Filed 6/17/19 P. v. Banks CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EDWARD EUGENE BANKS, Defendant and Appellant.	B286858 (Los Angeles County Super. Ct. No. TA142468) ORDER MODIFYING THE OPINION AND DENYING APPELLANT'S PETITION FOR REHEARING (CHANGE IN JUDGMENT)

THE COURT:

The opinion filed in the above-entitled matter on May 31, 2019 is modified.

1. At the bottom of page 2, the entire paragraph that begins with the words "In addition . . . ." is deleted and replaced with the following paragraph:

In addition, Banks argues he is entitled to remand for resentencing so that the trial court may exercise its discretion under Senate Bill No. 620 and Senate Bill No. 1393, because both bills went into effect after Banks was sentenced and apply retroactively. Given that nothing in the record suggests it would be futile to offer the trial court this opportunity to strike the

previously mandatory firearm enhancement reflected in Banks's sentence and/or the previously mandatory recidivist enhancement also reflected in Banks's sentence, we agree.

2. On page 3, the entire first full paragraph on that page beginning with the words "Accordingly, we remand . . . ." is deleted and replaced with the following paragraph:

Accordingly, we remand for the court to consider striking the firearm enhancement and/or recidivist enhancement. In all other respects, we affirm.

3. On page 27, section V. of the legal discussion is entirely deleted and replaced with the following:

V. Senate Bill No. 1393 and Senate Bill No. 620

Banks's sentence reflects a recidivist enhancement under section 667, subdivision (a)(1), based on his prior serious felony conviction, as well as a firearm enhancement under section 12022.53. After Banks was sentenced, two laws went into effect that changed a trial court's discretion to impose both types of enhancements: Senate Bill No. 1393 (Stats. 2018, ch. 1013) and Senate Bill No. 620 (Stats. 2017, ch. 682). Senate Bill No. 620 took effect on January 1, 2018, and Senate Bill No. 1393 took effect on January 1, 2019. Both apply retroactively to cases that, like Banks's, were not yet final when the laws went into effect. (*People v. Johnson* (2019) 32 Cal.App.5th 26, 68 [retroactivity of Senate Bill No. 1393]; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424-425 (*McDaniels*) [retroactivity of Senate Bill No. 620].)

Senate Bill No. 620 vests sentencing courts with discretion to strike or dismiss firearm enhancements, such as the firearm enhancement imposed here, in the interest of justice. (See § 12022.53, subd. (h).) The trial court specifically noted the firearm

enhancement was "mandatory," and there is nothing in the record that clearly shows the trial court would not reduce Banks's sentence if given the opportunity. (See *McDaniels, supra*, 22 Cal.App.5th at pp. 427-428.)

Prior to Senate Bill No. 1393, and thus under the law in effect when Banks was sentenced, five-year recidivist sentencing enhancements under section 667, subdivision (a)(1) were mandatory. Senate Bill No. 1393 amended section 667, such that courts may now exercise their discretion under section 1385 to strike, effectively, section 667, subdivision (a)(1) five-year enhancements, in the interests of justice. We see nothing in the record suggesting that it would be futile to afford the trial court the opportunity to exercise such discretion in this case.

Remand to permit the trial court the opportunity to exercise its discretion and strike the recidivist enhancement and/or the firearm enhancement is therefore appropriate.

4. On page 28, the entire disposition is deleted and replaced with the following revised disposition:

DISPOSITION

The conviction is affirmed. The matter is remanded to the trial court for it to consider striking the firearm enhancement in view of Senate Bill No. 620 and/or the section 667, subdivision (a)(1) recidivist enhancement in view of Senate Bill No. 1393. If the court strikes either or both of these enhancements, it shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

These modifications constitute a change in the judgment.

Appellant's petition for rehearing filed on June 10, 2019 is denied.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J. JOHNSON, J. BENDIX, J.

Filed 5/31/19 P. v. Banks CA2/1 (unmodified opinion)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EDWARD EUGENE BANKS, Defendant and Appellant.	B286858 (Los Angeles County Super. Ct. No. TA142468)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kelvin D. Filer, Judge. Affirmed and remanded for resentencing.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill, and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

Edward Eugene Banks was convicted of making a criminal threat and second degree murder in connection with the shooting death of Jason Thompson, a perceived rival for Banks's former girlfriend's affections. Banks appeals his convictions on four grounds.

First, Banks argues the prosecutor committed misconduct by making false representations in order to "smuggle in" inadmissible prior conviction evidence. We conclude that Banks forfeited any prosecutorial misconduct argument by failing to raise the issue or request an admonition below, and that the prosecutor's actions were not misconduct in any event.

Second, Banks argues the trial court erred in admitting "nested" hearsay statements in a tape-recorded 911 call. We reject Banks's argument without deciding the hearsay issue, as the admission of this evidence was harmless in any event, when considered in the context of the other evidence.

Third, Banks argues he received ineffective representation when his trial counsel failed to object to the lead investigating officer's improper opinions regarding Banks's guilt and the credibility of certain witnesses. Again, we disagree. Banks mischaracterizes the officer's testimony, ignores the context in which it was offered, and exaggerates its potential impact.

Fourth, Banks contends the court erred in denying an instruction on the lesser offense of heat of passion voluntary manslaughter. But even when viewed in the light most favorable to Banks, the evidence cannot support a finding of objectively reasonable provocation, a necessary element of heat of passion manslaughter.

In addition, Banks argues he is entitled to remand for resentencing so that the trial court may exercise its discretion under Senate Bill No. 620, because the bill went into effect after

Banks was sentenced and applies retroactively. Given that nothing in the record suggests it would be futile to offer the trial court this opportunity to strike the previously mandatory firearm enhancement reflected in Banks's sentence, we agree.

Accordingly, we remand for the court to consider striking the firearm enhancement. In all other respects, we affirm.

FACTUAL BACKGROUND

Edward Eugene Banks was charged with making a criminal threat against Shwandra Jeter, his former girlfriend (Pen. Code, § 422, subd. (a)),[1] and the murder of Jason Thompson, a friend of the Jeter family (§ 187), along with firearm allegations (§ 12022.53, subds. (b)–(d)) as to the murder, and prior conviction and prison term allegations as to both counts. (§§ 667, subds. (a)(1) & (d), 1170.12, subd. (b), § 667.5, subd. (b).)

I. *Prosecution's Evidence at Trial*

In the first portion of a bifurcated trial, the prosecution's theory of the case was that Banks was jealous, violent, and controlling in his relationship with Jeter, irrationally perceived Thompson to be a rival for Jeter's affections, shot Thompson because of it, and threatened Jeter with further violence if she told the police.

We initially provide a general outline of the evidence the prosecution offered to support this theory. In discussing Banks's appellate arguments, we provide further detail regarding the prosecution's evidence as necessary.

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

A. *Banks and Jeter's Relationship*

Banks and Jeter were romantically involved on and off for approximately five years and have three young children together. During police interviews played for the jury, Jeter and her family described Banks as jealous, controlling, and abusive. Other evidence supported this as well. For example, in 2014, Jeter was visiting Banks in Las Vegas with their children, and Banks would not let her leave. Banks threatened to push their infant (in a stroller) into traffic if Jeter tried to contact the police. Jeter was eventually able to call 911, and no charges were filed. Jeter's sister, Jennifer Jeter, described Banks's jealousy and obsession with Jeter as being like "fatal attraction," noting that he constantly suspected Jeter of being involved with other men. Jeter broke up with Banks two weeks before the shooting.

One repeated object of Banks's jealousy was Thompson, a close friend of Jeter's family (the family). Thompson lived in Palmdale but worked in Los Angeles, and as a result often stayed at the home where Jeter lived with her children (three children with Banks, as well as two older children from a previous relationship, Trayveon and Rayveon), Jeter's mother, Jeter's sister Jennifer, and Jennifer's children. Banks believed Jeter was interested in Thompson. Early in Banks and Jeter's relationship, Banks and Thompson had a physical altercation regarding Jeter. Thompson was about a foot taller than Banks, and badly beat Banks. The fight occurred at least a year prior to the shooting, and by some witness accounts several years before. Thompson initially distanced himself from the family after the fight—partially at Jeter's mother's suggestion that he do so to avoid trouble—but he eventually began visiting Jeter and the family again.

B. *The Day of the Shooting*

The layout of the area surrounding the family home is important to understanding witness testimony regarding the shooting. The family home was a rear unit of a duplex on West 92nd Street in Los Angeles. The door on the front of the duplex building leads only to the front unit. The main door for the family's rear unit is on the side of the building, along a driveway from the street to a rear parking area. On the side of the building opposite the driveway, a small patch of land runs from the parking area toward the front of the building, along the property's boundary fence.

1. *Events leading up to the shooting*

On October 22, 2016, Thompson was visiting the family home. Late that afternoon, Jeter, Jeter's mother and father, and Banks were playing dominos at a table set up in the driveway. The record is unclear as to where Thompson was at this time.

Jeter and Banks then took a short trip to the store with their children. Around the same time, Jeter's father left, and Thompson moved his car to let Jeter's father's car out of the driveway. Thompson parked his car across from the family home on West 92nd Street. After Jeter and Banks returned, their children went to play outside.

Shortly before the shooting, Banks was talking to Jeter, when Thompson interjected and said, "[N]igga, what'd you say?" in response to which Jeter stated, "[N]o. It ain't like that. . . . My baby daddy talking to me."

2. *Trial testimony regarding the shooting*

Jeter's mother testified that she was in the house when she heard what sounded like fireworks. She ran toward the front of the house, where she found Jeter on the doorstep, who said, "Momma, they shootin' out there. Don't go out there." Jeter's mother didn't know whether Jeter was coming in or going out of the home.

A neighbor testified to hearing five quick pops of what sounded like fireworks, followed by a woman screaming, "no, please, no," then children crying, and the sounds of a car leaving quickly. Another neighbor also heard a woman screaming during the shooting.

Jeter's oldest child, Rayveon, testified that, while he was outside with his brothers, he saw Thompson get "killed." Rayveon was seven years old at the time of the shooting and nine years old when he testified. He testified to seeing Banks jump on top of Jeter's father's car and firing "six or seven times. No. Five or four." Rayveon testified that Thompson said, "Ouch," ran to his car across the street, and drove away. Rayveon also saw his aunt Barbara (Jeter's other sister Barbara Jeter), who did not live at the family home, tell Banks to stop. On cross-examination, Rayveon testified he was in the backyard when he heard the shots, and that one cannot see the street from where he was when he initially heard the shots. Rayveon also testified that his mother and his aunt Barbara had told him to not say anything about Thompson's shooting. Rayveon was not living with his mother at the time he testified.

At trial, Jeter testified that she knew nothing about the shooting, at one point denying she even heard gunshots on the day of the shooting. The prosecution impeached this testimony by playing video recordings of prior statements during police

interviews, reflecting Jeter's knowledge about Banks's role in the shooting.

3. *Prior statements to police regarding shooting*

a. *Statements to Detective Fontes*

The prosecution played portions of a video recording in which, four days after the shooting, Detective Fontes, the lead investigator on the case, interviews Jeter. In the video, Jeter describes Banks as the shooter several times, but also claims to have learned that information only from neighbors. She also tells Detective Fontes that the day after the shooting, Banks said, "I got that nigger and I can get you all too." The video reflects Detective Fontes presenting Jeter with a "six-pack" photographic lineup, and Jeter choosing a photograph of Banks when asked whether she sees "the person that killed [Thompson]." Detective Fontes asks Jeter to write an explanation of why she selected that photograph, in response to which she wrote: "I pick out number four because they [*sic*] Edward Banks and he shot Jason [Thompson]."

b. *Statements to Detective Peraza*

Several months after the shooting (and Jeter's initial interview with Detective Fontes), a multi-agency team interviewed Jeter, Jeter's children, and Jeter's sister Jennifer at a Van Nuys facility for abuse victims. The multi-agency team was composed of Detective Fontes, Department of Children and Family Services (DCFS) social workers, and Detectives Castillo and Peraza, who specialize in interviewing children. Detective Fontes had engaged the assistance of Detectives Castillo and Peraza, who had in turn reached out to DCFS, based on information suggesting Banks continued to visit the family home after the shooting, potentially placing the children there at risk. For example, police found

Banks and Jeter in a car together during a routine traffic stop approximately two months after the shooting, during which Jeter told the officer "she felt compelled to go with [Banks] to the store to get him away from the house" that night.[2] Police also had concerns that Jeter or Banks might attempt to prevent Jeter's children from speaking truthfully about the incident.

The day Detectives Castillo and Peraza interviewed Jeter, DCFS had removed Jeter's children from her, and Jeter was extremely upset. While the video recording from the interviews reflects the detectives informing Jeter that the police had no control over when Jeter could regain custody of her children, Detective Peraza and Jeter also spoke in the hallway briefly before the interview, and this interaction was not videotaped.

At trial, the prosecution played Detective Peraza's recorded interview with Jeter. In it, Jeter initially tells Detective Peraza that Banks shot Thompson, but that Jeter herself had not seen it. Later in the video, Jeter states that she did witness the shooting, that she asked Banks to stop shooting, to which he replied, "Fuck you, I'm not listening to you," and that once Thompson ran away alone, Banks told her, "Fuck you, leave me alone before I shoot you." Jeter states she heard Thompson say, "Ow," after Banks shot twice, and that she believes Thompson was shot in the side.

c. *Jeter's testimony regarding her prior inconsistent statements*

When asked about these prior inconsistent statements at trial, Jeter explained that she only identified Banks in the photo

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[2] Testimony regarding this traffic stop is also the subject of one of Banks's arguments on appeal. We describe the testimony in additional detail in addressing that argument below.

array Detective Fontes showed her because she was "high" on "plenty of drugs" and because "all" of the detectives mentioned the custody of her children. She further testified that police present at the Van Nuys interview had suggested they could help her regain custody of her children if she implicated Banks, and that she therefore did so falsely during that interview. At trial, Detective Peraza denied making any such promises to Jeter, including during their interaction in the hallway that was not videotaped.

C. *Thompson's Death*

The prosecution's evidence further showed that at approximately 4:00 p.m. the day of the shooting, Thompson's car crashed into a metal fence at the northwest corner of 92nd Street and Broadway. When police arrived on the scene, Thompson was still alive in the front seat. He had gunshot wounds to his right arm and leg. They asked whether Thompson knew who had shot him, and he nodded his head indicating, "yes," but when asked, "who shot you," he said only, "I can't breathe." Thompson was transported to a hospital where he died from his gunshot wounds.

The medical examiner testified that the absence of soot or stippling from Thompson's skin suggested that the shots were fired from a distance of more than three feet. Testing of the bullet recovered from Thompson's body showed it was consistent with nine-millimeter Luger ammunition. Police found no weapons, ammunition, or casings in Thompson's car, and no sign that a bullet had struck the car.

D. *Forensic Evidence Near the Family Home*

The day after the shooting, police recovered a single spent shell casing of a nine-millimeter bullet from behind the family's residence. They found no weapons or other forensic evidence in

the driveway area or perimeter of the property. A series of blood "droplets" were on the sidewalk two properties east of the duplex on West 92nd Street.

The police never recovered the gun used in the shooting.

E. *Banks's Threatening Text Messages and Related 911 Call the Day After the Shooting*

The day after the shooting, Banks sent Jeter a series of threatening text messages, stating: "I been looking thru the alley across the street." "I[']m just waiting on the right time to get everybody since it fuck me do you hate me?" "If I come in right now what[']s going to happen?" "Is it going to be a gun battle cuz I[']m ready." "No reply." "What happens to all the love." Images of these text messages were admitted into evidence.

That evening, in response to these messages, Jeter called 911, though Jeter's cousin and Jeter's sister spoke with the 911 operator who answered. The prosecution played a recording of the 911 call. On the recording, Jeter's sister first asked the operator for help because a man said he was watching the family from across the street and threatened to kill them all. Jeter's sister described the suspect as a 35-year-old black man, but interrupted her description to exclaim, "[O]h my God!" Jeter's cousin then took over speaking with the operator.[3]

When police responded to the 911 call at the family residence later that night, they found Jeter, Jeter's cousin and sister, and about seven children in the family home. Jeter told police she was afraid Banks was going to "shoot up the place" and kill her family.

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[3] Jeter's cousin's statements to the 911 operator are the subject of one of Banks's appellate arguments, and we summarize them in more detail in discussing that argument below.

Jeter volunteered that there had been a lot of shootings in the area, and she did not know what would happen if she went outside, since her ex-boyfriend was watching her from across the street. When, in response, one officer asked Jeter about the previous day's shooting, Jeter indicated she did not know anything.

II. Defense Case

Banks presented no evidence in his own defense. Rather, his counsel argued that there was no eyewitness testimony regarding who shot Thompson, and that the remaining circumstantial evidence was insufficient to support a conviction. He discredited Jeter's prior identifications of Banks as the shooter, characterizing Jeter as a "liar," based on her many inconsistent statements. In both his closing argument and cross-examination of Jeter's child Rayveon, defense counsel also attempted to establish that Rayveon could not have seen the shooting, given his location at the time he heard the shots. Defense counsel argued that Rayveon's testimony was also internally inconsistent and inconsistent with other witnesses' testimony. For example, he noted Rayveon's account of Banks jumping onto Jeter's father's car, though witnesses had testified to the father having left by that point.

As to the criminal threat charges, defense counsel argued that Banks's text messages did not specifically refer to the shooting, and were instead consistent with a tumultuous, intense relationship.

III. Jury Verdict

During deliberations, the jury requested a readback of Rayveon's testimony. Thereafter, the jury found Banks guilty of both charges, found the murder to be in the second degree, and found all special allegations true. Banks filed a timely notice of appeal.

DISCUSSION

I. Prosecutorial Misconduct

Banks's first argument on appeal challenges the way the prosecution handled Officer Brandon Greiner's testimony regarding the traffic stop of Banks and Jeter approximately two months after the shooting, during which police found a .380-caliber gun under Banks's seat. As discussed below, however, Banks forfeited this argument by failing to raise in the trial court any allegation of prosecutorial misconduct. Indeed, although, on appeal, Banks bases his theory of misconduct on prejudice from Officer Greiner's references to Banks being a felon suspected of additional uncharged crimes, Banks never objected to these references below.

A. *Relevant Evidentiary Objections Below*

Rather, during a side bar before Officer Greiner testified, Banks objected that testimony about the gun found as a result of the traffic stop would be unduly prejudicial and was inadmissible under Evidence Code section 352. The prosecution responded that the evidence was relevant to Jeter's truthfulness, because it supported bias that might explain why she recanted her initial statements identifying Banks as the shooter—i.e., that she was either scared of Banks or loyal to him, and thus unwilling to inculpate him—and because it impeached her earlier testimony that she did not see Banks with a gun on the night of the traffic stop. To prevent any improper inference that the gun found in the car was the murder weapon, the prosecution agreed to stipulate that the gun in the car was not used to kill Thompson. The parties entered into such a stipulation, and Officer Greiner testified regarding the traffic stop.

Although the prosecution's questions were fairly open-ended, the prosecution did not ask Officer Greiner any questions that required the officer to reveal Banks's criminal history or police suspicions of other misconduct. Nevertheless, in the course of Officer Greiner's testimony, he noted that the traffic stop involved a "possible ADW suspect" and referred to Banks being booked on charges of being a felon in possession of a firearm.[4] Officer Greiner did *not* explain that "ADW" is an abbreviation for "assault with a deadly weapon." Defense counsel did not object to these references, and did not raise any concerns regarding the prosecutorial misconduct.

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[4] Specifically, the prosecution asked Officer Greiner, "Please tell the court and the jury about [the relevant traffic] stop," to which Officer Greiner responded, "*We received a radio call of possible ADW suspect* as well as suspect may be also involved with a homicide." After the officer described finding and recovering the .380-caliber gun, the prosecutor asked, "Did that conclude your involvement with that particular contact?" Officer Greiner asked, "Of the vehicle?" And the prosecutor clarified, "Of that whole stop." Officer Greiner replied, "We ended up—the detectives had asked us if we could take *the subject* down to 77 station *to be booked for felon in possession of a firearm*." Officer Greiner later confirmed "the suspect" referred to Banks. Following the officer's initial inability to recall the names and locations of all occupants in the car on cross-examination, the prosecution asked during redirect examination whether Officer Greiner had prepared a report "in this case" that might refresh his recollection. Officer Greiner stated, "Yes. I prepared a report *for the felon in possession of a firearm*." The report did not include the names of the occupants, though Officer Greiner was later able to recall their names.

B. *Banks's Argument*

A prosecutor engages in misconduct that violates the federal constitution where there is " ' "a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' " (*People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1583–1584 (*Alvarado*).) "[C]onduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " (*People v. Espinoza* (1992) 3 Cal.4th 806, 820, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 866.)

Banks contends that the "sole purpose" of the traffic stop testimony was to "smuggle[] in" "evidence that [appellant] had a prior felony conviction," "evidence about an irrelevant gun," and evidence that appellant was suspected of an "ADW." According to Banks, the prosecution's statements that it sought to impeach Jeter with Officer Greiner's testimony was "knowingly false," because the prosecution must have known Officer Greiner could not establish Jeter was aware of the gun in the car, let alone that Banks may have possessed it. Banks argues that this constitutes misconduct, as it involves the prosecution making intentionally false representations to the court as a means of getting before the jury prejudicial evidence in violation of the court's order bifurcating the prior conviction phase of the trial.

C. *Forfeiture*

" '[T]he general rule [is] that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion'—and on the same ground—'he made an assignment of misconduct and requested that the jury be admonished to disregard

the impropriety.' " (*People v. Ashmus* (1991) 54 Cal.3d 932, 976 (*Ashmus*).) A limiting instruction or admonition could have addressed any of the issues Banks now raises, and Banks does not argue otherwise. (See *People v. Valdez* (2004) 32 Cal.4th 73, 124–125 (*Valdez*) [reference to state prison custody, implying defendant's felon status, "was not so grave that a curative instruction would not have mitigated any possible prejudice to defendant"]; see also *People v. Pitts* (1990) 223 Cal.App.3d 606, 692-693 [jury is presumed to follow a curative admonition absent " 'exceptional' " circumstances]). The forfeiture rule is particularly important in the context of prosecutorial misconduct allegations, because "if the defense does not object, and the prosecutor is not asked to justify the [conduct], a reviewing court is rarely able to determine whether this form of misconduct has occurred." (*People v. Price* (1991) 1 Cal.4th 324, 481.) Here, for example, the record does not speak to whether the prosecutor warned Officer Greiner not to mention Banks's prior felonies, or why Officer Greiner chose to reference the "ADW" and "felon in possession" details, when such references were not necessary to answer the prosecution's questions. Had Banks timely raised the issue of prosecutorial misconduct, the court could have conducted an appropriate inquiry, potentially allowing it to resolve the issue of bad faith on the part of the prosecutor. (See, e.g., *People v. Batts* (2003) 30 Cal.4th 660, 675.) Because Banks did not make such a timely and specific objection or request an admonition, his prosecutorial misconduct argument is forfeited. (*Ashmus, supra*, 54 Cal.3d at p. 976; *People v. Silva* (2001) 25 Cal.4th 345, 374 (*Silva*) ["[T]he defense declined to have the trial court admonish the jury to disregard the question. Because such an admonition would have cured any harm, the failure to request an admonition renders the prosecutorial misconduct claim unreviewable."].)

We reject Banks's argument that his successful motion to bifurcate the trial on the recidivist allegations serves as a surrogate for raising the prosecutorial misconduct issue below and prevents forfeiture. Such a motion is hardly tantamount to an objection "on the same ground" as the prosecutorial misconduct complaint Banks raises on appeal. (*Ashmus*, *supra*, 54 Cal.3d at p. 976.) For this same reason, Banks's evidentiary objection to Officer Greiner's testimony at trial did not prevent forfeiture of his prosecutorial misconduct challenge. Indeed, that objection is inapposite for the additional reason that it presented an entirely different evidentiary issue than the one on which Banks bases his misconduct argument. Namely, at trial, Banks objected *regarding the gun* as being *unduly prejudicial*; on appeal, he questions the motives of the prosecutor based on the *relevance* of the gun to impeaching Jeter and the prejudice from comments regarding a *possible prior felony conviction*.

In any event, Banks's prosecutorial misconduct argument lacks merit. First, the prosecutor's actions do not constitute misconduct. The portions of Officer Greiner's testimony with which Banks takes issue were not directly responsive to any of the prosecutor's questions, and nothing in the record suggests the prosecutor knew—let alone intended—that Officer Greiner would offer these additional details. (*People v. Tully* (2012) 54 Cal.4th 952, 1039 ["witness's nonresponsive answer cannot be the basis of a claim of prosecutorial misconduct"]; *Valdez*, *supra*, 32 Cal.4th at p. 125 [not misconduct for prosecutor to ask how earlier interview was conducted, and witness responded with inadmissible testimony on interview location].) Nor do we view the prosecutor's explanation as to how Officer Greiner's testimony was relevant to impeachment as a "false" "offer of proof," but rather a conceivably meritorious argument put forth by an advocate. (See *Alvarado,*

supra, 141 Cal.App.4th at p. 1584.) The fact that Jeter was with Banks in a car containing a gun has some "tendency in reason to prove" that Jeter knew Banks had a gun that night, and taken together with other evidence in the record—including text messages in which Banks threatens Jeter and her family the day after the shooting—that she might fear him and have reasons to recant otherwise truthful testimony inculpating him. (See Evid. Code, § 780 [impeachment evidence]; *id.*, subd. (f) [bias interest or other motive]; *id.*, subd. (i) ["existence or nonexistence of any fact testified to"].) The prosecutor did not represent that Officer Greiner's testimony would affirmatively establish Jeter had seen Banks holding the gun found in the car. " '[T]here is [thus] no indication the prosecutor purposely elicited the [complained of] responses' " rather than " 'pursuing legitimate lines of inquiry.' " (*Valdez*, *supra*, 32 Cal.4th at p. 125.)

Second, we reject Banks's prejudice arguments that the "highly prejudicial and irrelevant evidence that Banks was a suspect in an ADW" and had a gun in his car "enabled the jury to infer that Banks had a propensity to commit crimes and did commit the crime charged." This argument exaggerates the impact of this testimony in light of the totality of other evidence at trial. That Banks may have possessed a gun the parties stipulated was not the murder weapon is not so "highly prejudicial" as to infect the entirety of the proceedings—particularly given that the jury saw texts in which Banks implies he had a gun. (See *Silva*, *supra*, 25 Cal.4th at p. 374 [trial not fundamentally unfair based on prosecutor's improper question regarding the circumstances of prior offense where other evidence referenced the offense].)

And even assuming the jury understood Officer Greiner's general references to Banks being "suspected in an ADW" or booking "the suspect" for being a "felon in possession," these too

are not "of such overwhelming force that it would have caused a reasonable juror to . . . presume defendant's guilt" or "blind[] jurors to the weight of the other evidence in the case." (See *People v. Quartermain* (1997) 16 Cal.4th 600, 627 [evidence regarding prior conspiracy to commit murder offered for limited purpose of establishing intent to commit murder of different individual many years later did not render trial fundamentally unfair].) Indeed, the jury had already heard more detailed evidence regarding other, arguably much more inflammatory prior uncharged acts—that Banks had threatened to push his own child into a busy street—and, in that context, been instructed regarding the limited relevance of such prior uncharged acts as well.

II. Hearsay Arguments

Banks next argues Jeter's cousin's statements in the 911 call recording constituted inadmissible double hearsay, and that the trial court erred in admitting it. Although we generally review evidentiary rulings for an abuse of discretion (see *People v. DeHoyos* (2013) 57 Cal.4th 79, 132), we forego such a review here, because any erroneous admission of the challenged portion of the 911 call was harmless.

A. *911 Call Recording*

In the recording of the 911 call, Jeter's cousin tells the 911 operator that she "just got here" and has locked both doors. The cousin tells the 911 operator that Banks had made a threatening call to Jeter "yesterday" or "the other day" in which Banks allegedly threatened to "kill them all if they called the police" and that "now" he was texting Jeter. Jeter's cousin further stated, "[W]e don't put it past him on account of what happened yesterday." When the 911 operator asked, "[W]hat happened yesterday?" Jeter's cousin explained, "Um, someone got shot down the street, or up the street,

I don't know where it happened but—" The 911 operator then asked, "You don't know if that was him or who that was?" Jeter's cousin responded, "Correct." She also stated that Banks "has guns."

B. *Harmless Error*

The court overruled Banks's hearsay objection to Jeter's cousin's statements in the 911 call on the grounds that the statements were "excited utterances" within Evidence Code section 1240 and a "contemporaneous statement" within Evidence Code section 1241. We need not delve into a multi-level hearsay analysis to reject Banks's argument, because in order for the admission of Jeter's cousin's statements in the 911 call to provide a basis for reversal, it must have been "reasonably probable" that excluding this evidence would have produced a more favorable verdict for Banks. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) It was not.

According to Banks, Jeter's cousin's statement that Banks "threat[ened] to kill everyone if they talked" reflects Banks's consciousness of guilt regarding Thompson's murder, and was thus prejudicial under the *Watson* standard. But other evidence supports Banks's consciousness of guilt in this same indirect way. Banks's own text messages stated he was "waiting on the right time to get everybody *since it* fuck me," and no evidence suggested what "it" might refer to, other than the shooting the day before. (Italics added.) When the officers responded to the 911 call, Jeter told them she was afraid Banks would shoot her and her family, when a day earlier—on the day Thompson was killed—Banks was at her family's home playing dominos. And Jeter told police during an interview that Banks told her, "I got that nigger and I can get you all too." Although, in her trial testimony, Jeter denied having made these statements, the jury could have reasonably chosen to believe

her earlier statements over her blanket denial at trial. Of course, none of this evidence—including Jeter's cousin's statements during the 911 call—conclusively establishes consciousness of guilt. But it sufficiently supports that, considering the record as a whole, it is no more than an " 'abstract possibility' " at best that Jeter's cousin's statements on the 911 call swayed the jury to believe Banks exhibited consciousness of guilt. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

Banks further argues that Jeter's cousin's references to Banks having a gun and his possible involvement in the shooting the day before had the requisite "reasonable chance" of affecting the jury's verdict, particularly when considered against a backdrop of what Banks describes as an otherwise weak, circumstantial case against him. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 (*College Hospital*).) But Banks's texts to Jeter already support that he had a gun and reflect Banks making violent threats. As for Jeter's cousin's references to the shooting the day before, she clarified during the 911 call that she did not know whether Banks was involved.

Thus, any support the 911 call offered for facts already supported by other, arguably more persuasive, evidence is not reasonably likely to have led to a different outcome.

III. Ineffective Assistance

Banks argues he was denied effective assistance when his counsel failed to object to what Banks characterizes as Detective Fontes's "highly prejudicial, inadmissible opinions on guilt and witness credibility, as well as irrelevant testimony about what facts led [Detective Fontes] to conclude Banks committed the crime." We disagree.

A. *Detective Fontes's Testimony*

The prosecution asked Detective Fontes to describe the steps he took in the course of his investigation. He explained how he initially came to view Banks as a "person of interest," and why he later came to view Banks as a "suspect," which Detective Fontes generally defined as "someone that I went through the process of identifying via anything from video surveillance to actual eyewitnesses and identified and placed that person at [the] scene committing the crime."

As part of his explanation for how the investigation led to Banks, Detective Fontes gave an opinion on Jeter's mother, Jeter's sister, and Jeter's credibility in their police interviews, saying, "I would say half of the interview with each was forthcoming and the other half was deceiving." Detective Fontes noted that the perceived evasiveness arose when he asked Jeter's mother, Jeter's sister, or Jeter to provide details about Banks's involvement in the shooting, even after each had generally indicated Banks was involved. Detective Fontes explained that he based this assessment on "the tone of their voice, their face. They would not look at me." The prosecutor ultimately asked, "So the evidence led you to Mr. Banks?" To which Detective Fontes answered, "[Y]es."

Later, the prosecution asked Detective Fontes to comment on how Jeter's testimony at trial compared to her responses during earlier police interviews, suggesting it was not credible.

B. *Strickland Analysis*

To establish ineffective assistance of counsel, a defendant must demonstrate: (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington*

(1984) 466 U.S. 668, 687 (*Strickland*).) On appeal, there is a strong presumption that counsel's conduct falls within the wide range of adequate professional assistance. (*People v. Stanley* (2006) 39 Cal.4th 913, 954.) In applying the first prong of this doctrine to trial counsel's choice of objections, "the defendant must affirmatively show that the [failure to object] involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics." (*People v. Floyd* (1970) 1 Cal.3d 694, 709 (*Floyd*).) *Strickland*'s second prong requires a defendant prove prejudice as a demonstrable reality, not merely by speculation as to the effect of counsel's actions or omissions. (See *People v. Williams* (1988) 44 Cal.3d 883, 937.)

1. *Opinions on Banks's guilt*

It is not tantamount to directly opining on Banks's guilt that Detective Fontes defined the term "suspect" in a manner implying guilt, and then testified Banks was a suspect. Even if the jurors made the connection between these two portions of Detective Fontes's testimony necessary to imply an opinion of guilt, "[n]othing in [Detective Fontes's] testimony . . . indicated that [he] was offering an opinion for direct jury consideration on the issue of defendant's credibility." (See *People v. Stitely* (2005) 35 Cal.4th 514, 546-547 (*Stitely*).) Rather, he did so in the course of "highlight[ing] the twists and turns in a long [investigation]," the general timeline and evolution of which were relevant at trial in the manner discussed below. (*Id.* at p. 546.) In this context, "[n]o reasonable juror" would have understood Detective Fontes as offering testimony as to whether Banks was guilty of the crimes charged. (*Id.* at pp. 546–547.)

2. *Opinions on veracity of Jeter's mother, Jeter's sister, and Jeter*

Opinion testimony regarding "the veracity of particular statements by another," is generally "inadmissible on that issue." (*People v. Melton* (1988) 44 Cal.3d 713, 744.) But Detective Fontes's comments regarding Jeter supported a key *defense* theme: that Jeter's many pretrial statements inculpating Banks were not credible. In closing arguments, for example, defense counsel said that "no matter what, she's [Jeter's] a liar. She's not credible. She's not reliable. . . . [O]nce you find her not credible or question what she said, anything she said to detectives, anything she said to [Jeter's sister] and [Jeter's mother], it vitiates everything." The record thus supports that defense counsel may have had a tactical basis for declining to object. (See *Floyd, supra*, 1 Cal.3d at p. 709.)

With respect to Detective Fontes's impressions of Jeter's sister's and mother's demeanor in police interviews, an officer's testimony with respect to whether he believes a witness's statements may be admitted to "assist[ ] the jury in understanding the actions of the police." (*People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 33.) Detective Fontes's testimony explaining how and why he continued to investigate Banks's potential involvement in the shooting, based in part on his assessment of witness statements as the investigation progressed, assisted the jury in assessing Jeter's claims at trial that the police had tried to steer the investigation towards Banks by pressuring Jeter to inculpate him. (See *Stitely, supra,* 35 Cal.4th at pp. 546–547 [detective properly testified about reasons for investigative actions, including references to defendant's "lies"].)

Moreover, even if these comments did cause the jury to question Jeter's mother's and sister's credibility more than the jury would have done, based solely on the jury's own evaluation of the

videotaped police interviews and comparison with trial testimony, there is not a "reasonable chance" this led to a less favorable outcome for Banks. (*College Hospital, supra,* 8 Cal.4th at p. 715.) Neither Jeter's mother's credibility, nor Jeter's sister's credibility, nor either witness's testimony, was "crucial" to the prosecution's case. (See *Floyd, supra*, 1 Cal.3d at p. 709.) And the effect of Detective Fontes's comments must be measured in light of the prosecution's other evidence, including an eyewitness to the murder, as well as other circumstantial evidence connecting Banks to the shooting.

Thus, Banks's trial counsel did not provide him ineffective assistance of counsel in declining to object to the portions of Detective Fontes's testimony Banks identifies.

IV. Manslaughter Instruction

Banks next argues the trial court denied appellant due process when it declined to issue an instruction on heat of passion voluntary manslaughter under section 192, subdivision (a). We review this issue de novo. (*People v. Verdugo* (2010) 50 Cal.4th 263, 293.) In so doing, "we review the evidentiary support for [the lesser] instruction 'in the light most favorable to the defendant' [citation] and should resolve doubts as to the sufficiency of the evidence to warrant instructions ' "in favor of the accused." ' " (*People v. Wright* (2015) 242 Cal.App.4th 1461, 1483 (*Wright*).)

Whether a defendant acted in the heat of passion in causing the death of another presents a subjective question, but the circumstances giving rise to the heat of passion are assessed objectively. (*People v. Steele* (2002) 27 Cal.4th 1230, 1251–1253.) This means that, in order to establish heat of passion voluntary manslaughter, the evidence must support that the passion under which the defendant acted " 'would naturally be aroused in the

mind of an ordinarily reasonable person under the given facts and circumstances.' " (*Id.* at p. 1252, quoting *People v. Logan* (1917) 175 Cal. 45, 49.) In applying this objective component, "the law of provocation focuses on ' "emotion reasonableness" ' (i.e., 'whether "the defendant's emotional outrage or passion was reasonable" '), not on [the] ' "act reasonableness" ' (i.e., 'whether "a reasonable person in the defendant's shoes would have responded or acted as violently as the defendant did." ' " (*Wright*, *supra*, 242 Cal.App.4th at pp. 1481–1482, italics omitted.)

Banks argues that the evidence reflects a trajectory of building jealousy that culminated on the day of the murder. Banks viewed Thompson as a rival for Jeter's affections, and Thompson had physically beaten Banks in connection with this perceived rivalry once in the past. Then Banks found Thompson at the family home less than two weeks after Jeter had broken up with Banks. Although Thompson initially removed himself from the situation, he later "chose to interject himself in a conversation between Banks and [Jeter], saying 'nigga, what[']d you say,' prompting [Jeter] to diffuse the situation by telling Thompson, 'no . . . . It ain't like that. . . . My baby daddy talking to me.' " Banks argues this is sufficient provocation to arouse the passions of an ordinary person in the circumstances. It is not.

The evidence Banks identifies, even viewed in the light most favorable to him, does not reflect any "sudden heat of passion, but only . . . a persistent, brooding jealousy." (*People v. Hudgins* (1967) 252 Cal.App.2d 174, 181.) Courts have required significantly greater provocation to justify a voluntary manslaughter instruction in connection with perceived or actual infidelity, including in the cases on which Banks relies. He cites *People v. Bridgehouse* (1956) 47 Cal.2d 406, 409, for example, in which the defendant shot his wife's lover after discovering him at home in the presence of his

young child in violation of a restraining order. The Court reduced the defendant's conviction to voluntary manslaughter on the grounds "that defendant's wife was having an affair which had extended over a considerable period of time with the deceased; that she would neither approve of the defendant commencing an action for divorce nor would she forego seeing [her lover], the victim of the crime; [and] that the sight of the victim in his mother-in-law's home was a great shock to the defendant who had not expected to see him there or anywhere else." (*Id.* at p. 413.) Banks also cites *People v. Berry* (1976) 18 Cal.3d 509, 513, in which the defendant's wife told him that she was having an affair with another man and spent two weeks "taunting" him about it. (*Ibid.*)

Here, by contrast, there is no evidence that Jeter had ever been romantically involved with or even interested in Thompson, nor any basis on which Banks could have reasonably believed that Thompson and Jeter were seeing each other. Moreover, even if the evidence did support an actual or perceived romantic involvement, the fact that Jeter was seeing another man—even a man who had beaten Banks at least a year earlier—would not be sufficient for objectively reasonable provocation. (See *People v. Hyde* (1985) 166 Cal.App.3d 463, 473 (*Hyde*) ["we refuse to countenance any suggestion that [victim's] mere dating of [defendant's former girlfriend] after she broke up with [defendant] constitutes provocation"].) " '[E]xtreme jealousy and preoccupation' with a former girlfriend's new boyfriend [does] not constitute 'sufficient provocation.' " (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1414, quoting *Hyde*, *supra*, 166 Cal.App.3d at p. 473.) The cases Banks cites in which infidelity played a role in objectively reasonable provocation also involved other, extreme circumstances. (See e.g., *ibid.* [victim engaged in a two-week pattern of sexually arousing the defendant husband and taunting him into jealous rages over

her love for another man]; *People v. Borchers* (1958) 50 Cal.2d 321, 328–329 [after a long period of admitted infidelity, on the night of victim's death, victim repeatedly urged that defendant shoot her and the child the defendant sought to adopt and taunted him by calling him "chicken"].) Nor is the fact that Thompson attempted to interject into Banks and Jeter's conversation, or may not have attempted to hide his presence at the family home, akin to Thompson attempting to taunt or humiliate Banks in any way.

The trial court correctly chose not to instruct the jury on heat of passion voluntary manslaughter.

V. Senate Bill No. 620

Remand is required for resentencing in light of Senate Bill No. 620. (Stats. 2017, ch. 682.) Senate Bill No. 620 took effect on January 1, 2018, after Banks was sentenced and applies retroactively to cases not yet final on that date. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 424-425 (*McDaniels*).) It vests sentencing courts with discretion to strike or dismiss firearm enhancements, such as the firearm enhancement imposed here, in the interest of justice. (See § 12022.53, subd. (h).) The trial court specifically noted the firearm enhancement was "mandatory," and there is nothing in the record that clearly shows the trial court would not reduce Banks's sentence if given the opportunity. (See *McDaniels, supra*, 22 Cal.App.5th at pp. 427-428.) Remand to permit the trial court the opportunity to exercise its discretion and strike the firearm enhancement is therefore appropriate.

DISPOSITION

The conviction is affirmed. The matter is remanded to the trial court for it to consider the striking of the firearm enhancement in view of Senate Bill No. 620. If the court strikes the enhancement, it shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.