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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA PROFIT,

Defendant and Appellant.

F061998

(Super. Ct. No. BF127246A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Paul A. Bernardino, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On March 22, 2009, appellant Joshua Profit fatally shot fellow Westside Crips gang member Clarence Bagsby. He was charged with first degree murder and the matter proceeded to jury trial. The jury rejected appellant's testimony that he shot the victim in self-defense and convicted him of the lesser included offense of second-degree murder (count 1). It also found him guilty of being a felon while carrying a concealed firearm (count 2). (Pen. Code, §§ 187, subd. (a), 12021.)¹ The jury found firearm use allegations to be true. (§§ 12022.5, 12022.53, subds. (d), (e)(1).) The jury found a gang special circumstance allegation and a gang enhancement allegation to be not true. (§§ 190.2, 186.22.) The court found true one prior serious felony conviction allegation and two prior prison term allegations. (§§ 667, subds. (a)-(e), 667.5, subd. (b).) Appellant was sentenced to an aggregate unstayed term of 55 years to life plus 15 years.

Appellant argues that denial of his requests for grants of judicial immunity to two prospective defense witnesses constituted an abuse of discretion and prosecutorial misconduct. This contention lacks merit. Appellant also argues the special allegation that a principal discharged a firearm causing death in violation of section 12022.53, subdivisions (d) and (e)(1) must be reversed because there is insufficient evidence proving that he violated section 12022.53, subdivision (e)(1). Although we agree that one of the essential elements of section 12022.53, subdivision (e)(1) was not proven, there is ample proof that appellant personally and intentionally discharged a firearm causing death in violation of section 12022.53, subdivision (d), as charged in the information and found true by the jury. Consequently, the finding that appellant violated section 12022.53, subdivision (e)(1) will be stricken, but the finding that appellant violated section 12022.53, subdivision (d) and imposition of the prescribed term of 25

¹ All statutory references are to the Penal Code unless otherwise specified.

years to life will be upheld. Respondent raises an additional claim of error, arguing that the court erroneously imposed the prior prison term enhancements twice. Respondent is correct. The two-year term imposed for these enhancements as part of the sentence on count 2 will be stricken. In all other respects, the judgment will be affirmed.

FACTS

A gang expert testified that on March 22, 2009, appellant, the victim, the victim's cousin Willie Rogers, Anthony Roberson-Anderson and Carlos Roberson were all active members of the Westside Crips gang. The victim's brother, Brian Bagsby, was a Westside Crips gang associate.² The Crips and the Bloods are rival gangs.

At approximately 1:30 p.m. on March 22, 2009, Brian and Willie were together at Willie's house. Brian testified that he received a cell phone call from the victim, who said "that he had got into a fight and they was trying to jump him." The victim asked Brian and Willie to meet him "[a]t the store."

Willie testified that the victim called him at 1:45 p.m. The victim said that he got into a physical fight with "one of his homeboys." Brian was asleep and did not talk to the victim. Willie woke Brian up and they left to meet the victim. Willie concealed a loaded shotgun with a shortened barrel inside his pants.

Brian and Willie walked towards the nearby Payless Market (market). They stopped in front of Mardell Blake's house, which is close to the market. The victim joined them. Then the victim approached Mardell and told her "there had been a confrontation." Mardell "was nervous that there was a confrontation happening in front of [her] house," and told the victim "that's not cool." The victim and his friends started walking in a northerly direction.

² Several of the witnesses are related to each other. To enhance readability and avoid confusion, some percipient witnesses will be referenced by their first names. No disrespect is intended or implied by this informality.

Appellant, Anthony and Carlos were standing by appellant's car, which was parked in the market's parking lot. They walked towards the victim and his companions, stopping in the middle of the street. Mardell heard someone in appellant's group say, "I am going to get you. I am going to get you, Clarence. I am going to get you." Appellant and Carlos accused the victim of "hanging around with Bloods." The victim replied that he was "[d]one messing with fake people." Appellant became angry. Appellant and his companions walked back to appellant's car. Mardell felt that the victim's life had been threatened. She retrieved her cell phone and called the victim, advising him to "go home, you need to get off the streets."

The victim and his companions walked to Virginia Vela's house and sat on her front porch. Garrion Black joined them. The front yard of Virginia's house is enclosed by a four-foot high chainlink fence. A four-foot high wooden picket fence separates the front yard from the back yard.

A few minutes later, Brian saw appellant's car pass by Virginia's house at a normal rate of speed. Appellant was driving; Carlos and Anthony were passengers. Carlos called the victim's cell phone, which Brian was holding. Brian recognized Carlos's voice. Carlos "said that we got to walk home sometime. That they was gonna get us when we walk home."

Approximately 10 minutes later, appellant exited the alley across the street from Virginia's house on foot and walked in front of the house. Willie testified that he saw a gun handle protruding from appellant's pocket so he jumped off the porch, hopped over the wood fence and ran into the backyard. Garrion also fled. Willie testified that he did not see the victim "with a gun at all on that porch at any time that day."

Brian testified that one of appellant's hands was inside a jacket pocket. Brian heard appellant say, "What's up now." Brian saw the victim stand up and then he heard gunshots. Brian was looking at the victim and did not see a gun in the victim's hand. Willie and Garrion hopped over the fence into the backyard. Brian followed them. Brian

looked back at the victim and saw that he was heading towards the fence. Brian heard 18 to 20 shots fired from two different types of guns. Brian did not see from what direction the shots were fired. At one point Brian heard a pause in the shooting before it continued again. Although Brian told the police that appellant fired first and the victim returned fire, when Brian testified he denied seeing anyone fire a gun.

The victim yelled for help and said that he had been shot. Willie and Brian returned to the victim, who was lying on his stomach inside the front yard. A .38-caliber revolver containing five spent casings was lying on the ground at the victim's feet.

The victim was shot 10 to 12 times. Nine bullets entered the victim's back in a tight grouping at the lower left rear shoulder. It was subsequently determined that one bullet entered the victim's arm from a distance of two to four feet and nine bullets entered the victim's back from a distance of "two feet or less." Bakersfield Police Department Sergeant William Darbee testified that based on gun powder residue around the entry wounds he believed that appellant was standing "two feet above [the victim] while [the victim] had his back to him, on the ground" when appellant fired the shots into the victim's back

Appellant's handgun, a .380-caliber semi-automatic pistol, was found in a bush near the crime scene. No unfired bullets remained in the gun. Two Winchester .380 casings were found in the street, one casing was found on the sidewalk and five casings were found in the front yard. A loaded shotgun that had "been cut down" was found behind the picket fence. A Metro PCS cell phone was found on the porch.

The victim and Willie had gunshot residue on both hands. One particle of gunshot residue was found on Brian's left hand. No gunshot residue was found on Garrion's hands. Appellant's gunshot residue kit was not tested because he washed his hands after the shooting.

A gang expert testified that appellant killed the victim to preserve his respect in the Westside Crips gang. The victim hit appellant earlier that day, which showed

disrespect. Appellant, as an older and more senior gang member, had to discipline the victim, who was a younger gang member.

Appellant's family convinced appellant to turn himself in at the police station where officers took him into custody. In a video-recorded interview, appellant said he shot the victim in self-defense. Appellant carried a firearm for protection because of his past as a gang member. Appellant told the police he got in a fist fight with the victim on the day of the shooting because the victim did not help him when he was jumped two or three months ago by some Bloods gang members who were related to the victim. Immediately prior to the shooting, he was traveling to purchase some marijuana when his car broke down. Appellant told the officers that he was alone in the car but someone helped him push it after it broke down. While walking down an alley by himself, appellant saw the victim and two other males sitting on the front porch of a house. One of the males handed the victim a gun. Appellant said, "Little Gator ... it's like that ... you're gonna shoot me over a fist fight[?]" Appellant was standing in the middle of the street when the victim "came off the porch and he started shootin' at me." Appellant fell down and played dead. The victim kept shooting towards the ground. Appellant said he "had no choice to get back up and return fire" because he was "so scared that he was gonna kill me." Appellant walked towards the victim while shooting at him. The victim was climbing over the gate into the front yard when he fell. Appellant jumped the gate.³ Then appellant "went up on him and at least five times shot 'em from on top of him." The victim said, "I'm hit," so appellant stopped shooting and ran away.

Appellant testified in his own defense at trial. Appellant admitted that he has been a gang member since he was 14 years old. On the day of the shooting appellant associated with his friends in the Westside Crips but no longer committed crimes for the

³ Appellant testified that he is six feet and one inch tall and the victim was five feet and seven inches tall.

gang. He was employed as a manager at a McDonald's restaurant. Appellant testified that in 2008 the victim proposed a staged robbery of the McDonald's where appellant worked. Appellant said he refused to participate in such a crime. Appellant also declined to hide a Crips gang member from the police. These decisions made him unpopular with the gang so he felt it was necessary to carry a gun for protection.

Appellant testified that on the day of the shooting he and Anthony went to the market to buy some cigars so they could make marijuana blunts. The victim was standing across the street. Appellant confronted him about an occasion when the victim stood by and watched some members of the Bloods gang jump him. The victim punched appellant in the face and appellant punched him back. The victim walked away and made a cell phone call. The victim walked back and forth "mean-mugging" appellant. Appellant's car would not start. Arvel Street arrived and helped him repair the car. Brian and Willie arrived and met with the victim. Appellant testified that Willie was wearing brown gloves, which meant that he was armed with a firearm. Carlos arrived at the market with his girlfriend. They joined appellant and Anthony. The two groups of males yelled at each other and then walked away.

Appellant testified that he drove Carlos and his girlfriend to appellant's mother-in-law's house. Carlos gave him \$20 to purchase marijuana. Anthony and appellant returned to the area where the market was located to buy marijuana. Appellant's car stalled. They pushed the car into an alley. Then they started walking south to his mother-in-law's house. Appellant last saw Anthony when they exited the alley. Appellant noticed the victim. Then he observed Garrion hand the victim a gun and make a motion indicating for the victim to "go get him." Appellant raised his hands in the air and said, "Clarence, it's over -- it's all over a fist fight? You are going to shoot all over a fist fight?" The victim jumped off the porch and started shooting at appellant. Appellant fell on his back in the middle of the street. The victim fired two or three shots while appellant was on the ground. Appellant reached into his pocket, cocked his gun and fired

once from the ground. Appellant fired a second shot while getting up and a third shot while jumping the gate to rush the victim. The victim turned to run away. Appellant testified the victim “was still a threat to me, and I advanced.” Appellant jumped the gate and charged towards the victim. At that point the victim “was ... standing up.” Appellant testified, “I went blank. I just shot until I couldn’t shoot no more.” When the victim fell to the ground, appellant continued firing until he heard the victim say, “I’m hit, cuz; I’m hit.” Appellant jumped back over the fence and ran away. He hid his gun in a bush and threw his shirt and jacket in a trash can. He left his shoes inside a plastic bag in Carlos’s bedroom. Appellant denied planning to kill the victim and said the shooting “came out of a personal situation” between the victim and himself; it was not a “gang shooting.”

Arvel Street testified that he helped fix appellant’s car in the market’s parking lot on the day of the shooting. A battery cable needed to be replaced so Street warned appellant that the car could stall again.

DISCUSSION

I. Judicial Immunity Was Properly Denied.

A. Facts.

Willie was not charged with any crimes in connection with this case. The prosecution granted Willie immunity and he testified as a prosecution witness. The defense wanted to call Anthony and Carlos as witnesses. Separate counsel was appointed for each of them and, after consulting with counsel, they each invoked their constitutional privilege against self-incrimination and refused to testify. Appellant orally motioned for a judicial grant of immunity to Anthony and Carlos.

Defense counsel made an offer of proof as to each witness. Carlos would testify that he arrived at the market after the fist fight between the victim and appellant. Carlos walked across the street towards the victim. The victim said, “I got love for Carlos.” Carlos heard Anthony yell “something to the effect of, quote, fuck that nigga if you got a

gun, end quote,” which Carlos understood to mean that Anthony thought the victim was armed. Carlos did not see a gun but assumed the victim was armed because he would not take his hand out of his pocket. Carlos heard the victim say, “ain’t no more fighting,” which Carlos understood “to mean that things are going to the next level. And by the next level he is talking about some type of violence beyond fist fights.” Carlos would testify that Anthony yelled things “that might be construed as a threat but only because it appeared that [the victim] had a gun.” They walked back to appellant’s car and waited for it to be repaired. While they were waiting, the victim looked at Anthony and appellant in a menacing manner before walking away. Breon Mosley warned appellant “that he was told that the next time Clarence sees Joshua Profit that shots will be fired.” Carlos gave appellant \$20 and asked him to buy some marijuana. Anthony and appellant left to purchase marijuana from a dealer who was located in the neighborhood where the shooting occurred. Carlos would testify that he did not make a threatening call before the shooting. He did call Brian, “but it was after the shooting and he called to say, hey, this wasn’t supposed to happen.”

Defense counsel said Anthony was interviewed by the police shortly after the shooting. “It has a number of things in here which we believe are exculpatory.” Anthony “is prepared to testify that [the victim] fired first.”

The prosecutor opposed the motion for judicial immunity. He argued that Carlos and Anthony faced liability as co-conspirators for the homicide. Anthony accompanied appellant to the shooting and Carlos made criminal threats and concealed evidence. Granting immunity to these witnesses would invite cooperative perjury.

The trial court denied the motion for judicial immunity. The court stated that it had applied the tests set forth in *People v. Stewart* (2004) 33 Cal.4th 425, 468 (*Stewart*). The court found Carlos’s potential testimony to be clearly exculpatory but not essential. With regard to Anthony, the court found the proffered testimony to be clearly exculpatory and “essential to the extent that it would provide evidence to the jury that [the victim]

fired first at the defendant, which would support the self-defense theory of the case which the defense wishes to assert.” However, “there is a strong governmental interest which countervails against a grant of immunity.” If immunity were granted, it “could create an opportunity for undermining the administration of justice by inviting cooperative perjury among law violators.” The court found there was prima facie evidence of a conspiracy between appellant, Anthony and Carlos, to commit a gang-related crime of violence on the victim. With respect to both Carlos and Anthony, the court did “not find there is evidence to establish that the prosecutor has intentionally refused to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative, exculpatory evidence.”

B. Denial of judicial immunity was not erroneous as a matter of law or fact.

“The state and federal Constitutions guarantee the defendant a meaningful opportunity to present a defense.” (*People v. Lucas* (1995) 12 Cal.4th 415, 456 (*Lucas*)). Yet, this right to compulsory process does not permit the defendant to compel a witness to waive his or her privilege against self-incrimination. (*People v. Woods* (2004) 120 Cal.App.4th 929, 938 (*Woods*)). A trial court is required to permit exercise of the privilege against self-incrimination if there is any possibility the witness’s testimony could serve as a link in a chain of evidence tending to establish guilt of a crime, regardless of the likelihood of prosecution. (*People v. Williams* (2008) 43 Cal.4th 584, 614; *People v. Seijas* (2005) 36 Cal.4th 291, 305.)

“[T]he prosecution has a statutory right, incident to its charging authority, to grant immunity and thereby compel testimony (Pen. Code, § 1324)” (*In re Williams* (1994) 7 Cal.4th 572, 609; *Stewart, supra*, 33 Cal.4th at p. 468.) “Under California law, a witness may not be prosecuted for any act about which he or she was required by the district attorney to testify. (§ 1324.) In addition to broad transactional immunity, there is also ‘use immunity’—‘[i]mmunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom’ [Citation.] Use immunity does

not afford protection against prosecution, but merely prevents a prosecutor from using the immunized testimony against the witness. Use immunity provides sufficient protection to overcome a Fifth Amendment claim of privilege.” (*People v. Cooke* (1993) 16 Cal.App.4th 1361, 1366.)

“[T]here is no authority in this state for the proposition that a prosecutor must request or the trial court must grant immunity to a witness on the ground that the witness’s testimony could be favorable to the defense.” (*People v. Cudjo* (1993) 6 Cal.4th 585, 619.) The California Supreme Court has “characterized as ‘doubtful’ the ‘proposition that the trial court has inherent authority to grant immunity.’ [Citations.]” (*Stewart, supra*, 33 Cal.4th at p. 468.) Yet, it has also concluded that it is “possible to hypothesize cases where a judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant’s rights to compulsory process and a fair trial.” (*People v. Hunter* (1989) 49 Cal.3d 957, 974 (*Hunter*).) Consequently, in several cases involving claims that judicial immunity was improperly denied our Supreme Court has proceeded by first assuming, without deciding, that such inherent judicial authority exists and then analyzing the facts of each particular case to determine if the defendant met the standards under which court-ordered immunity could conceivably be warranted. (*Stewart, supra*, 33 Cal.4th at p. 468; *Hunter, supra*, 49 Cal.3d at p. 975; *Lucas, supra*, 12 Cal.4th at p. 461; *People v. Cudjo, supra*, 6 Cal.4th at p. 619.) We will follow this procedure here.

In *Stewart, supra*, 33 Cal.4th 425, our Supreme Court upheld the trial court’s refusal to grant judicial immunity to a potential defense witness because there existed counterveiling governmental interests weighing against immunity. The *Stewart* court applied two tests it outlined in *Hunter, supra*, 49 Cal.3d at page 974. (*Stewart, supra*, 33 Cal.4th at p. 468.) The first test allows a trial court to grant immunity to a witness when all three of these requirements are satisfied: (1) the proffered testimony is clearly exculpatory; (2) the testimony is essential; and (3) there is no strong governmental interest which countervails against a grant of immunity. (*Id.* at p. 469.) The defendant

bears the burden of making ““a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant’s case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative, or it is found to relate only to the credibility of the government’s witnesses.’ [Citation.]” (*Id.* at p. 469, fn. 23.) The second test is based on a finding of prosecutorial misconduct. It authorizes a trial court to grant immunity to a defense witness “when ‘the prosecutor intentionally refused to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory evidence,’ thereby distorting the judicial factfinding process.” (*Id.* at p. 470.)

i. The trial court did not err as a matter of law.

Appellant argues the trial court erred as a matter of law when it found there were countervailing governmental interests weighing against grants of immunity to Carlos and Anthony. He asserts that the countervailing government interest test focuses on the effect a grant of immunity could have on subsequent prosecution of the witness and not on whether the proposed witness is guilty of a crime or involved in the same criminal enterprise as the defendant. We are not persuaded.

In *Lucas, supra*, 12 Cal.4th 415, our Supreme Court observed that “[o]bviously, as the prosecutor stated, it was contrary to the People’s interest to grant immunity to one potentially involved in a double murder.” (*Id.* at p. 461.) And in *Stewart, supra*, 33 Cal.4th 425, the Court relied on the proposed witness’s culpability in the charged homicides as a countervailing governmental interest weighing against grant of immunity. (*Id.* at pp. 469-470.) The *Stewart* court explained that the prospective defense witness, Solvang, “himself may have been the killer—and if that were true, there certainly would have been a strong governmental interest in not granting Solvang immunity (either ‘transactional’ or ‘use’) from the prosecution.” (*Id.* at p. 469.) Alternatively, “Solvang himself may have been guilty as an aider and abettor of the homicides,” (*ibid.*) and

“conferral of such immunity would have facilitated perjury by Solvang, who had shown himself to be of questionable veracity” (*id.* at p. 470). Next, the court explained that if immunity had been conferred, any later prosecution of the proposed witness would have been hampered. It concluded, “[b]ased upon these considerations, and given Solvang’s apparent complicity and culpability, the prosecution clearly had a strong governmental countervailing interest in not granting him either use or transactional immunity.” (*Id.* at p. 470.)

Following *Lucas* and *Stewart*, we hold that “counterveiling governmental interests” properly include the proposed witness’s possible involvement in the offenses giving rise to the charges against the defendant. Appellant’s argument to the contrary largely relies on federal authorities. “[W]e are not bound by the decisions of the lower federal courts, even on federal questions.” (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) When federal cases are not in conformity with the decisions of our Supreme Court, we reject them as unpersuasive. The decisions of the California Supreme Court are binding on this issue, as on all others. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

ii. The trial court’s factual findings are supported by substantial evidence.

Appellant also argues that the trial court factually erred by concluding there was prima facie evidence supporting a finding that Anthony and Carlos were participants in a conspiracy to commit a crime of violence on the victim. Appellant contends that it is “far more likely” that the victim, “Brian, and Willie were involved in a conspiracy to kill appellant rather than the other way around.” Again, we are not persuaded. The evidence does not show that either Brian or Willie were co-conspirators in a plot to kill appellant. The victim and his friends were not searching for appellant after the confrontation at the market. Instead they retreated to Virginia’s house. Appellant, Anthony and Carlos drove by Virginia’s house where the victim could be observed sitting on the front porch. Soon

thereafter, appellant approached the house on foot with a loaded gun in his pocket. Willie fled the moment he observed a gun handle protruding from appellant's pocket; Brian and Garrion also fled. Although Willie had a loaded shotgun, he did not shoot at appellant. There is no evidence showing that Brian was armed.

In contrast, the evidence amply supports the trial court's finding that appellant, Carlos and Anthony were co-conspirators. Anthony and Carlos participated in the confrontation at the market. Appellant, Anthony and Carlos drove by Virginia's house a few minutes before appellant appeared in front of the house with a loaded gun. Carlos made a threatening cell phone call shortly before the shooting and hid appellant's shoes afterwards. Anthony accompanied appellant to the alley near Virginia's house. From this evidence, the trial court could reasonably conclude that appellant, Anthony and Carlos conspired to commit a crime of violence on the victim. The fact that the jury ultimately found appellant guilty of second degree murder does not render the trial court's finding of prima facie evidence of a conspiracy to be factually unsupported.

Appellant also argues that public policy weighed in favor of a grant of immunity because he was not "attempting to unfairly manipulate immunity to his advantage." We disagree. The trial court's concern that granting immunity to Carlos and Anthony would invite cooperative perjury among co-conspirators was valid and is supported by the evidence. During appellant's police interview, appellant concealed Anthony's and Carlos' involvement in the murder. Appellant did not mention the threatening cell phone call made by Carlos and did not tell the police that Carlos hid his shoes. Appellant did not tell the police that Anthony joined him on the trip to purchase marijuana. Instead, appellant lied to the police and told them he was alone when his car broke down. For appellant to conceal the involvement of these witnesses in the events surrounding the shooting and then seek a grant of judicial immunity so they could testify on his behalf most certainly shows that appellant was attempting to manipulate immunity to his advantage and invites cooperative perjury.

iii. The trial court properly declined to grant judicial immunity to Carlos and Anthony.

The record affirmatively shows that the trial court was aware of the two tests that are applied to requests for judicial immunity. The trial court stated that it had read *Stewart, supra*, 33 Cal.4th 425, and it referred to “the Stewart case” during its ruling. The record supports the trial court’s findings that Carlos’s testimony was not essential and that governmental interests weighed against grants of immunity to Anthony and Carlos. Carlos was not present during the gun battle between appellant and the victim. Carlos did not see who fired first and could not have offered any testimony supporting or refuting appellant’s claim that he fired in self-defense. Thus, Carlos’ testimony was not essential to the theory of the defense. According to the defense’s proffer, Anthony would testify that the victim fired first. Yet, appellant told the police that Anthony was not present at the shooting. Appellant testified that he last saw Anthony when they were both in the alley. Neither Willie nor Brian testified that they saw Anthony in the area during the shooting. Therefore, the veracity of Anthony’s prospective testimony that he saw the victim fire first is doubtful. In light of the “apparent complicity and culpability” of Anthony and Carlos in the victim’s death and the risk of cooperative perjury, the prosecution had strong governmental interests weighing against a grant of immunity. (*Stewart, supra*, 33 Cal.4th at p. 470; *Lucas, supra*, 12 Cal.4th at p. 461.) Appellant “has failed to demonstrate the existence of circumstances in which a trial court might be required to confer use immunity to ensure a fair trial.” (*People v. Cudjo, supra*, 6 Cal.4th at p. 619.) No evidence showed that the prosecutor refused to grant immunity for the purpose of suppressing essential testimony. Accordingly, we conclude that the trial court properly denied the motion for grants of judicial immunity.

II. No Prosecutorial Misconduct Occurred.

A. Facts

After the close of evidence the defense orally motioned for a mistrial based on prosecutorial misconduct or alternatively to reopen the case and compel the prosecutor to grant use immunity to Carlos and Anthony. In response, the prosecutor stated he had never spoken with Carlos or Anthony, did not dissuade them from testifying and had not directed any investigation concerning either of these individuals. The prosecutor said that he told the attorneys who were appointed to represent Carlos and Anthony what charges their clients could face. The prosecutor did not tell their attorneys that he was thinking about filing such charges or indicate that he would file charges if they testified. Then the prosecutor stated: “Obviously, Carlos and Anthony both felt that, based on their conversations with their attorney, they could incriminate themselves, giving credence to potentially my theory that Carlos and Anthony, you know, were in on the conspiracy and they knew what was happening and they helped in some manner, Carlos by the phone call and Anthony by, you know, being there in the alley and also yelling the threats in the street.”

The prosecutor also explained that he did not find Carlos to be trustworthy. Carlos told the police that he did not know anything about the shooting, which was not true because Carlos hid appellant’s shoes under his house. In the offer of proof Carlos “said he didn’t call Brian on the porch.... But if we look at People’s Exhibit 15, it shows an incoming call just prior to the shooting.”

The prosecutor also stated that “Anthony was not a willing witness.” The prosecutor pointed out that appellant had testified that he lied to the police when he told them that Anthony was not in the alley with him because “Anthony didn’t want to be involved.” Thus, the prosecutor does not “know how much of a willing witness Anthony has been.”

Further, the prosecutor pointed out that he did not give immunity to Brian or Garrion. He would have liked to give immunity to Garrion, but did not think it was appropriate based on the circumstances. The prosecutor stated that he gave Willie immunity because “he was honest from the start. In his videotaped interview he admitted having that illegal gun. All of his illegal activity was already on videotape before this case ever came to trial. He also testified at a preliminary hearing, and he admitted it again. Everything Willie said was already on record. There was nothing he could have said on the stand that would have made things any different.” The prosecutor did not give Willie a plea bargain involving any other pending cases. The prosecutor believes that Willie was arrested for possession of marijuana and “at one point he had a failure to appear because he didn’t take care of them.” The prosecutor said he had “not done anything to help him in any case.” Further, he did not “plan on helping him in any cases, and that was not part of any agreement with Willie Rogers.”

Finally, the prosecutor stated that he thought Anthony and Carlos “probably would have helped my case. I think that they would have been inconsistent, and I think they would have only helped. Usually when gang members testify it helps my case.”

The court denied the mistrial motion and the motion to reopen the case. It found this case was factually distinguishable from *United States v. Westerdahl* (9th Cir. 1991) 945 F.2d 1083 (*Westerdahl*). It did “not find that there has been an un rebutted prima facie showing of prosecutorial misconduct that could have prevented a defense witness from giving relevant testimony. I do believe that the allegation of prosecutorial misconduct has been rebutted by [the prosecutor] in his offers of proof.” Also, Anthony and Carlos were liable as co-conspirators in the murder. For these reasons and “considering all of the circumstances,” the court did “not find that the defense has met its burden to establish either as a prima facie un rebuttable case that would require some further evidentiary hearing or to persuade this Court that the prosecutor in this case has acted with the deliberate intention of distorting the fact-finding process.”

B. The prosecutor did not intentionally refuse to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative, exculpatory evidence, thereby distorting the fact-finding process.

“To establish a violation of his compulsory process rights, a defendant ‘must establish three elements. “First, he must demonstrate prosecutorial misconduct, i.e., conduct that was ‘entirely unnecessary to the proper performance of the prosecutor’s duties and was of such a nature as to transform a defense witness willing to testify into one unwilling to testify.’ ” [Citation.] Second, he must establish the prosecutor’s misconduct was a substantial cause in depriving the defendant of the witness’s testimony. [Citation.] ... Finally, the defendant must show the testimony he was unable to present was material to his defense. [Citation.]’ ” (*Woods, supra*, 120 Cal.App.4th at p. 936, quoting *People v. Lucas, supra*, 12 Cal.4th at p. 457.) “The federal due process test ... also recognizes the ‘“exclusive authority and absolute discretion” ’ vested in the prosecution to grant immunity to a witness, and intrudes upon that discretion only where the prosecution violates the defendant’s right to a fair trial by refusing to grant use immunity to a witness whose testimony would have been relevant ‘ “with the deliberate intention of distorting the fact-finding process.” ’ [Citations.] *Intentional* distortion of the fact-finding process requires government action that amounts ‘to something akin to prosecutorial misconduct.’ [Citation.]” (*People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1552 (*Hollinquest*)). Grant of judicial immunity may be appropriate “when ‘the prosecutor intentionally refused to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory evidence,’ thereby distorting the judicial factfinding process.” (*Stewart, supra*, 33 Cal.4th at p. 470.)

When reviewing denial of appellant’s mistrial motion and motion to reopen the case for grant of judicial immunity based on prosecutorial misconduct, we “focus on the prosecutor’s motives for withholding immunity from” Carlos and Anthony. (*Hollinquest, supra*, 190 Cal.App.4th at p. 1552.) The record does not contain any evidence suggesting that threats, intimidation or coercion were exerted by the prosecutor upon

Carlos or Anthony to preclude them from making a free and voluntary choice not to testify. The prosecutor did not threaten to charge Anthony or Carlos with any crimes if they testified as defense witnesses. The prosecutor explained to the court that he decided not to grant Carlos and Anthony immunity because he believed the evidence showed that they were participants in a conspiracy to commit a gang-related act of violence on the victim and granting them immunity would invite cooperative perjury. As we have previously explained, the evidence supports the finding that Carlos and Anthony were co-conspirators. The trial court found the prosecutor's explanation why he declined to grant Carlos and Anthony immunity to be credible and we discern no basis to overturn this finding.

Citing *United States v. Straub* (9th Cir. 2008) 538 F.3d 1147, 1158, appellant asserts that the prosecutor impermissibly denied immunity to Carlos and Anthony because they would have directly contradicted Willie. We are not convinced. Willie did not testify that appellant fired first. Willie testified that he was running away when the shots were fired and did not see who fired the first shot. Thus, if Anthony were to have testified that the victim fired first, such testimony would not have directly contradicted Willie's testimony. Carlos was not present at the time of the shooting and could not have seen who fired first. Therefore, appellant's contention that the prosecutor presented immunized testimony that he fired first while refusing immunity to a witness who would have directly contradicted the immunized witness fails.

In addition, the prosecutor did not extensively rely on immunized testimony in presenting the People's case. Willie was the only witness who received immunity for his testimony. Willie was not offered a plea bargain in any pending case or otherwise promised lenity or consideration in exchange for his testimony. Appellant's speculation that the prosecutor would have immunized Brian if it had been necessary is not supported by the record. These facts distinguish this case from *Westerdahl, supra*, 945 F.2d 1083, which appellant argues is analogous. In *Westerdahl*, the People presented the

testimony of two immunized witnesses and one plea-bargain witness who was promised that in exchange for his testimony pending charges would be dismissed.

Finally, appellant contends that the prosecutor exhibited a pattern of presenting distorted evidence throughout the trial, thereby supporting an inference that he denied immunity to Carlos and Anthony with the intent to distort the fact-finding process and suppress essential, noncumulative and exculpatory evidence. This argument is not convincing. We have examined the trial record closely and do not find any instance in which the prosecutor exceeded the bounds of propriety or manipulated the evidence in an intentionally misleading manner. The prosecutor did not withhold exculpatory evidence from appellant.

Appellant's complaints about the prosecutor's focus on appellant's admission to police officers that he shot the victim in the back lack merit. The prosecutor properly focused the jury's attention on evidence proving that appellant intentionally murdered the victim by firing numerous rounds into his back. The location of the entry wounds is important because it refutes appellant's self-defense claim. Also, appellant admits there is no direct evidence that the prosecutor "personally coached" Sergeant Darbee. The prosecutor did not commit any misconduct during examination of forensics expert Dianna Matthias. He elicited testimony from Matthias concerning the distance from which appellant fired the shot that hit the victim's arm. The fact that Matthias gave more specific testimony during cross-examination does not support an inference of prosecutorial misconduct.

Additionally, respondent persuasively contends that Carlos and Anthony could not have been affected by the prosecutor's examination of these three witnesses because they were excluded from the courtroom at that time. There is no "causal link" between the alleged prosecutorial misconduct and appellant's inability to present the testimony of Carlos and Anthony. (*Stewart, supra*, 33 Cal.4th at p. 471.) Appellant cannot show that the prosecutor's examination of these witnesses either transformed Carlos and Anthony

from willing witnesses to unwilling witnesses or was a substantial cause for their decisions to invoke the privilege against self-incrimination.

For all of these reasons, we conclude that appellant did not satisfy his burden of proving that the prosecutor denied immunity to Carlos and Anthony “with the deliberate intention of distorting the factfinding process.” (*Stewart, supra*, 33 Cal.4th at p. 471.) There is no evidence that the prosecutor harbored an improper motive or engaged in any misconduct that resulted in Carlos and Anthony deciding to assert the privilege against self-incrimination. In the absence of any evidence of improper motive or other misconduct that resulted in assertion of the privilege against self-incrimination, we cannot conclude that the prosecutor acted with the specific objective of preventing Anthony or Carlos from testifying. Thus, the mistrial motion and the motion to reopen the case and grant judicial immunity were properly denied. (*Id.* at pp. 470-472 [refusal to grant immunity was not intentional distortion of the factfinding process]; *Hollinquest, supra*, 190 Cal.App.4th at pp. 1551-1553 [refusal to grant immunity was not prosecutorial misconduct].)

III. Defendant’s Sentence Was Properly Enhanced Pursuant To Section 12022.53, subdivision (d).

A. Facts.

In relevant part, the information alleged appellant “was a principal in the [charged murder], and, in the commission of the offense, at least one principal intentionally and personally discharged and personally used a firearm, and proximately caused great bodily injury or death, to a person other than an accomplice, within the meaning of Penal Code section 12022.53(D) and (E)(1).” (Capitalization omitted.)

The jury was instructed on the section 12022.53 enhancement with modified versions of CALJIC Nos. 17.19 and 17.19.5. CALJIC No. 17.19 instructed the jury on the meaning of the terms “firearm” and “personally used a firearm.” CALJIC No. 17.19.5 is entitled “intentional and personal discharge of firearm/great bodily injury

(Penal Code § 12022.53, subdivisions (c) and (d)).” (Capitalization and bolding omitted.) As given, this instruction provided:

“It is alleged in Count one that the defendant intentionally and personally discharged a firearm and caused death to a person during the commission of the crime charged. [¶] If you find the defendant guilty of the crime thus charged, you must determine whether the defendant intentionally and personally discharged a firearm and caused death to a person in the commission of that felony.

“The word ‘firearm’ includes a handgun.

“The term ‘intentionally and personally discharged a firearm,’ as used in this instruction, means that the defendant himself must have intentionally discharged it.

“A cause of death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the death and without which the death would not have occurred.

“The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

“Include a special finding on that question in your verdict, using a form that will be supplied for that purpose.” (Brackets omitted.)

The jury found the “section 12022.53(d) [and] (e)(1)” enhancement to be true.

The verdict form was phrased, as follows:

“We, the Jury, empanelled to try the above entitled cause, find it to be true the defendant, JOSHUA PROFIT, was a principal in the foregoing offense and in the commission of the offense, at least one principal did personally and intentionally discharged a firearm which proximately caused great bodily injury or death to another person, not an accomplice, during the commission of the above crime, within the meaning of Penal Code section 12022.53(d) [and] (e)(1), as to a lesser but necessarily included offense in the crime charged in the first count of the Information.”

The jury separately found an enhancement alleging that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a) to be true. The jury found a section 186.22, subdivision (b)(1) gang enhancement not true.

During sentencing, the court stated, “The defendant is sentenced to the Department of Corrections for the term prescribed by law of 30 years to life. Said sentence to be enhanced by 25 years per Penal Code Section 12022.53 [s]ubdivision (d) - is it (d) and (e)(1)?” The prosecutor replied, “(d) and (e)(1) is the way we had it.” The court asked the probation officer, “It should be (d) and (e)(1). Correct, Mr. Boaz?” The probation officer replied, “Yes, your Honor.” In relevant part, the minutes of the sentencing hearing provides that appellant was sentenced to 30 years on count 1 “plus enhancement for allegation number 3 as to count 1 pursuant to PC 12022.53 (D)(E)(1) of 25 year(s).” (Capitalization omitted.)

B. The section 12022.53 enhancement was properly imposed because there is substantial evidence supporting the jury’s finding that appellant violated subdivision (d) of this section.

Section 12022.53, subdivision (d) increases the punishment for defendants who have personally and intentionally shot a victim and thereby caused great bodily injury or death. This subdivision provides:

“... [A]ny person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 26100, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.”

Section 12022.53, subdivision (e)(1) is a gang-related enhancement provision. It does not require the defendant to have personally fired a gun. Rather, it increases the punishment for defendants who participated in a gang-related crime in which one of the principals fired a gun and thereby caused great bodily injury or death. This subdivision provides that the enhancements apply to any person who is a principal in the commission of an offense if it is proved that the person violated section 186.22, subdivision (b), and also proved that any principal in the offense committed any act that is specified in section 12022.53, subdivision (b), (c), or (d).

Appellant argues that the section 12022.53, subdivisions (d) and (e)(1) enhancement must be reversed for insufficiency of the evidence because the People did not prove that he violated section 12022.53, subdivision (e)(1). Respondent argues that the jury found appellant liable as the actual shooter pursuant to section 12022.53, subdivision (d), not as an aider and abettor requiring pleading and proving of the gang enhancement.

Neither appellant's nor respondent's position on this issue is convincing. As we will explain, the jury found true one enhancement allegation that appellant violated both subdivision (d) and subdivision (e)(1) of section 12022.53. The finding that appellant violated subdivision (d) of section 12022.53 is severable from the finding that appellant violated subdivision (e)(1). The finding that appellant violated subdivision (e)(1) of section 12022.53 must be stricken because the jury found that the section 186.22, subdivision (b) gang enhancement allegation was not true. Yet, there is ample proof supporting the jury's finding that appellant violated subdivision (d) of section 12022.53. Therefore, appellant's sentence on count 1 was properly enhanced by 25 years pursuant to section 12022.53, subdivision (d).

“In determining whether the evidence is sufficient to support a conviction or an enhancement, ‘the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citations.]” (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.) In doing so, we “ ‘neither reweigh[] evidence nor reevaluate[] a witness’s credibility.’ ” (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) In addition, we presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

The jury's finding that appellant violated subdivision (e)(1) of section 12022.53 is not supported by substantial evidence because the jury returned a not true finding on the

gang enhancement allegation (§ 186.22, subd. (b)). Thus, an essential element necessary to prove subdivision (e) of section 12022.53 was not established.

Yet, the jury's finding that appellant violated subdivision (d) of section 12022.53 is supported by substantial evidence. The jury found appellant guilty of murder, which is a crime specified in subdivision (a) of section 12022.53. Appellant admitted personally shooting the victim multiple times. It was determined during the autopsy that the victim died from multiple gunshot wounds. There is proof that appellant intentionally shot the victim. Appellant and the victim argued with each other shortly before the shooting and Mardell heard a member of appellant's group threaten "to get" the victim. The shooting was not accidental and the jury rejected appellant's claim that he fired in self-defense.

There is no evidence indicating that jurors might have disagreed about the particular act that appellant committed. The jury was instructed on section 12022.53, subdivision (d), and the verdict form references this subdivision.⁴ The jurors found appellant guilty of murder and also found a section 12022.5 enhancement allegation for personal firearm use to be true. Thus, the record affirmatively shows that the jury unanimously found appellant personally and intentionally murdered the victim by shooting him multiple times. Consequently, the jury's finding that appellant violated subdivision (d) of section 12022.53 is severable from its finding that appellant violated subdivision (e)(1) of this section.

The punishment for violating subdivision (d) of section 12022.53 is "an additional and consecutive term of imprisonment in the state prison for 25 years to life." (§ 12022.53, subd. (d).) The trial court properly sentenced appellant on count 1 in accordance with subdivision (d) of section 12022.53 by imposing a term of 25 years to life for the section 12022.53 enhancement.

⁴ Appellant did not raise any objection to the jury's instructions on the section 12022.53 enhancement or the wording of the verdict form.

We will strike the finding that appellant violated subdivision (e)(1) of section 12022.53 and order preparation of a corrected abstract of judgment. (*People v. Flores* (1960) 177 Cal.App.2d 610, 612-614.)

IV. The Prior Prison Term Enhancements Were Erroneously Imposed Twice.

Respondent raises a claim of sentencing error, arguing that the court *twice* imposed terms of imprisonment for the prior prison term enhancements (§ 667.5, subd. (b)). Appellant does not dispute this point. We have reviewed the record and find respondent’s claim of error to be well-taken.

The court enhanced the sentence imposed for count 1 “by two years per the two allegations of [s]ection 667.5 [s]ubdivision (b) of the Penal Code.” The court enhanced the sentence imposed for count 2 “by two years per the two allegations of [s]ection 667.5 [s]ubdivision (b) of the Penal Code. Said sentence to be served fully consecutive to the sentence imposed above.” The minutes of the sentencing hearing reflect that the sentences imposed on counts 1 and 2 were both enhanced by two years for the section 667.5, subdivision (b) enhancements.

An enhancement imposed pursuant to section 667.5, subdivision (b) can be imposed only once as a component of the offender’s aggregate term. (*People v. Tassell* (1984) 36 Cal.3d 77, 89-92.) In this case, the court erred by imposing the prior prison term enhancements twice. This sentencing error is easily remedied. In circumstances such as this, the appellate court “may correct this error without remanding for further proceedings in the presence of [appellant].” (*People v. Smith* (2001) 24 Cal.4th 849, 854.) We will modify appellant’s sentence on count 2 by striking the two-year term that was imposed for the section 667.5, subdivision (b) enhancements.

DISPOSITION

The true finding on the Penal Code section 12022.53 enhancement is modified to strike the reference to subdivision (e)(1). The sentence on count 2 is modified to strike the term of two years’ imprisonment that was imposed for the section 667.5, subdivision

(b) enhancements. In all other respects the judgment is affirmed. The superior court is ordered to prepare a corrected abstract of judgment reflecting these modifications and to transmit a certified copy of it to the appropriate authorities.

LEVY, Acting P.J.

WE CONCUR:

KANE, J.

POOCHIGIAN, J.