorer in reverse. With Rayford's help, she backed out. More firing ensued. Norman drove the car to the complex's security booth and Rayford had the security guard call 911.

Norman suffered a three-to-four centimeter gunshot laceration to her right cheek, which caused a scar, and multiple puncture wounds from shotgun pellets, which uncomfortably remain in an eight-inch area of her left arm. Rayford incurred a bullet wound to the left side of his head, which fractured his jaw.

There is some dispute whether Norman told an investigating officer that the two young men she observed--both Black males--were in their mid-20's, or whether she said one looked about 20 and the other 17.

Within days of the shooting, Norman was shown photo lineups that included photos of Calhoun and Smart. Norman did not identify either defendant from the photos, but indicated that one of the photos resembled Calhoun. Norman also reiterated to an officer that she had been caught in a cross fire.

At trial, Norman identified Calhoun and Smart as the two young men she had observed at the shooting, with Calhoun being the taller individual with the gun. At the scene of the shooting, Norman had seen the taller man, who was around 5 feet 11 inches tall, in her headlights, but the shorter man, who was around 5 feet 8 inches tall, was further back. Norman had told a responding officer that she could probably identify the taller suspect but not the shorter one. Rayford made no identifications in photo lineups or in court.

Carlos Haggerty witnessed the incident from about two blocks away. Haggerty corroborated much of Norman's account of the firing, adding that he saw a man run after Norman's moving car, shooting at it. Haggerty believed that at least two guns were used because he heard "a whole bunch of gun[]fire."

Another witness, Jezmier Slade, was alerted after hearing six to eight rapid gunshots. Slade saw two Black men, one significantly taller than the other, standing beside the driver's door of a white Ford Explorer. The vehicle drove off

and the men ran off. As the men ran, Slade saw the taller one holding what Slade thought was a semiautomatic handgun in his left hand. Smart had Slade recalled to testify that one man was about six inches taller and perhaps 40-50 pounds heavier than the other.

Calhoun claimed he was 5 feet 10 inches tall and weighed 143 pounds at the time of the offenses; Smart's comparables were 5 feet 9 inches and 146 pounds. At trial, the two stood next to each other. Smart looked a little shorter.

The day after the shooting, the police investigated at the G Parkway. They arrested 14-year-old Melvin Reno, who claimed to be a Garden Block (29th Street) Crip gang member along with Smart and Calhoun. Reno was on probation for robbery and attempted burglary and wanted to know "what he could get" for talking to the police about the shooting.

According to Reno, on the Saturday before the shooting, Big T.C. Deuce (Mtula Payton) had punched out a Meadowview Blood at a party in the G Parkway.

Testifying at trial in exchange for his relocation, Reno testified that, on the night of the shooting, he was simply walking through the G Parkway when he saw Calhoun, Smart and a Blood named Jacoby James, who was known as "Sir." James fired first at a white Explorer or at Calhoun and Smart, and Calhoun returned fire with a handgun while Smart accompanied Calhoun. Reno speculated that James fired at the vehicle or at Calhoun and Smart in retaliation for the assault on the Blood the previous Saturday (some Crips had similar vehicles), or that

Calhoun fired at the vehicle because Sabrina Norman had a son who was a Blood.

The police tried but could not find Jacoby James, but they conceded he had been arrested on an unrelated matter.

Police also interviewed 15-year-old Eugene Gibson, who is Calhoun's nephew. Initially, Gibson denied being at the G Parkway on the night of the shooting. Then he admitted that he and Calhoun were there, and that Calhoun returned fire from apparently some Meadowview Bloods. When the police pressed Gibson about Smart, Gibson stated that Smart was there as well. Gibson added that he did not see a gun in Smart's hands but thought Calhoun and Smart both shot two times, and that Calhoun was firing a handgun that "spits" out shells (no such shell was found at the scene).

Testifying at trial under a grant of immunity, Gibson stated that everything he had told the police before trial was untrue.

The police interviewed both Smart and Calhoun after their arrests. The prosecutor played both tape-recorded interviews for the jury.

Initially, and for hours, Smart denied being present at the shooting. He admitted being a Garden Block Crip (24th Street) gang member (the Garden Block Crips consist of the 29th, 24th and 21st Street subsets). In a later interview, Smart conceded he was on the scene, but claimed that once he heard the shooting he just ran away. He thought the shooting was against the Crips because they had "stomped a nigger out." At the time of the

shooting, Smart claimed he was extremely drunk; as a result, he could not remember if Gibson was also there but Gibson "probably was."

Calhoun, too, initially denied being present at the shooting. In response to continued questioning, though, he later conceded he had been walking through the G Parkway with Smart when he heard an exchange of gunfire and ran away. Neither he nor Smart had a gun. Calhoun informed the officers during the interview and again at its conclusion that he was just telling them what they wanted to hear.

The prosecution's gang expert, a Sacramento police detective specializing in African-American gangs, opined that Calhoun and Smart were members of the 29th Street set of the Garden Block Crips. He also opined that the shooting was between two rival gangs, was likely related to the assault by Mtula Payton (Big T.C. Deuce) on the Blood at the prior Saturday party, and benefited the Garden Block Crip gang.

DISCUSSION

I. *Sufficiency of the Evidence*

Smart contends the evidence is insufficient that he aided and abetted a criminal act, and also insufficient to establish the gang enhancement because the gang expert's opinion testimony as to the requisite predicate offenses was inadmissible. We disagree.

In reviewing the sufficiency of evidence in a criminal appeal, we must review the whole record in the light most

favorable to the judgment to determine whether it contains substantial evidence--i.e., evidence that is credible and of solid value--from which a rational trier of fact could have found a defendant's guilt beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.)

A. *Sufficiency of Evidence--Aiding and Abetting Offenses*

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.)

Substantial evidence shows that Smart, a Garden Block Crips gang member, accompanied at least one armed member of his gang (Calhoun; possibly also Gibson) into disputed gang territory in the G Parkway, knowing that his gang had previously "stomped . . . out" a rival member of the Meadowview Bloods gang. A shootout between these Crips and the Bloods ensued, during which the victims in the white Explorer were caught in the cross fire; or, the defendants simply targeted the Explorer pursuant to a gang shooting. There is substantial evidence that Smart moved in tandem with Calhoun during and after the shooting, that Calhoun asked Smart during the incident, "[D]id you get 'em?," and that Calhoun and Smart had written previous letters to one another detailing various gang activities and guns. There is

other, weaker evidence that Smart was also armed during the shootout.

In light of this evidence, a rational juror could conclude that Smart knew that Calhoun was armed and a gang shooting was possible, that Smart intended to facilitate or encourage his gang compatriots if a shooting occurred, and that by act or advice he promoted or encouraged those compatriot(s) during the shooting. In short, as the People put it, Smart provided backup and support for Calhoun, his fellow gang member. Consequently, a rational juror could conclude beyond a reasonable doubt that Smart aided and abetted the charged offenses of firearm assault and shooting at an occupied car.

B. *Sufficiency of Evidence--Predicate Offenses*

Smart contends the prosecution erroneously relied on the gang expert's opinion testimony to establish the required predicate offenses for the gang enhancement instead of simply proving these offenses through proper nonexpert channels (e.g., documentary evidence). We disagree.

To apply the gang enhancement as well as the section 12022.53 enhancement to an aiding and abetting defendant, that defendant must have committed the applicable offense for the benefit of a criminal street gang within the meaning of the section 186.22, subdivision (b), gang enhancement. (§ 12022.53, subd. (e)(1).) To establish this criminal street gang element, the prosecution must prove that a gang includes members that have engaged in a "'pattern of criminal gang activity,'" meaning that gang members have, individually or collectively, committed

or attempted to commit two or more specified criminal offenses (the predicate offenses). The predicate offenses themselves need not be gang-related. (§ 186.22, subds. (e), (f); *People v. Gardeley* (1996) 14 Cal.4th 605, 616-617, 621-623; *In re I. M.* (2005) 125 Cal.App.4th 1195, 1206 (*I. M.*).)

Here, the prosecution's gang expert testified to two predicate offenses. In the first, Mtula Payton, a validated member of the Garden Block Crips (29th Street) gang was convicted of battery with serious bodily injury for punching out William Smith on March 28, 2004, simply because Smith was attending a Crips party and said he was from Meadowview (but not a gang member). In the second, Marques Payton, another Garden Block Crips (29th Street) member, was convicted of assault with a firearm for shooting Nolan Rapier, a rival G-Mobb gang member, on February 24, 2002, in retaliation for Rapier's confrontation with some "little homies" of Garden Block. The gang expert had "personally investigate[d]" both of these offenses and provided a wealth of detail regarding them.

Smart relies on *In re Nathaniel C.* (1991) 228 Cal.App.3d 990 (*Nathaniel C.*) and *In re Leland D.* (1990) 223 Cal.App.3d 251 (*Leland D.*) to claim the gang expert's testimony here was insufficient to establish the required predicate offenses. Smart's reliance is misplaced.

The evidence deemed insufficient to establish a predicate offense in *Nathaniel C.* and *Leland D.* involved police officers providing only nonspecific hearsay information of suspected offenses. In *Nathaniel C.*, the officer testified about a

suspected shooting of one gang member by another in another city. The officer had no personal knowledge of the incident and repeated only what he had been told by the police in the other city regarding what they believed about the shooting. (*Nathaniel C., supra,* 228 Cal.App.3d at pp. 1003-1004.) In *Leland D.*, the nonspecific hearsay was from unidentified gang members and there was no evidence even as to when the alleged crimes had taken place. (*Leland D., supra,* 223 Cal.App.3d at pp. 259-260.)

By contrast, the gang expert here (a gang detective) had *personally investigated* both of the predicate offenses and provided a wealth of detail about them, including that they resulted in particular convictions. This evidence more than meets the test of sufficiency suggested in *I. M.*, where a probation officer testified in detail about a certain gang offense based on its police report and had personal knowledge that a gang member was being prosecuted for it. (*I. M., supra,* 125 Cal.App.4th at pp. 1206-1208.)

II. *Section 12022.53, Subdivision (d) Enhancement*

As part of their prison sentences Smart and Calhoun each received an additional 50 years to life, comprised of two enhancements of 25 years to life imposed under section 12022.53, subdivision (d) (hereafter section 12022.53(d)). That enhancement applies to personal and intentional firearm discharge that proximately causes great bodily injury in the commission of, among other enumerated crimes, the section 246 offense (shooting at an occupied vehicle).

Two issues are raised. The first is whether the trial court misinstructed on the proximate cause element regarding this enhancement. We conclude the trial court did err, but that the error is harmless under any standard of prejudice.

The second issue invokes the limitation under section 12022.53, subdivision (f) (hereafter section 12022.53(f)) that "[o]nly one additional term of imprisonment under this section shall be imposed per [defendant] for each crime." The pleadings charged Smart and Calhoun with only one section 246 offense and essentially one enhancement under section 12022.53(d). We conclude that Smart and Calhoun did not receive fair notice that *two* section 12022.53(d) enhancements could be imposed. Consequently, we strike one such enhancement as to each defendant.

A. *Misinstruction*

As pertinent here, section 12022.53(d) specifies that any person who, in the commission of a section 246 felony, personally and intentionally discharges a firearm and proximately causes great bodily injury to any person (other than an accomplice) shall be punished by an additional and consecutive term of 25 years to life.

Under section 12022.53, subdivision (e)(1), the section 12022.53(d) enhancement also applies to any person who is a principal in the section 246 offense if both of the following are pleaded and proved: (1) that person committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b));

and (2) any principal in the section 246 offense committed the section 12022.53(d) act.

The jury found that, in the commission of the section 246 offense, Calhoun personally and intentionally discharged a firearm which caused great bodily injury to Sabrina Norman and to Roy Rayford, within the meaning of section 12022.53(d). Although the jury found not true an identical section 12022.53(d) allegation as to Smart, it nevertheless found the section 12022.53(d) enhancement applied to Smart via section 12022.53, subdivision (e)(1). This is because the jury found that Smart committed (aided and abetted) the section 246 offense for the benefit of a criminal street gang while another principal in that offense (Calhoun) committed the section 12022.53(d) act. (§ 12022.53, subd. (e)(1).)

The trial court initially instructed the jury on the section 12022.53 enhancement charged against the defendants as follows:

"It is alleged in Count Three [i.e., the § 246 offense] that the defendant intentionally and personally discharged a firearm and caused great bodily injury to a person in the commission of the crime charged [this covers § 12022.53(d)].

"It is also alleged that the crime was committed for the benefit of a street gang and that a principal intentionally and personally discharged a firearm and caused great bodily injury [this covers § 12022.53, subd. (e)(1)].

"If you find a defendant guilty of the crime thus charged [i.e., the § 246 offense], you must determine whether either of these allegations is true or not true."

In defining the causation element for the section 12022.53 enhancement, the trial court provided a modified form of the so-called group beating instruction. (See CALJIC No. 17.20.) This instruction applies when an individual strikes a blow (or blows) in a group beating or fires a shot (or shots) in a group shooting, and when it is impossible to determine which assailant inflicted which injuries. Under the instruction, the individual may be punished with an enhancement for personally inflicting great bodily injury if his conduct was of a nature that it could have caused that injury. Otherwise, "[o]nly those whose foot could be traced to a particular kick, whose fist could be patterned to a certain blow or whose weapon could be aligned with a visible injury" would be punished under this enhancement, and mob violence would be encouraged. (*People v. Corona* (1989) 213 Cal.App.3d 589, 593-594 (*Corona*) [group beating]; *In re Sergio R.* (1991) 228 Cal.App.3d 588, 601-602 (*Sergio R.*) [group shooting].)

Employing CALJIC No. 17.20, the group beating instruction, the trial court instructed on the proximate cause element of the section 12022.53 enhancement as follows:

"When a person participates in a group shooting and it is not possible to determine whether he or another principal inflicted a particular injury, he may be found to have personally inflicted great bodily injury upon the victim if,

one, the application of unlawful gunfire upon the victim was of such a nature that, by itself, it could have caused the great bodily injury suffered by the victim; [¶] Or two, at the time the defendant personally applied unlawful gunfire to the victim, the defendant knew that other persons as part of the same incident had applied, were applying, or would apply unlawful gunfire upon the victim, and the defendant knew or reasonably should have known that the cumulative effect of all the unlawful physical force would result in great bodily injury to the victim."[2]

The causation element of the section 12022.53(d) enhancement does not require that a defendant *personally cause* great bodily injury, but only that he or she *proximately cause* it. (*People v. Bland* (2002) 28 Cal.4th 313, 336 (*Bland*); § 12022.53(d).) As *Bland* recognized: "[S]ection 12022.53(d) does not require that the defendant fire a bullet that directly inflicts the harm. The enhancement applies so long as defendant's personal discharge of a firearm was a proximate, i.e., a substantial, factor contributing to the result." (*Bland, supra,* 28 Cal.4th at p. 338.) *Bland* approved of the following definition of "proximate cause" for the section 12022.53(d) enhancement: "'A proximate cause of great bodily injury or death is an act or omission that sets in motion a

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[2] Our state Supreme Court just recently validated the CALJIC No. 17.20 group beating instruction in *People v. Modiri* (2006) 39 Cal.4th 481 (*Modiri*).

chain of events that produces as a direct, natural and probable consequence of the act or omission the great bodily injury or death and without which the great bodily injury or death would not have occurred." (*Bland, supra,* 28 Cal.4th at p. 336; CALJIC No. 17.19.5.)

Here, the trial court instructed on the proximate cause element of the section 12022.53(d) enhancement in terms of the group-based personal infliction of great bodily injury rather than in terms of the applicable and approved proximate cause definition. Consequently, the trial court erred. The question is the effect of that error.

One simple answer is that the error was harmless under any standard of prejudice because the court instructed in terms of the *narrower*, more difficult concept to prove of *personal infliction* of great bodily injury, rather than in terms of the *broader*, easier concept to show of *proximate causation* of such injury. (See *Bland, supra,* 28 Cal.4th at p. 338.) The misinstruction, in short, benefited the defendants.

The defendants do not see it that way, however. They argue that under the causation instruction given here, the jury did not have to find either proximate causation or personal infliction to saddle them with the section 12022.53 enhancements.

As for proximate causation, the defendants point to that part of the section 12022.53(d) proximate cause definition about an act that "'sets in motion a chain of events'" that produces the great bodily injury. (*Bland, supra,* 28 Cal.4th at p. 335.)

The defendants highlight the evidence that they were fired upon first by a rival gang member, and Calhoun simply returned fire at that member and not at the occupied car. Consequently, the defendants argue, it was that rival gang member, rather than the defendants, that set in motion the chain of events that led to the great bodily injuries here. Had the trial court properly provided the "set in motion" proximate cause instruction, the jury would not have found the section 12022.53 enhancement applied against defendants.

Before we analyze the substance of this argument, we must explain a legal premise underlying our analysis. Pursuant to defense request, the trial court instructed on self-defense and a defense of others. In its verdicts of guilt, the jury did not find that defendants acted in these lawful, defensive ways. Instead, the jury found that Calhoun's shooting was gang-related rather than defensive-related. Substantial evidence supports these findings. Furthermore, any misinstruction on the section 12022.53(d) enhancement would not have affected the jury's guilt determination regarding the section 12022.53-qualifying offense of section 246 since that guilt determination had to precede any decision on the section 12022.53 enhancement (and the jury was instructed as to this procedure). Consequently, our analysis of the trial court's misinstruction on the proximate cause element of the section 12022.53(d) enhancement will be premised on the jury's supported determination that the shooting was gang-related rather than defensive-related. We now turn to the substance of the defendants' proximate cause argument.

In the context of a gang-related shooting, the defendants' argument that a rival gang member "set in motion" the chain of events that produced the great bodily injuries--and therefore that the rival gang member, rather than defendants, proximately caused those injuries--is an argument that has been shot down by the highest authority. In *People v. Sanchez* (2001) 26 Cal.4th 834 (*Sanchez*), our state Supreme Court dealt with a similar situation and issue. There, two rival gang members exchanged gunfire during which an innocent bystander was hit and killed by a single bullet. Who fired the fatal bullet, and thus who personally inflicted the harm, was unknown, but the *Sanchez* court held that the jury could find that *both* gunmen had *proximately caused* the death for purposes of determining their guilt for murder. (*Sanchez, supra,* 26 Cal.4th at pp. 848-849; see also *Bland, supra,* 28 Cal.4th at pp. 337-338.) Relying on decisions involving bystander deaths from duels, gun battles and mutual combat, *Sanchez* concluded that each defendant's "commission of life-threatening deadly acts in connection with" attempting to kill the other was "a substantial concurrent, and hence proximate, cause" of the bystander's death. (*Sanchez, supra,* 26 Cal.4th at pp. 845, 846, see generally pp. 845-849.)

In *Bland*, our state Supreme Court defined the proximate cause element of the section 12022.53(d) enhancement by incorporating *Sanchez*'s proximate cause principles. *Bland* involved, like *Sanchez*, a rival gang shooting in which it could not be determined who fired the bullet that struck a bystander. *Bland* concluded: "[S]ection 12022.53(d) does not require that

the defendant fire a bullet that directly inflicts the harm. The enhancement applies so long as defendant's personal discharge of a firearm was a proximate, i.e., a substantial, factor contributing to the result." (*Bland, supra,* 28 Cal.4th at p. 338.)

Here, Calhoun, as part of a gang-related shooting, either exchanged gunfire with a rival gang member or targeted the car occupied by Norman and Rayford. This gunfire resulted in great bodily injuries to Norman and Rayford. At a minimum, then, the evidence shows that Calhoun committed life-threatening deadly acts either by attempting to kill the rival gang member or by firing into the occupied car. Consequently, Calhoun, under section 12022.53(d), was "a proximate, i.e., a substantial, factor contributing to" Norman's and Rayford's great bodily injuries. (*Bland, supra,* 28 Cal.4th at p. 338; see also *Sanchez, supra,* 26 Cal.4th at pp. 848-849.)

Furthermore, the language of the trial court's group shooting misinstruction on the proximate cause element specified that at least one of the defendants had to apply "unlawful gunfire upon the victim" or "unlawful gunfire to the victim." In light of the evidentiary context here of either a rival gang shootout or a gang-related shooting at an occupied vehicle, this language satisfies section 12022.53(d)'s proximate cause requirement that at least one of the defendants' firearm discharges had to have been a substantial factor contributing to the great bodily injury. (*Bland, supra,* 28 Cal.4th at pp. 337-338.)

Accordingly, the trial court's failure to give the "set in motion" proximate cause instruction could not have prejudiced Smart or Calhoun under any standard of prejudicial error. As to causation, the jury was instructed along the narrower, tougher-to-prove lines of group-related personal infliction of great bodily injury. (See *Bland, supra,* 28 Cal.4th at p. 338.) The jury also had to find that at least one of the defendants personally discharged a firearm upon the victims. As in *Bland*, the jury here could not have misunderstood the element of proximate causation "in a way that would have prejudiced defendant[s]--i.e., that would have resulted in a finding of proximate causation on an improper basis." (*Ibid.*)

As for the defendants' argument that, under the trial court's misinstruction, personal infliction did not have to be found, the jury, as we have explained, did not have to find this element for the section 12022.53(d) enhancement to be applied. Again, that enhancement, with respect to its causation element, "applies so long as defendant's personal discharge of a firearm was a proximate, i.e., a substantial, factor contributing to the result." (*Bland, supra,* 28 Cal.4th at p. 338.) We have just explained how the trial court's misinstruction on the proximate cause element of the section 12022.53(d) enhancement--misinstructing in terms of group-related personal infliction--could not have prejudiced defendants.

B. *The Single Count of Section 246 and its Accompanying Single Allegation of Section 12022.53*

The second issue involving the section 12022.53 enhancement implicates subdivision (f) of that section, the first sentence of which reads: "Only one additional term of imprisonment under this section shall be imposed per person for *each crime*." (Italics added.) The remaining part of subdivision (f) makes clear that the word "person" in this sentence means "defendant."[3]

Here, each of the defendants was charged with and convicted of only one crime that qualified for the section 12022.53(d) enhancement: the section 246 offense of shooting at an occupied vehicle. (§ 12022.53, subds. (a), (d).) Furthermore, as to this single charge of section 246, the information alleged, in a single paragraph, what appears to be an allegation of a single enhancement under section 12022.53, by alleging in full: "It is further alleged that the defendants, Sergio David Calhoun and Jarvell Deandrae [*sic*] Smart, principals, personally and intentionally discharged a firearm, to wit, a handgun, which proximately caused great bodily injury to Sabrina Norman and Roy

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[3] Subdivision (f) provides in full: "Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d)."

Rayford, within the meaning of Penal Code Sections 12022.53(d) and (e)(1) [subdivision (e)(1) is the section 12022.53(d) enhancement as applied to a principal in a gang crime when another principal commits the section 12022.53(d) act]."

We had the parties supplementally brief the issue of whether section 12022.53(f) means that only one section 12022.53(d) enhancement may be imposed upon each defendant because each of them was convicted of only one qualifying crime (the section 246 offense). (See *People v. Mason* (2002) 96 Cal.App.4th 1, 12 (*Mason*) [the only limitation to the number of section 12022.53 enhancements that may be imposed "is that only one enhancement may be imposed per *crime* (i.e., qualifying felony)"] (italics in original); see also *People v. Oates* (2004) 32 Cal.4th 1048, 1057 (*Oates*) [the enactment of subdivision (f) "shows that the Legislature specifically considered the issue of multiple enhancements and chose to limit the number imposed only 'for each crime'"]; *People v. Perez* (2001) 86 Cal.App.4th 675, 680-682 (*Perez*) ["The first sentence of section 12022.53, subdivision (f) presents no ambiguity as to the Legislature's intent to apply a limitation to one enhancement per crime"]; *People v. Cobb* (2004) 124 Cal.App.4th 1051, 1056-1058 (*Cobb*).)

Pursuant to our supplemental brief inquiry, a dilemma has been posed as to what constitutes a "crime" for section 12022.53(f) purposes.

On the one hand, California law is well-settled that with regard to crimes of violence against persons, such as assault, homicide or robbery, where a single act injures

more than one victim, there are as many crimes as there are victims. (*People v. Majors* (1884) 65 Cal. 138, 146-147; *Neal v. State of California* (1960) 55 Cal.2d 11, 20-21 (*Neal*); *People v. Lagomarsino* (1950) 97 Cal.App.2d 92, 98-99 (*Lagomarsino*); see 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 25, p. 231.) Under this principle of multiple victims-multiple offenses, the defendants here each committed two offenses of section 246 because there were two injured victims; as a result, two section 12022.53(d) enhancements may be imposed upon each defendant pursuant to section 12022.53(f).

On the other hand, however, this principle of multiple victims-multiple offenses has been applied only where each victim is the subject of a *separately charged offense*; that is, the number of offenses charged aligns with the number of victims injured. (See e.g., *Neal, supra,* 55 Cal.2d at p. 15; *Lagomarsino, supra,* 97 Cal.App.2d at p. 93; *In re Tameka C.* (2000) 22 Cal.4th 190, 192; *In re Asean D.* (1993) 14 Cal.App.4th 467, 471.) In line with this charging principle, the defendants committed a single offense under section 246 because they were charged with and convicted of only a single such offense; as a result, only one section 12022.53(d) enhancement may be imposed upon each defendant under section 12022.53(f).

For three reasons, we resolve the dilemma of what constitutes a "crime" here for section 12022.53(f) purposes on the basis of the just-noted charging principle. Consequently, each defendant may receive only one section 12022.53(d)

enhancement pursuant to the single section 246 offense charged against him, and we will strike the second such enhancement.

First, as the California Supreme Court has made clear, "a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*People v. Mancebo* (2002) 27 Cal.4th 735, 747, 752-754 (*Mancebo*); see also *People v. Riva* (2003) 112 Cal.App.4th 981, 985, 1000-1003.)

The defendants did not have fair notice of their potential punishment under section 12022.53(d) of an additional *50* years to life. As noted, the information charged them with only *one* qualifying crime (§ 246) under section 12022.53(d), and alleged the section 12022.53 enhancement in a singular rather than multiple way. Although the verdict forms delineated a section 12022.53(d) enhancement separately as to each victim, that was too late in the game to afford the defendants fair notice of the possibility of two such enhancements. (See *Mancebo, supra,* 27 Cal.4th at p. 752 [fair notice may be critical to a defendant's ability to contest the factual bases for the enhancements, and any plea bargaining requires that a defendant know up front what enhancements the prosecution intends to seek].)

We do not think it is too much to ask that a prosecutor clearly specify in his or her accusatory pleading a defendant's potential for punishment under the section 12022.53(d) enhancement, which tallies 25 years to life per enhancement. The need for such clarity--for fair notice--is aptly illustrated

by the present case. For example, Smart was just 15 years old at the time of the section 246 offense. The jury found that he did not personally use a firearm, did not personally discharge a firearm, and did not personally inflict great bodily injury. He was sentenced to the low term of three years on the section 246 offense, but nevertheless received an additional 50 years to life for that crime pursuant to the two section 12022.53(d) enhancements imposed against him. (§ 246.) The probation report, in its sentencing recommendation, noted only one section 12022.53(d) enhancement per defendant.

We recognize that a defendant's culpability is generally greater if he injures multiple victims rather than just one, and such a defendant generally should receive greater punishment. (See *Neal, supra,* 55 Cal.2d at p. 20.) But a prosecutor may easily account for such increased culpability by charging the number of offenses in line with the number of victims and alleging the appropriate section 12022.53 enhancement as to each offense. The prosecutor did not do so here. Instead, he alleged one offense and essentially one section 12022.53(d) enhancement. A due process lack of fair notice to defendants resulted regarding their enhancement potential.

The second reason for using charging principles to resolve the issue here of multiple versus individual enhancement implicates the nature of an enhancement. An enhancement does not define a crime but instead imposes an added penalty when the crime is committed under specified circumstances. (See *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398; see also

3 Witkin & Epstein, Cal. Criminal Law, *supra,* Punishment, § 281, p. 371.) The prosecutor charged defendants with a single crime (§ 246) that constituted the qualifying offense for the section 12022.53(d) enhancement to apply. (§ 12022.53(d).) But the People effectively want the enhancement allegation, which specified two victims, to constitute an allegation of two section 246 offenses. This is the tail wagging the dog, an enhancement defining the crime. This is not legally allowed. In line with the nature of an enhancement, section 12022.53(f) contemplates a separate section 12022.53 enhancement for each separately punishable qualifying offense. Here, there was one separately punishable qualifying offense as to each defendant--the section 246 offense.

And finally, along these lines, the cases that have imposed multiple enhancements under section 12022.53(d) on one defendant have aligned each enhancement with a separately punishable (charged and convicted) qualifying offense. (See *Oates, supra,* 32 Cal.4th at pp. 1052-1053, 1056-1057; *Mason, supra,* 96 Cal.App.4th at pp. 3-4, 10-12; *Perez, supra,* 86 Cal.App.4th at pp. 677-678, 680-682; accord, *Cobb, supra,* 124 Cal.App.4th at pp. 1053, 1056-1058 [only a single charged (and convicted) section 12022.53 qualifying offense and therefore only one such enhancement, not two].)

We will strike one of the two section 12022.53(d) enhancements imposed against each defendant.

III. *In-Court Identification of Defendants*

The defendants claim that Norman's in-court identification of them was based on unnecessarily suggestive means and should not have been admitted. The basis of this claim is that Norman failed to identify the defendants in the pretrial photo lineups, the trial court denied Calhoun's motion for a pretrial lineup, and then Norman first identified the defendants in the incriminating context of a trial. We disagree with this claim.

In a case where there exists a reasonable likelihood of a mistaken identification, due process requires that an accused, upon timely request, be afforded a pretrial lineup for witnesses. (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 625.) The trial judge is vested with "broad discretion" in this realm, and the timeliness of such a request plays a big part in that discretion. (*Id.* at pp. 625-626.) "Such motion should normally be made as soon after arrest or arraignment as practicable. . . . [M]otions which are not made until shortly before trial should, unless good cause is clearly demonstrated, be denied in most instances by reason of such delay." (*Id.* at p. 626.)

Here, the trial court found Calhoun's lineup request untimely. Calhoun made the request five months after his arrest, three months after he was held to answer, and less than two weeks before the trial date. We cannot say the trial court abused its discretion in this regard.

Moreover, we agree with the court in *People v. Dominick* (1986) 182 Cal.App.3d 1174 when it agreed with the court in

People v. Prado (1982) 130 Cal.App.3d 669, 673-674, by stating: "We agree with the decision in . . . *Prado* . . . that the positive, in-court identification of a defendant by an assault victim need not be excluded merely because the victim has previously failed to make a positive identification from a photographic display . . . . These circumstances do not amount to an impermissibly unfair one person showup." (*Dominick, supra,* 182 Cal.App.3d at p. 1197, fn. omitted.) As *Prado* recognized, a victim's failure to identify a defendant from a pretrial photo display goes to the weight of the victim's in-court identification, not its admissibility. (*Prado, supra,* 130 Cal.App.3d at p. 674.) The same can be said here. Here, the defense was allowed to exploit the weaknesses in Norman's in-court identifications, including her experiences with the pretrial photo displays.

IV*. Cruel and/or Unusual Punishment*

Smart and Calhoun contend their respective sentences of 53 and 65 years to life constitute cruel and/or unusual punishment under the state and federal Constitutions.

The bulk of these two sentences is comprised of the two 25-year-to-life enhancements (i.e., 50 years to life) imposed upon each defendant under section 12022.53(d). We have stricken one of these enhancements as to each defendant, reducing each defendant's sentence by 25 years. Consequently, Smart's sentence is now 28 years to life while Calhoun's is 40 years to life.

A sentence constitutes cruel or unusual punishment under the California Constitution if it is so disproportionate to the crime for which it is imposed that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424; Cal. Const., art. I, § 17.) The analogous cruel and unusual provision in the federal Constitution has been interpreted to apply to a "'grossly disproportionate'" sentence as well. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 [115 L.Ed.2d 836] [conc. opn. of Kennedy, J.]; *Ewing v. California* (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108].) The main consideration in a disproportionate-sentence analysis, and the one the parties argue here, is the nature of the offender and the offense. (*Lynch, supra,* 8 Cal.3d at pp. 425-427.)

As for the nature of the offender, Smart and Calhoun were only 15 years old at the time of the offenses. Neither defendant had a lengthy criminal history, but, then again, neither had a lengthy life history either: Smart's record consisted of battery, petty theft and assault with a deadly weapon (although the probation report indicates no weapon was actually used); Calhoun's record encompassed vehicle theft and its attendant possession of stolen property. Both defendants, however, were enmeshed in the gang culture.

As for the nature of the offenses, they involved a gang shooting in a public parking lot of a residential apartment complex. At a minimum, in a gang context, Calhoun, with Smart as backup, fired shots from close range into the front seat area

of a car that contained two occupants. Miraculously, no one was killed, but both occupants incurred great bodily injury.

Under these circumstances, we do not find that Smart's or Calhoun's reduced sentence shocks the conscience or is grossly disproportionate. (See *People v. Martinez* (1999) 76 Cal.App.4th 489, 497 [section 12022.53 does not constitute cruel or unusual punishment: the ease with which a victim of one of the section's enumerated felonies could be killed or injured if a firearm is involved clearly supports a legislative determination treating firearm offenses harshly].)

V. *Section 12022.7--Calhoun's Great Bodily Injury Enhancement on Counts One and Two*

Pursuant to section 12022.7 enhancement allegations, the jury found that Calhoun personally inflicted great bodily injury during the assaults involving Norman (count one) and Rayford (count two). (§ 12022.7, subd. (a).) The trial court was foreclosed from imposing any prison terms for these enhancements by having imposed the section 12022.53(d) enhancement. (§ 12022.53(f).)

Calhoun contends the trial court prejudicially erred in instructing the jury on these section 12022.7 great bodily injury enhancements on counts one and two. At issue is the trial court's instruction regarding section 12022.7's requirement that a defendant *personally* inflict the great bodily injury; the court used the group beating/group shooting instruction of CALJIC No. 17.20 for this requirement. (See *Corona, supra,* 213 Cal.App.3d 589; *Sergio R., supra,*

228 Cal.App.3d 588.) We quoted and extensively discussed this instruction in section IIA of this opinion.

Calhoun argues that CALJIC No. 17.20 is wrong on the law and was wrong on the facts here.

As for wrong on the law, our state Supreme Court just recently validated CALJIC No. 17.20 in *Modiri, supra,* 39 Cal.4th 481. *Modiri* reasoned that CALJIC No. 17.20 "makes clear that the physical force personally applied by the defendant [in the group assault context] must have been sufficient to produce great bodily injury either (1) by itself, or (2) in combination with other assailants." (*Id.* at p. 494.) That dispenses with Calhoun's "wrong on the law" argument.

As for wrong on the facts, Calhoun argues that the group beating/group shooting instruction of CALJIC No. 17.20 applies only if it is impossible to determine which assailant inflicted which injury, and that was not the case here. We disagree. The evidence showed that a multitude of shots were fired, that several persons fired or could have fired, that shots were fired from multiple directions, that injuries occurred from multiple directions, and that the physical evidence disclosed next to nothing in showing who fired what gun. Given these circumstances, there is substantial evidence to support the conclusion that it was impossible to determine which assailant inflicted which injury; CALJIC No. 17.20 therefore applied. (See *People v. Banuelos* (2003) 106 Cal.App.4th 1332, 1338-1339 [impossibility finding is reviewed under substantial evidence standard].)

DISPOSITION

We direct the trial court to modify defendant Smart's sentence and defendant Calhoun's sentence by striking one of the two section 12022.53(d) enhancements of 25 years to life imposed on each defendant. We also direct the trial court to amend each defendant's abstract of judgment accordingly, and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, we affirm the judgment against each defendant. **(*CERTIFIED FOR PARTIAL PUBLICATION*.)**

DAVIS, Acting P.J.

We concur:

MORRISON, J.

HULL, J.