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

THE PEOPLE,

Plaintiff and Respondent,

v.

JARRAD BEARD, et al.,

Defendants and Appellants.

F066422, F066548

(Super. Ct. No. F11907194)

OPINION

APPEAL from judgments of the Superior Court of Fresno County. Denise R. Whitehead, Judge.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant Jarrad Beard.

Peggy A. Headley, under appointment by the Court of Appeal, for Defendant and Appellant Jerry Beard.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Michael Dolid, Deputy Attorneys General, for Plaintiff and Respondent.

In this consolidated appeal we uphold judgments of conviction against brothers Jarrad and Jerry Beard arising from the shooting deaths of two young men. A jury found Jarrad Beard guilty of two counts of voluntary manslaughter and one count of discharging a firearm in a grossly negligent manner. He was sentenced to an aggregate term of 34 years in prison, which included enhancements for personal use of a firearm within the meaning of Penal Code section 12022.5 (all undesignated statutory references are to the Penal Code). The same jury found Jerry Beard guilty of one count of voluntary manslaughter and returned a true finding on an accompanying section 12022.5 enhancement. He was sentenced to 10 years of confinement in the Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ).

Appellants were acquitted of more serious charges based on the jury's apparent conclusion that they acted in imperfect self-defense during a confrontation with the victims. Both contend the jury would likely have returned verdicts of involuntary manslaughter had it been instructed on such a theory, and claim the trial court's failure to so instruct was prejudicial error. Jarrad Beard presents an additional claim of instructional error based on the use of CALCRIM No. 361 ("Failure to Explain or Deny Adverse Testimony") in the alleged absence of a proper evidentiary foundation.

The firearm enhancements are challenged on grounds that the accusatory pleading did not provide adequate notice of appellants' potential liability under section 12022.5. This issue is framed in terms of whether or not section 12022.5, subdivision (a) can be construed as a "lesser included enhancement" of section 12022.53, subdivision (d). We answer that question in the affirmative, and reject appellants' alternative argument that implied findings of unreasonable self-defense precluded imposition of the enhancements as a matter of law.

This appeal also includes a claim that racial discrimination tainted the jury selection process. We find this assertion to be meritless. Finally, there are numerous allegations of sentencing error. All submissions of error and prejudice are rejected with

the exception of Jerry Beard's challenge to a restitution order pertaining to charges for which he was acquitted. The order in question will be stricken. The judgments are otherwise affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying incident occurred in northwest Fresno on December 20, 2011. Jarrad Beard, then age 19, spent part of the day at his mother's house smoking marijuana and playing video games with his brothers, Jerry (age 15) and Jarett (age 14), and a friend of theirs named Adam Frisby (age 16).¹ At some point in the late afternoon or early evening, the group walked to a convenience store located near the corner of Herndon and Polk Avenues to purchase "wraps" for rolling marijuana cigarettes. In preparation for this errand, Jarrad and Jerry armed themselves with two handguns: a .45-caliber Colt Commander and a nine-millimeter (9mm) Imez Makarov.

After purchasing items from the store, Jarrad and his companions started to walk back home. While crossing Herndon Avenue, the boys exchanged unfriendly looks with a group of strangers in a pickup truck stopped at a traffic light. The driver of the truck was 18-year-old Justin Hesketh. Mr. Hesketh was accompanied by passengers Brandon Moore (age 16) and Sawyer Drehman (age 15).

When Jarrad reached the other side of the street, he fired a shot at Mr. Hesketh's vehicle with one of his guns, hitting the front left tire and causing it to deflate. Mr. Hesketh and Mr. Moore subsequently exited the truck and chased Jarrad and his group into a nearby apartment complex. Sawyer Drehman stayed behind with the vehicle. A confrontation ensued inside of the complex and ended with Mr. Hesketh and Mr. Moore being killed by gunfire.

¹ We hereafter periodically refer to appellants by their first names, as commonly done in the interest of clarity and efficiency when multiple parties share the same last name.

Justin Hesketh sustained three bullet wounds to his neck and chest. Brandon Moore was shot four times; once in the chest, once in the thigh, and once in each arm. Jarrad Beard later confessed to shooting the victims with his Colt .45. Jerry Beard admitted to firing a single shot from the 9mm pistol.

Appellants were each charged with two counts of murder (§ 187, subd. (a)) in an information filed by the Fresno County District Attorney. Jarrad was further charged with one count of shooting at an occupied vehicle (§ 246). The information contained multiple-murder special circumstance allegations (§ 190, subd. (a)(3)) and enhancement allegations under section 12022.53, subdivision (d) for personal and intentional discharge of a firearm causing great bodily injury or death. Jerry was prosecuted as an adult pursuant to Welfare and Institutions Code section 707, subdivision (d)(2). The case went to trial in October 2012.

The prosecution's case-in-chief established the information summarized above. Forensic evidence indicated that most of the victims' wounds had been caused by the higher caliber weapon used by Jarrad. Accepting as true Jerry's statement that he fired the 9mm pistol one time, the prosecution argued his shot was responsible for the bullet that struck Justin Hesketh in the neck.

The basic facts were uncontroverted, but there were conflicting accounts regarding whom among the parties had acted as the initial aggressor. According to Sawyer Drehman, the victims made no attempt to confront or pursue the defendants until after Jarrad had fired a bullet into the front tire of their vehicle. Sawyer testified that the truck was about to proceed southbound on Polk Avenue when suddenly they heard a loud "bang" and Justin Hesketh said, "They threw something at the car." Mr. Hesketh then made a U-turn and parked on the side of the road. The prosecution theorized that neither victim realized the Beard brothers were armed until they caught up with them inside of the apartment complex.

Jarrad claimed he shot at the truck only after it became apparent the driver intended to make a U-turn in his direction. He explained: "I was thinking, because if they coming towards us, they doing something funny." Jarrad waited until he had "a clear shot of the tire," then took aim and fired. His reasoning at the time was that shooting out the tire would "slow them down in traffic."

Another point of contention was the victims' alleged use of a racial epithet. A resident of the apartment complex testified to seeing Jerry and another boy running from the victims and hearing Brandon Moore say, "Get back here you little fucker." Jarrad claimed one or both of the victims had yelled something to the effect of, "Get over here you fuckin' nigger...we're fixin' [to] kill you."

The defense case relied heavily on evidence which showed Justin Hesketh and Brandon Moore were under the influence of methamphetamine at the time of their deaths. Two expert witnesses were called to testify about the likely effects of the drug at the levels found in the decedents' systems. It was also revealed that Mr. Hesketh had been in possession of what is colloquially known as a "fistpack." The four-inch piece of metal, when clenched in a person's fist, would have hardened the impact of a punch.

Testifying in his own defense, Jarrad explained that he had obtained and carried his guns for self-defense purposes. He purchased the 9mm Makarov from an acquaintance in late November or early December 2011 after being attacked outside of his girlfriend's apartment in an unrelated incident. Jarrad acquired the Colt .45 just hours before the shootings of Justin Hesketh and Brandon Moore after he convinced its previous owner to trade him the gun for a half ounce of marijuana and approximately \$30 in cash.

As for the actual shootings, Jarrad described coming face-to-face with the victims and brandishing his weapon so they could see it, while at the same time running backwards and demanding that they "back up." When the men continued to move towards him, he opened fire. Once the shooting was over, Jarrad and Jerry returned to

their mother's house, cleaned themselves up, and resumed their activities of earlier in the day, i.e., smoking marijuana and playing videogames.

The jury acquitted appellants of all crimes charged in the information. Jarrad was convicted of two counts of voluntary manslaughter as a lesser included offense of murder, and of grossly negligent discharge of a firearm (§ 246.3) as a lesser included offense of willfully discharging a firearm at an occupied vehicle. He was found to have personally used a firearm within the meaning of section 12022.5, subdivision (a) during commission of the voluntary manslaughter offenses. Jerry Beard was convicted of voluntary manslaughter only in relation to the death of Justin Hesketh, and was also found to have violated section 12022.5, subdivision (a).

The trial court sentenced Jarrad to a total of 34 years in prison and imposed various fines and fees. His sentence was calculated as follows: As to count 1, voluntary manslaughter of Justin Hesketh, the aggravated term of 11 years plus the aggravated term of 10 years for the section 12022.5 firearm enhancement. As to count 2, voluntary manslaughter of Brandon Moore, the aggravated term of 11 years plus 16 months for the related firearm enhancement (representing one-third of the middle term), to be served consecutive to the terms imposed under count 1. As to count 3, grossly negligent discharge of a firearm, a consecutive term of 8 months (representing one-third of the middle term).

Jerry received a 10-year sentence comprised of the middle term of 6 years for voluntary manslaughter and the middle term of 4 years for the section 12022.5 enhancement. Pursuant to Welfare and Institutions Code section 1731.5, the trial court ordered him committed to the DJJ for the duration of his sentence. Various fines and fees were also imposed (see Discussion, *infra*).

DISCUSSION

Wheeler/Batson Motion

Appellants allege error in the prosecution's use of peremptory challenges to excuse four Hispanic prospective jurors during the jury selection process, and in the trial court's overruling of their objections to those challenges under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*). The Beard brothers were identified as African-American on juror questionnaire forms, but after the prosecutor began exercising his challenges, defense counsel submitted that Jarrad and Jerry were each one-quarter Hispanic. Relying on this ethnic commonality, Jarrad's attorney argued that a "side-by-side analysis of the other jurors, the questions that were asked, the responses, [and] the lack of cause challenges to any of those jurors by the prosecutor" established a prima facie showing of racial discrimination for purposes of a *Wheeler/Batson* motion. The trial court accepted this argument and gave the prosecutor an opportunity to respond.

The prosecutor noted that a significant percentage of the prospective juror panel was Hispanic. He also described his general approach to the selection process: "[W]hat I am ultimately after are jurors who are intelligent, who have life experience, who have a stake in this community, who are responsible and productive [members] of this society. Those are the types of people who I believe will follow the law, who will take their duties seriously, and have the mental ability to understand and follow the law...." These remarks were followed by separate explanations for each of the four disputed challenges (see further discussion, *infra*).

The trial court acknowledged that the majority of the panel had been comprised of Hispanic individuals, thus causing it to doubt whether the defense had actually established a prima facie claim of discriminatory conduct. The court ruled that the burden shifted to the prosecution because of the low threshold of proof required at the first stage of a *Wheeler/Batson* inquiry, but ultimately found "each and every one of the

explanations given by [the prosecutor] to be race-neutral and proper grounds for consideration in exercising peremptory challenges.” The explanations were credited at face value, and the *Wheeler/Batson* motion was denied. We find no error.

Applicable Law

State and federal law prohibits the use of peremptory challenges to strike prospective jurors on the basis of race or ethnicity. (*People v. Avila* (2006) 38 Cal.4th 491, 541, citing *Batson*, *supra*, 476 U.S. at p. 88; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) A three-step procedure is used to evaluate allegations of such discrimination. “First, the defendant must make out a prima facie case ‘by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.’ Second, once the defendant has made out a prima facie case, the ‘burden shifts to the State to explain adequately the racial exclusion’ by offering permissible race-neutral justifications for the strikes. Third, ‘[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.’” (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. and citations omitted.)

Appellants’ claim concerns the third stage of the analysis, where “‘the issue comes down to whether the trial court finds the prosecutor’s race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor’s demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.’” (*People v. Lenix* (2008) 44 Cal.4th 602, 613 (*Lenix*), quoting *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.) Our review of the trial court’s ruling examines “only whether substantial evidence supports its conclusions.” (*Lenix*, *supra*, 44 Cal.4th at p. 613.) We presume the prosecution used its peremptory challenges in a lawful manner and accord “great deference to the trial court’s ability to distinguish bona fide reasons from sham excuses.” (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) “So long as the trial court makes a

sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.” (*Ibid.*)

Prospective Juror A.R.

A.R. was a 22-year-old single parent who was living with her mother at the time of trial. She had worked at Target for approximately three years following her graduation from high school. The prosecutor claimed to have concerns regarding A.R.’s youth and lack of life experience, but was particularly troubled by disclosures about her brother’s history of methamphetamine use and his recent conviction of a gang-related offense. The following explanation was given to the trial court:

“The main issue dealt with her brother... As I understood what she said, her brother had been accused of a gang crime. Charges had been filed. He’d been sentenced. He was essentially – I gathered he was sentenced on gun charges. It was a case that went to trial here... She also, I believe, expressed the fact, if I’m correct, that it [was] the same brother who had methamphetamine problems. It’s something she had experienced. That is a particular issue with me in this case. While she somewhat minimized – well, I’m not sure if she minimized, she gave me information about what she had observed with his drug use.

Taking together all of my concerns, her youth, the fact she had somebody closely involved with gang-related charges who had been sentenced and who she had actually attended the sentencing for, if I’m correct, she was somebody that I did not believe would have the life experience or really a stake in the community to be a good juror for this case. I do recognize that she had a grandfather or grandmother and [the grandmother’s] husband who were in the Sheriff’s Department in another county, or one was retired [and] one was still in the county. That was something I considered, but it really came down to when she talked about her brother, and the issues surrounding her brother, including the drug use, that caused me to think that this is not a juror who would be fair and impartial.”

The record shows A.R. did in fact make the referenced statements about her brother. Our Supreme Court has recognized that “a prospective juror’s family’s negative experience with the justice system [is] a legitimate potential reason to want to excuse a juror.” (*People v. Duff* (2014) 58 Cal.4th 527, 546, citations omitted.) Youth, immaturity, and limited life experience are also valid race-neutral justifications for

challenging a prospective juror. (*People v. Arias* (1996) 13 Cal.4th 92, 139; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328.) The trial court thus had a factual and legal basis for accepting the prosecutor's explanation.

Appellants argue that a "comparative juror analysis" shows the reasons given by the prosecutor were pretextual. "The rationale for comparative juror analysis is that a side-by-side comparison [of the characteristics and voir dire responses] of a prospective juror struck by the prosecutor with a prospective juror accepted by the prosecutor may provide relevant circumstantial evidence of purposeful discrimination by the prosecutor." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 109.) This type of analysis is mandatory on appeal, but not necessarily dispositive of the unlawful discrimination issue. (*People v. Chism* (2014) 58 Cal.4th 1266, 1318.) We employ the analysis as part of the substantial evidence test, adhering to the same presumption of correctness and degree of deference to which the trial court's findings are entitled. (*People v. Johnson* (2015) 61 Cal.4th 734, 755.)

Comparative juror analysis confirms that race was not the only distinguishing characteristic between A.R. and the non-Hispanic jurors who were allowed to remain on the panel. Although some non-Hispanic jurors shared the traits of youth and family histories of drug use and/or criminal convictions, none had the same combination of these factors. For example, appellants point out that Jurors Nos. 2 and 23 had relatives with criminal convictions and substance abuse problems, but ignore that both of those jurors were in their 40s, were married, and had achieved higher levels of education than A.R. Any circumstantial inference of race-based discrimination under these facts does not negate the substantial evidence in support of the trial court's ruling.

It appears the trial judge made a sincere and reasoned attempt to evaluate the explanation given for the peremptory challenge. On this point we note that "[w]hen the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings." (*People v. Silva*

(2001) 25 Cal.4th 345, 386.) Based on the totality of the circumstances, the prosecutor's explanation for striking A.R. was plausible. Therefore, we will not disturb the trial court's finding that it was also genuine.

Prospective Juror S.L.

S.L. was a high school drop out with a prior criminal record. He reported having work experience as a beekeeper. Like A.R., this prospective juror still lived with his mother. The prosecutor gave the following reasons for using his first peremptory challenge to strike S.L. from the panel:

"I would, first of all, note that he, himself, did not identify himself as being Hispanic on the questionnaire. He is a 20-year-old, single, no children, he had not completed high school. He lives at home. Those are issues that are important to me [i.e.,] somebody who has life experience. He does not have the life experience that I would be looking for.

He has a 2009 conviction for burglary in this county, prosecuted by the District Attorney's Office. He mentioned on the questionnaire that there had been somebody with a prior conviction, a close friend or relative with a prior conviction. He did not say whether or not he was satisfied or not with the outcome. In making observations of [S.L.], Detective Paul Cervantes, who is seated with me ... noted a couple of tattoos, Bulldog² tattoos, two of them....

[T]he factors that I have difficulties with him are, first of all, low education, no life experience, prior criminal conduct. It would suggest that he's not somebody who has a stake in this community and would be willing to follow the laws. And I don't think, given his age, lack of experience, lack of education he would be able to address some of the complex legal issues in this case, and the factual issues, I would say."

² On our own motion, we take judicial notice that there is a criminal street gang in Fresno County known as the "Bulldogs." (Evid. Code, §§ 452, subs. (g) & (h), 459.) We have knowledge of this fact from, among other sources, numerous published and unpublished cases involving the gang and its members. (E.g., *People v. Urbano* (2005) 128 Cal.App.4th 396, 399; *In re Jorge G.* (2004) 117 Cal.App.4th 931, 937.)

We have no reason to second-guess the trial court’s denial of the *Wheeler/Batson* motion as it pertained to S.L. A prospective juror’s own criminal history is a “fully legitimate and understandable reason for prosecutorial concern” during voir dire. (*People v. Harris* (2013) 57 Cal.4th 804, 877 (conc. opn. of Liu, J.), citing *People v. Lomax* (2010) 49 Cal.4th 530, 575 [stricken juror had suffered a prior misdemeanor conviction]; *People v. Williams* (2006) 40 Cal.4th 287, 311 [stricken juror had suffered two prior misdemeanor convictions for driving under the influence, both of which were prosecuted by the same district attorney’s office that was trying the case].) It was also permissible for the prosecutor to strike S.L. because of his limited educational background and possible gang ties. (*Batson, supra*, 476 U.S. at p. 89, fn. 12 [prospective jurors may be evaluated based upon their education]; *People v. Williams* (1997) 16 Cal.4th 153, 191 [gang connections are a legitimate, race-neutral reason for exercising a peremptory challenge].) Comparative juror analysis shows that S.L. stood out from the rest of the panel because of his prior criminal history and lack of educational achievements.³ In short, the record does not support the allegation of *Wheeler/Batson* error.

Prospective Juror P.S.

P.S. was a 27-year-old man who worked as a supervisor for a large retail chain. He never finished high school, but had been steadily employed for 10 years. The following reasons were given for his removal from the prospective juror panel:

“He, too, had not completed high school, was single, no children, relatively young. He’s a little bit older – actually, a little bit older than [S.L.], but still 27. I didn’t gather whether he lived at home or not, but I did not get the sense that he had a strong stake in the community.

³ All jurors who served on the case had graduated from high school or held a general equivalency diploma (G.E.D.).

Significant to me was the fact that he had two very close relatives who have significant criminal histories: an uncle who's still in prison for an armed robbery that was committed in 1997 [and] a father who had been to prison for robbery and drug trafficking. Significantly, on the questionnaire, Question #5, whether he had any close friends or relatives who had been the victims of a violent crime, he said 'Yes.' Asked if he was satisfied with the result, he said 'No.'⁴ I am concerned that [this] person would not have a sense of trust in the judicial system. As I understand it, and I may have missed this, but that case had to do with domestic violence a couple years ago. I believe it was within the home.

Those are issues that caused me concern about whether he would be a fair and impartial juror in this case, particularly with the individuals in his life, close life that have been engaged in crime. Again, the question being whether he is somebody who will come, who will approach officers, who will approach this case with a particular bias, and just with respect to his age and lack of experience, whether he was going to be able to listen, understand, and comprehend the proceedings and the law in particular, his failure to complete high school.”

Appellants concede that the prosecutor's explanations were race-neutral, but argue they must have been pretextual since there were other panel members who were young, and because one non-Hispanic juror served on the case despite never having completed high school. We are not persuaded. The latter argument refers to Juror No. 39, who, unlike P.S., reported that he had earned a G.E.D. Furthermore, that juror was 48 years old and answered “no” when asked if he or anyone close to him had ever been a victim of a violent crime. Jurors Nos. 22 and 28, i.e., the two panel members who were younger than P.S., also answered “no” to this question. Thus, a comparative juror analysis does not support appellant's position. The finding of a genuine race-neutral explanation for the preemptory challenge against P.S. is supported by substantial evidence.

Prospective Juror G.L.

The prosecutor's lengthiest explanation was given in regards to G.L., a single mother of four children whose ages ranged from 6 to 30 years old:

⁴ The “No” response pertained to a follow up question on the form which asked if anyone was arrested in connection with the violent crime that was committed against a friend or family member.

“Notably, she did not consider herself as a minority, nor did she identify any group that she was a minority member of. [G.L.], unlike the other three that I had excused, who did not have life experience, does have four children. She has completed high school. I was a little unclear on her occupation as a family assistant is what she listed it as, but really, what it came down to with [G.L.] was an interaction that I had with her. And one of my primary concerns in this case has to do [with] the youthfulness of the defendants. She has four children. Her two youngest are 17 and 16. I questioned her about the 17-year-old whether – how she would feel judging somebody who was similar in age to her own child of the same age. I don’t know if it was me, I don’t know if it was her[, but] I was not able to really get a response where I felt that she was understanding the issue and responding to me.

Now, I did give her the grace, and I felt like my question – I went back and asked Detective Cervantes about my questioning her, was I clear in my questioning, and when she kind of sat there and was not really responding to me, kind of a little bit dumb-founded, in my view, or just not comprehending, I thought, ‘Well, maybe [] my question was bad,’ and I asked it another way, I believe – If I’m correct, I tried several times to try and get a response from her on that. I didn’t get anything satisfactory enough to cause me to think there was not going to be an issue that she was going to be comfortable with the age issues, but even more than that, just watching her and in my engagement with her, I didn’t get the sense that she was somebody who was either comprehending what I was saying to the level I think necessary for a juror on a case like this, that involves serious charges, significant legal issues, and some touchy factual issues, I didn’t think that she had the ability, really, to follow and track and comprehend. And significant in that, sitting down here in seat number 18, the last of the group down in front is [Juror No. 23], who is the person who would be taking seat number 12.... I will state that I made a conscious decision that I thought [Juror No. 23] would be a better juror. She is somebody who has engaged with all of us quite well, been quite open, has good life experience....

...And the point is, [Juror No. 23], by her name, although she identifies herself – I don’t think she identifies herself as Hispanic, her name would suggest that she is, but my point is there is a Hispanic lady that I am going to replace [G.L.] with. But my issues with [G.L.] were based really on my interaction with her, not really comprehending what I was saying, where I was going. . . .”

Appellants’ criticism of this explanation focuses on the fact that some non-Hispanic jurors had children of similar ages to those of G.L. However, no attempt is made to refute the prosecutor’s stated concerns regarding G.L.’s intellectual aptitude for

jury service. The record, viewed in the light most favorable to the trial court's ruling, supports the legitimacy of those concerns. For example, one of the defense attorneys had asked, "Ms. [L.], when I say the words 'a presumption of innocence,' – I note that the judge made a statement about it earlier – when I say there is a presumption of innocence for Jerry Beard and Jarrad Beard, what does that – what's your understanding of that?" G.L. replied, "There is probably evidence, or somebody has evidence on both these brothers." The attorney tried to rephrase the question by asking, "When we're telling you that there is a rule of law that you would be asked to apply called a presumption, to presume, make a presumption of innocence, what does that mean to you, a presumption of innocence?" Her response: "I wouldn't know how to answer that because I don't understand that."

A person's apparent lack of intelligence is a valid reason for excluding him or her from the jury pool. (*People v. Montes* (2014) 58 Cal.4th 809, 850 [prospective juror's difficulty comprehending voir dire questions supported the denial of a *Wheeler/Batson* motion].) Comparative juror analysis does not show a pretext behind the prosecutor's stated reasons for striking G.L. We find nothing in the record to disprove the trial court's conclusion that the prosecutor acted lawfully in using his preemptory challenge, nor do we have any reason to deviate from the "great deference" that is ordinarily given to such a determination. Therefore, we will not reverse the trial court's denial of the *Wheeler/Batson* motion.

Failure to Instruct on Involuntary Manslaughter

Appellants contend that the trial court erred by failing to instruct on involuntary manslaughter as a lesser included offense of murder. Jerry Beard's request for such an instruction was denied. Jarrad Beard did not ask for an involuntary manslaughter instruction, but argues on appeal that the trial court had a sua sponte duty to give one. Their claims are based on the argument that jurors could have found the shootings were committed without an intent to kill or a conscious disregard for life. We disagree.

Standard of Review

The duty to instruct on a lesser included offense does not arise unless there is substantial evidence from which the jury could find that the lesser offense, but not the greater, was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).) “Evidence is ‘substantial’ only if a reasonable jury could find it persuasive.” (*People v. Young* (2005) 34 Cal.4th 1149, 1200; accord, *People v. Moye* (2009) 47 Cal.4th 537, 553 [“the existence of ‘any evidence, no matter how weak’ will not justify instructions on a lesser included offense....”].) We review claims involving the failure to instruct on a lesser included offense de novo, considering the evidence in the light most favorable to the accused. (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30 (*Brothers*).)

Analysis

Voluntary and involuntary manslaughter are lesser included offenses of murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813 (*Thomas*).) “A defendant commits voluntary manslaughter when a homicide that is committed either with intent to kill or with conscious disregard for life—and therefore would normally constitute murder—is nevertheless reduced or mitigated to manslaughter.” (*People v. Bryant* (2013) 56 Cal.4th 959, 968 (*Bryant*).) The mitigating circumstances will involve some form of provocation or imperfect/unreasonable self-defense. (*Ibid.*) Involuntary manslaughter, on the other hand, is defined by statute as a killing which occurs “in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” (§ 192, subd. (b).)

In *People v. Blakeley* (2000) 23 Cal.4th 82 (*Blakeley*), the California Supreme Court rejected the proposition that an unintentional killing committed through an act of unreasonable self-defense is, at most, involuntary manslaughter. (*Id.* at 89.) The *Blakeley* defendant had argued that intent to kill is a necessary element of voluntary manslaughter. (*Ibid.*) The high court clarified that voluntary manslaughter may be found

where there is an intent to kill *or* a conscious disregard for life. (*Id.* at p. 91.) The term “conscious disregard for life” is shorthand for the mens rea of implied malice. (*Bryant, supra*, 56 Cal.4th at p. 968.) Malice is implied “when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.” (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

The *Blakeley* opinion briefly touched upon the theoretical possibility that a defendant who kills in unreasonable self-defense may, under certain circumstances, only be guilty of involuntary manslaughter. (*Blakeley, supra*, 23 Cal.4th at p. 91.) This idea was revisited in *Bryant, supra*, which held that “[a] defendant who has killed without malice in the commission of an inherently dangerous assaultive felony must have killed without either an intent to kill or a conscious disregard for life. Such a killing cannot be voluntary manslaughter because voluntary manslaughter requires either an intent to kill or a conscious disregard for life.” (*Bryant, supra*, 56 Cal.4th at p. 970.)

Earlier this year, the Second District concluded that, “if an unlawful killing in the course of an inherently dangerous assaultive felony without malice must be manslaughter [citation] and the offense is not voluntary manslaughter [citation], the necessary implication of the majority’s decision in *Bryant* is that the offense is involuntary manslaughter.” (*Brothers, supra*, 236 Cal.App.4th at pp. 33-34.) Therefore, if the evidence in a homicide case raises an issue regarding the existence of implied malice, the trial court has a sua sponte duty to instruct on involuntary manslaughter. (*Id.* at p. 35.) “However, when, as here, the defendant indisputably has deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law, and no material issue is presented as to whether the defendant subjectively appreciated the danger to human life his or her conduct posed, there is no sua sponte duty to instruct on involuntary manslaughter.” (*Ibid.*)

Jarrad Beard implores us to consider that he told police, “I wasn’t even tryin’ to kill nobody,” and testified at trial that he “couldn’t think” and “wasn’t really trying to aim” when he shot the victims. He submits that his version of the events provided evidence from which the jury “could have found he acted reflexively, not consciously, much less with a conscious disregard for life.” The record compels a different conclusion.

Jarrad admitted to discharging at least four rounds from his pistol, including two shots that were fired into Brandon Moore’s body at point-blank range. Mr. Moore had allegedly swung at him once and was in the act of taking a second swing, which, according to Jarrad’s testimony, is what prompted him to begin shooting. While firing those initial rounds, Jarrad allegedly saw Justin Hesketh “trying to pull something out [of] his sweater.” According to his own testimony, Jarrad reacted to this by turning his gun on Mr. Hesketh and firing more shots.

The defendant’s ability to recall and explain these details leaves no doubt that he knew what was happening during the critical moments of his encounter with the victims. Indeed, his entire theory of the case (i.e., that he acted in self-defense) was dependent upon his awareness of those facts. He never claimed to be legally unconscious when he fired the gun. (Cf. *People v. Newton* (1970) 8 Cal.App.3d 359, 373, 377 [voluntary manslaughter conviction reversed for failure to instruct on theory of unconsciousness].) Jarrad’s testimony indicated that he fired at Mr. Moore and Mr. Hesketh because he feared imminent peril. It follows that because his conduct was so objectively dangerous to human life, no reasonable juror could have found that he was not conscious of the attendant risks. (See *Thomas, supra*, 53 Cal.4th 771, 814-815 [no reversible error in failure to instruct on involuntary manslaughter where defendant pointed gun at victim’s head before firing two shots; “Such conduct is highly dangerous and exhibits a conscious disregard for life.”]; *People v. Evers* (1992) 10 Cal.App.4th 588, 598 [intentional use of violent force against a victim, knowing the probable consequences of one’s actions,

precludes an instruction on involuntary manslaughter]; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1048 [intentionally firing a shot at victim at close range is an act dangerous to human life and presents a high probability of death, and is therefore sufficient to establish implied malice, even if the jury did not find an intent to kill.].) Thus, the trial court did not err by failing to instruct sua sponte on a theory of involuntary manslaughter.

Jerry Beard argues the jury could have found him guilty of involuntary manslaughter based on the theory that (1) his shooting of Justin Hesketh was a violation of either section 245 (assault with a deadly weapon) or section 246.3 (discharging a firearm with gross negligence), and (2) he committed those offenses without conscious disregard for life. His position is ostensibly based on the holding in *Bryant, supra*. The reasoning behind these arguments is flawed.

The facts of this case bear no resemblance to those in *Bryant*. The *Bryant* defendant had been involved in a physical altercation with her boyfriend during which both struggled to gain possession of a kitchen knife. (*Bryant, supra*, 56 Cal.4th at p. 963.) The defendant took control of the weapon and made a thrusting motion with it as her boyfriend came towards her. The boyfriend was stabbed once in the chest and died as a result. (*Ibid.*) The issue presented to the California Supreme Court was whether the trial court erred by failing to instruct on *voluntary* manslaughter based on a theory that the defendant killed without malice during the commission of an “inherently dangerous assaultive felony.” It was held that “such a killing is not voluntary manslaughter and that the trial court therefore did not err in failing to so instruct the jury.” (*Ibid.*) In a concurring opinion, Justice Kennard expressed the view that involuntary manslaughter is a viable theory when there is evidence that an inherently dangerous assaultive felony has been committed without malice. (*Bryant, supra*, 56 Cal.4th at pp. 971-974 (conc. opn. of Kennard, J.)) Incidentally, Justice Kennard went on to conclude that the trial court would not have had a sua sponte duty to instruct on such a theory, since it constituted “a

legal principle that has been so ‘obfuscated by infrequent reference and inadequate elucidation’ that it cannot be considered a general principle of law.” (*Id.* at p. 975, citing *People v. Flannel* (1979) 25 Cal.3d 668, 681.)⁵

Jerry’s claim that sections 245 or 246.3 would have served as predicate crimes for an involuntary manslaughter verdict makes little sense, even on the premise that involuntary manslaughter can occur through the commission of a non-malicious, inherently dangerous felony. Assault with a firearm under section 245 necessarily entails the act of criminal assault. Assault, by definition, requires the attempt to commit a violent injury on the person of another. (§ 240.) It is virtually inconceivable that a jury could have found Jerry fired a bullet at Justin Hesketh in an attempt to commit a violent injury upon him, but did so without realizing and consciously disregarding the danger his conduct posed to Mr. Hesketh’s life.

Section 246.3 criminalizes the willful discharge of a firearm in a grossly negligent manner which could result in injury or death to a person. (§ 246.3, subd. (a).) The statute was enacted to deter “the dangerous practice of discharging firearms into the air

⁵ We note that *Bryant* was published approximately seven months after the trial in this case. The Second District’s opinion in *Brothers* came even later, in April 2015. Since Jarrad Beard’s claim is based on an alleged sua sponte instructional duty, his claim not only fails on the merits, but also under the “inadequate elucidation” doctrine. In other words, Jarrad’s claim fails because the concept that an unlawful killing committed without malice in the course of an inherently dangerous assaultive felony is involuntary manslaughter was not a commonly known and established defense at the time of his trial. (*People v. Michaels* (2002) 28 Cal.4th 486, 529 [a trial court “has no duty to [] instruct on doctrines of law that have not been established by authority.”]; *People v. Bryant* (2013) 222 Cal.App.4th 1196, 1205 [“[A] legal concept that has been referred to only infrequently, and then with ‘inadequate elucidation,’ cannot be considered a general principle of law requiring a sua sponte jury instruction.”].)

Jerry Beard argues in his reply brief that the inadequate elucidation doctrine should not be applied to him since his trial counsel made an affirmative request for an involuntary manslaughter instruction. It is unnecessary to resolve that issue because, as we explain, his proposed instruction was not supported by substantial evidence.

during festive occasions.” (*People v. Leslie* (1996) 47 Cal.App.4th 198, 201.) Jerry admitted to police that he did not merely fire his gun into the air, but instead aimed towards a particular individual.

“[G]rossly negligent discharge of a firearm in violation of Penal Code section 246.3 is an offense ‘inherently dangerous to human life.’” (*People v. Clem* (2000) 78 Cal.App.4th 346, 348.) One who violates section 246.3 “‘is engaged in a felony whose inherent danger to human life renders logical an imputation of malice on the part of all who commit it.’” (*Id.* at p. 353.) The evidence in this case does not allow for the conclusion that Jerry violated section 246.3 by willfully discharging a firearm in the direction of Mr. Hesketh, yet did so without a conscious disregard for life. Therefore, Jerry’s request for an involuntary manslaughter instruction was properly denied.

CALCRIM No. 361

The jury was instructed with CALCRIM No. 361 as follows: “If Jarrad Beard failed in his testimony to explain or deny any evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. If Jarrad Beard failed to explain or deny, it is up to you to decide the meaning and importance of that failure.”

Jarrad claims the instruction was unwarranted because he answered all questions asked of him on the witness stand and did not fail to explain any adverse evidence. Respondent counters that the instruction was justified because Jarrad’s version of events was entirely inconsistent with the forensic evidence, and thus implausible. We agree that the instruction was appropriate.

The standard of review is *de novo*. (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469.) CALCRIM No. 361 may be used if the defendant “‘failed to explain or deny any fact of evidence that was within the scope of relevant cross-examination.’”

(*People v. Saddler* (1979) 24 Cal.3d 671, 682 [discussing the use of a substantially similar instruction, CALJIC No 2.62].) A contradiction between the defendant's testimony and that of another witness is not enough to support the instruction. (*Ibid.*) "When a defendant testifies, however, and 'fails to deny or explain inculpatory evidence or gives a 'bizarre or implausible' explanation, the instruction is proper.'" (*People v. Vega* (2015) 236 Cal.App.4th 484, 498.) The instruction may therefore be given when a defendant's testimony cannot be reconciled with autopsy findings or other forensic evidence. (See, e.g., *People v. Belmontes* (1988) 45 Cal.3d 744, 784, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Jarrad's testimony raised obvious questions regarding how, if his statements were true, multiple bullets could have entered the victims' bodies at downward trajectories as determined by the forensic pathologist who conducted their autopsies. For example, Justin Hesketh sustained gunshot wounds to the front left and right side of his chest. The entry point on the front right side was two inches higher than the entry wound on the left, and that bullet travelled downward approximately seven inches before exiting the right side of his back. Jarrad, who was three inches shorter than Mr. Hesketh, testified that he shot the victim as he was running backwards and while Mr. Hesketh was located somewhere behind Brandon Moore.

The results of Mr. Moore's autopsy indicated "contact wounds" to the right chest and upper right thigh, meaning the muzzle of the gun would have been pressed up against his body when those shots were fired. The bullet that entered his chest travelled downward through the right kidney. When asked about the contact wounds, Jarrad testified that "the gun didn't touch him...They say it's contact, but at the time I didn't feel the gun pressed up against him." He claimed to have fired three shots at Mr. Moore, who was four inches taller than him, acknowledging that the initial rounds struck the victim "somewhere in the upper body." When asked if he was aiming for that location, he replied, "I wasn't really trying to aim. It just went up." These shots were also

allegedly fired as he was running backwards. The third shot was allegedly fired as Jarrad was falling to the ground. A reasonable juror could have interpreted the bulk of this testimony as bizarre and/or implausible in light of the objective forensic evidence. We thus conclude there was an evidentiary foundation for the use of CALCRIM No. 361.

Imposition of Firearm Enhancements

Jarrad contends that the trial court erred by imposing sentencing enhancements pursuant to section 12022.5, subdivision (a) because such enhancements were not expressly pleaded in the information. In the alternative, he submits that the jury's implied finding of imperfect self-defense precluded imposition of the enhancements. Jerry joins in these arguments. We reject both claims.

As discussed, appellants were charged with murder. Each murder charge alleged personal and intentional discharge of a firearm resulting in death or great bodily injury within the meaning of section 12022.53, subdivision (d). At trial, defense counsel stipulated to allowing the court to instruct jurors on section 12022.5, subdivision (a), as a "lesser of Penal Code section 12022.53(d)" without requiring amendment of the information to allege section 12022.5 enhancements in relation to any potential manslaughter verdicts. We assume this occurred because the parties and the trial judge realized that section 12022.53 can only be used to enhance the crimes listed in subdivision (a) of that section, and voluntary manslaughter is not among the offenses enumerated therein. Now, despite the parties' agreement, appellants contend that adjudication and sentencing under section 12022.5 violated their constitutional due process rights.

"Due process of law requires that an accused be advised of the charges against him; accordingly, a court lacks jurisdiction to convict a defendant of an offense that is neither charged in the accusatory pleading nor necessarily included in the crime alleged." (*In re Fernando C.* (2014) 227 Cal.App.4th 499, 502-503, citing *People v. Lohbauer* (1981) 29 Cal.3d 364, 369.) The same principle has been applied to enhancements.

(*People v. Dixon* (2007) 153 Cal.App.4th 985, 1001-1002.) Therefore, the adequacy of notice with respect to so-called “lesser included enhancements” is determined by reference to the charging document. (*Ibid.*)

Section 12022.5 is applicable where a defendant personally uses a firearm in the commission of a felony “unless use of a firearm is an element of that offense.” (§ 12022.5, subd. (a).) In contrast, section 12022.53, subdivision (d) applies to “any 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....” Jarrad points out that section 12022.53 differs in scope from section 12022.5 because it can be applied to crimes for which use of a firearm *is* an element of the offense, e.g., section 246 (discharge of a firearm into an inhabited dwelling). He thus reasons that section 12022.5 cannot be construed as a lesser included enhancement of section 12022.53 because, under certain circumstances, a defendant could face liability under the latter statute but not the former. This is a clever argument, but it ignores the fundamental difference between enhancements and substantive offenses. “[A] sentence enhancement is not equivalent to a substantive offense, because a defendant is not at risk for punishment under an enhancement allegation until convicted of a related substantive offense.” (*People v. Wims* (1995) 10 Cal.4th 293, 307.) We are not persuaded that the required analysis can be performed by comparing two enhancements without consideration of the predicate offenses to which they may or may not apply in a given case.

“Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, *or the facts actually alleged in the accusatory pleading*, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.” (*People v. Birks* (1998) 19 Cal.4th 108, 117, italics added.) Appellants request that we use this traditional test to

determine the lesser included enhancement issue, but disregard the importance of the allegations in the information. Their position is at odds with *People v. Fialho* (2014) 229 Cal.App.4th 1389 (*Fialho*), wherein the Sixth District concluded that section 12022.5, subdivision (a) is a lesser included enhancement of section 12022.53, subdivision (d) if the latter enhancement is pleaded with a murder charge and the defendant is later convicted of voluntary manslaughter. (*Fialho, supra*, 229 Cal.App.4th at pp. 1393, 1397-1398.)

We believe the *Fialho* opinion correctly holds that “only the factual allegations underlying an offense or enhancement must be pleaded, unless the relevant statute provides otherwise.” (*Fialho, supra*, 229 Cal.App.4th at p. 1397.) Here, as in *Fialho*, the information pleaded all facts necessary to give appellants notice of their potential exposure under section 12022.5 by charging murder and alleging a section 12022.53, subdivision (d) enhancement in connection with that particular offense. (*Ibid.*) Sections 12022.5, subdivision (a) and 12022.53, subdivision (d) are both applicable to the crime of murder. One cannot commit murder by means of personally and intentionally discharging a firearm (§ 12022.53, subd. (d)) without necessarily engaging in personal use of a firearm during commission of the offense (§ 12022.5, subd. (a)). Therefore, the section 12022.5, subdivision (a) enhancements were lawfully imposed.

Appellants alternatively claim the jury’s adoption of an imperfect self-defense theory eliminated the “facilitative nexus” between their firearm use and the crime of voluntary manslaughter. Jarrad explains the contention thusly: if either of them “honestly and actually believed in the need for self-defense when he shot, he necessarily believed he was acting lawfully; as such, he could not have known he was involved in the commission of a felony or acted with an intent to facilitate a felony as required by section 12022.5.” This argument finds no support in case law. Section 12022.5 requires only a general intent to use a firearm and contains no additional knowledge element regarding the legality of one’s actions. (*In re Tamika C.* (2000) 22 Cal.4th 190, 198-199; *People v.*

Wardell (2008) 162 Cal.App.4th 1484, 1494-1495.) “A gun use occurs ‘in the commission of’ an offense if the gun use in fact *objectively facilitated* the commission of the offense.” (*Wardell, supra*, at p. 1495.)

Jarrad’s implied argument that imperfect self-defense justified his actions is a theme which runs throughout his briefing. The killings were not justified. “[U]nreasonable self-defense’ is . . . not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter. And voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder.” (*People v. Barton* (1995) 12 Cal.4th 186, 200-201; accord, *People v. Randle* (2005) 35 Cal.4th 987, 994 [“Imperfect self-defense mitigates, rather than justifies, homicide”].) It is beyond dispute that appellants’ use of firearms objectively facilitated the crimes for which they were convicted. We thus find no grounds for reversal of the enhancements.

Sentencing Issues

Cruel and Unusual Punishment

Jarrad’s aggregate sentence of 34 years in prison was the maximum period of incarceration allowed by law. He asserts for the first time on appeal that the sentence violates his constitutional right to be free from cruel and unusual punishment. We agree with respondent that the claim has been forfeited, and therefore decline to address it on the merits. Having anticipated this result, Jarrad alternatively contends that his trial attorney rendered constitutionally deficient performance by failing to raise the issue at the time of sentencing. The fallback argument is unavailing.

“A defendant’s failure to contemporaneously object that his sentence constitutes cruel and unusual punishment forfeits the claim on appellate review.” (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1247, and cases cited therein.) Citing an exception to this rule discussed in *People v. Scott* (1994) 9 Cal.4th 331, Jarrad submits that his failure to

raise the issue in a timely manner should be excused because his lawyer did not have a “meaningful opportunity to object” and was not “clearly apprised of the sentence the court intend[ed] to impose and the reasons that support[ed] any discretionary choices.” (*Id.* at p. 356.) We interpret the record differently in light of *People v. Gonzalez* (2003) 31 Cal.4th 745 (*Gonzalez*), which holds that a trial court is not obligated to provide advance notice of its intended sentence. (*Id.* at pp. 754-755.) “[T]he parties need only be advised of the trial court’s intended sentence ‘during the course of the sentencing hearing itself’” (*Id.* at p. 752.) “In the rare instance where the actual sentence is unexpected, unusual, or particularly complex, the parties can ask the trial court for a brief continuance to research whether an objection is warranted, or for permission to submit written objections within a specified number of days after the sentencing hearing.” (*Id.* at p. 754.)

Here, the trial court’s pronouncement of sentence included a lengthy explanation regarding its consideration of the probation report, the parties’ sentencing memoranda, statements from third parties, arguments by counsel, and myriad aggravating and mitigating circumstances which factored into its sentencing choices. After apprising defendants of their sentences, the trial judge asked counsel, “Anything further in this matter?” Jarrad’s attorney remained silent, and the hearing was thereafter adjourned. The invitation for further input from the parties afforded the defendant a meaningful opportunity to assert the constitutional objections he now attempts to raise on appeal. (*People v. Boyce* (2014) 59 Cal.4th 672, 731.) His failure to act resulted in a forfeiture of those claims. (*Ibid.*)

We disagree with Jarrad’s contention that his trial attorney was negligent for not moving to reduce the sentence on constitutional grounds. To prove ineffective assistance, he must show the attorney’s performance fell below an objective standard of reasonableness under prevailing professional norms, and that, in the absence of such deficient performance, it is reasonably probable that the result of the sentencing hearing

would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *People v. Anderson* (2001) 25 Cal.4th 543, 569 (*Anderson*).) As for the first prong of the *Strickland* analysis, we cannot fault Jarrad’s lawyer for failing to raise a constitutional claim that had little or no chance of success. (See *Anderson, supra*, 25 Cal.4th at p. 587 [“Counsel is not required to proffer futile objections.”].) This dovetails into the analysis under the second prong, which requires more than a theoretical possibility of success. “The likelihood of a different result must be substantial, not just conceivable.” (*Harrington v. Richter* (2011) 562 U.S. 86, 112.) A prison term falling within the Legislature’s sentencing guidelines is considered cruel and unusual in only the rarest of circumstances. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494; accord, *Ewing v. California* (2003) 538 U.S. 11, 22 [successful Eighth Amendment challenges to noncapital sentences should be “exceedingly rare”].) Accounting for all possible mitigating circumstances in this case, we do not believe a 34-year sentence for the deaths of two young men killed in a hail of gunfire by a 19-year-old adult satisfies the high threshold for cruel and unusual punishment. It is even less likely that the trial judge would have reached a different conclusion but for counsel’s failure to challenge the constitutionality of the sentence.

Discretionary Sentencing Choices

Jarrad’s final claim challenges the methodology used by the trial court in arriving at its decision to impose consecutive sentences and upper terms on all counts and enhancements. He alleges four points of error: “First . . . as to the 11-year upper terms imposed on the manslaughter charges . . . the court’s stated reasons for this term were either not supported by the record, in direct contravention of the jury’s findings or in violation of the dual use proscription. Second . . . the reason given for the 10-year upper term on the count one enhancement violated the dual use proscription under section 1170, subsection (b). Third . . . in running the count one term consecutive to the count two term, the court relied on factors [on] which it had already relied in imposing the upper

terms, also in violation of section 1170, subsection (b). Finally . . . the court failed to state any reason at all for its decision to run counts one and two fully consecutive under section 1170.16 rather than the more lenient [section] 1170.1.”

Like the cruel and unusual punishment argument, these claims were forfeited by failure to object at the time of sentencing. Jarrad submits that his arguments should be addressed on the merits within the context of an ineffective assistance of counsel analysis. We again conclude that the claim of constitutionally deficient representation fails under the *Strickland* test.

“A party in a criminal case may not, on appeal, raise ‘claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices’ if the party did not object to the sentence at trial. [Citation.] The rule applies to ‘cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons’” (*Gonzalez, supra*, 31 Cal.4th at p. 751.) For the reasons previously discussed regarding Jarrad’s failure to make timely objections, the forfeiture rule is applicable to his claims of discretionary sentencing error.

The ineffective assistance of counsel claim fails under the second prong of the *Strickland* analysis. As noted above, the ultimate question is whether it is reasonably probable the trial court would have imposed a different sentence but for defense counsel’s failure to object. Given the nature of Jarrad’s contentions, the test for prejudice is essentially the same as it would be if the alleged errors were established in a properly preserved claim. (See *People v. Osband* (1996) 13 Cal.4th 622, 728 (*Osband*) [“Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if “[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.””]; *People v. Coelho* (2001) 89 Cal.App.4th 861, 889-890 [where it

is “virtually certain” court would impose same sentence on remand, remand would be an idle act exalting form over substance]; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1783 [remand for court to state reasons for imposing consecutive sentence not required where it is not reasonably probable court would impose a different sentence].)

The following transcript excerpts underscore the trial court’s assuredness in the propriety of its sentencing choices.

“I would first note that this tragic [loss] of two young lives would have never happened if Jarrad Beard had not decided to purchase not one, but two firearms. Jarrad Beard also decided to carry these guns to the store to purchase blunts so that he could smoke marijuana. Not only did he make this dangerous and deadly decision for himself, he also chose to take his two younger brothers to the store with him, and, in fact, armed Jerry with one of the firearms. Jarrad then fired a shot at the victims’ vehicle. Had he not done that, Brandon and Justin would be alive today....

The jury obviously took into consideration that Brandon and Justin chased the Beard brothers and made threatening comments to them. Although apparently acting in imperfect self-defense, Jarrad fired not one, but multiple shots and those shots resulted in the death of both Brandon and Justin. Knowing he had just shot two people, not knowing whether they were alive or dead, he simply left the scene. He made absolutely no effort to get any help for Brandon or Justin. He left them there bleeding by the side of the pool to die. Then he went home and smoked marijuana and played video games. This conduct is beyond comprehension in its callousness.

Jarrad’s decision to purchase guns, and his willingness to use them, demonstrates that he is a serious danger to society. This was not the first time Jarrad carried a gun in public with a willingness to use it. By his own testimony, on a prior occasion, when he was armed with a gun in public and believed he was threatened, he testified he would have shot at a vehicle if he had been closer. In addition, Jarrad also involved his younger brother, who was a minor, only 15 at the time, to be involved in the offense... Jarrad was the one who gave the gun to Jerry. Jarrad was the one who fired the shot at the victims’ vehicle, the acts that set the entire tragic event in motion.

The factors in mitigation are that Jarrad was young at the time, had no prior criminal history, and accepted responsibility in the proceedings. These factors in mitigation are clearly outweighed by the factors in aggravation. Having concluded

that the factors in mitigation are substantially outweighed by the factors in aggravation[,] as to count 1, Jarrad is sentenced to the aggravated term of 11 years. The court will also impose the aggravated term on the [section] 12022.5 for an additional ten years, for a total of 21 years. The aggravated term on the enhancement is appropriate given the manner in which defendant purchased the weapons, his demonstrated willingness to carry those weapons in public, use them, and the multiple times he fired at the victims in this case, and that the use of the firearms resulted in the deaths of two young men.... Consecutive sentencing is appropriate given that the defendant's conduct resulted in the death of two young men and the callous nature of the defendant's conduct, both during and after the shooting.... Consecutive sentencing is appropriate on count 3, as it occurred separately from Counts 1 and 2 and involved a separate act of violence.”

It is settled that a trial court may impose an upper term based on only one aggravating factor (*Osband, supra*, 13 Cal.4th at p. 728), and ““minimize or even entirely disregard mitigating factors without stating its reasons”” (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1258). Trial courts may also impose consecutive sentences based on a single aggravating factor (*Osband, supra*, at pp. 728-729) or when two or more crimes are “transactionally related” and each involves a different victim. (*People v. Calhoun* (2007) 40 Cal.4th 398, 407-408 (*Calhoun*)).) Furthermore, enumeration in the California Rules of Court of criteria for making discretionary sentencing decisions “does not prohibit the application of additional criteria reasonably related to the decision being made.” (Cal. Rules of Court, rule 4.408(a).)⁶

Jarrad's claim that the trial court relied on aggravating factors that were not supported by the record and/or inconsistent with the jury's verdict is simply untenable. First, respondent accurately cites *People v. Towne* (2008) 44 Cal.4th 63 (*Towne*) as standing for the proposition that a trial court may base its sentencing decision upon facts which the jury implicitly found not to be true. (*Id.* at pp. 85-86.) “[A] jury verdict acquitting a defendant of a charged offense does *not* constitute a finding that the defendant is factually innocent of the offense or establish that any or all of the specific

⁶ All further rule references are to the California Rules of Court.

elements of the offense are not true.” (*In re Coley* (2012) 55 Cal.4th 524, 554.) “Facts relevant to sentencing need be proved only by a preponderance of the evidence” (*Towne, supra*, 44 Cal.4th at p. 86.) Second, while Jarrad argues at length that his “honest belief in the need for self-defense” should not have been characterized as “callous,” he ignores that the term “callousness” was used primarily in relation to his behavior after the shooting was over. The trial court was within its discretion to consider his post-shooting conduct as an aggravating circumstance. (*People v. Gonzales* (1989) 208 Cal.App.3d 1170, 1173, and cases cited therein [“Numerous appellate courts have upheld the use of defendant’s conduct subsequent to the offense as an aggravating factor or as a factor in other sentencing decisions.”].)

The court further relied on factors such as Jarrad’s inducement of others to participate in the offenses and his position of leadership or dominance of other participants (Rule 4.421(a)(4)); inducing a minor to commit or assist in the commission of the crime (*id.*, subd. (a)(5)); and engaging in violent conduct that indicates a serious danger to society (*id.*, subd. (b)(1)), all of which were supported by a preponderance of evidence in the record. Support for the imposition of consecutive sentences is found in the trial court’s valid conclusion that the crimes involved separate acts of violence (Rule 4.425(a)(2)), separate victims (*Calhoun, supra*, 40 Cal.4th at pp. 407-408) and, relevant to count 3, “were committed at different times or separate places” (Rule 4.425(a)(3)).

Regardless of whether some of appellant’s contentions have merit, it is not reasonably probable that the trial court would have imposed a different sentence if his attorney had alleged error at the sentencing hearing. Given the abundance of supporting evidence in the record, the trial court could have easily imposed the same sentence by selecting “disparate facts from among those it recited to justify the imposition of both a consecutive sentence and the upper term[s],” and breaking them up so as to avoid any possible dual use problems. (*Osband, supra*, 13 Cal.4th at p. 729.) “[O]n this record we

discern no reasonable probability that it would not have done so.” (*Ibid.*) We therefore reject Jarrad’s challenge to the length of his sentence.

Restitution

Jerry Beard assigns error to the trial court’s imposition of an \$11,609.88 restitution fine payable to Brandon Moore’s mother because (1) he was fully acquitted of all charges relating to Mr. Moore’s death and (2) all evidence indicated that the bullet fired from his weapon hit Justin Hesketh. Respondent concedes the error and agrees the order of restitution should be stricken. We accept the concession as appropriate and modify the judgment accordingly. (See § 1202.4; *People v. Leon* (2004) 124 Cal.App.4th 620, 622.)

DISPOSITION

The judgment as to Jarrad Beard is affirmed. The order of restitution in the amount of \$11,609.88 to Elaine Moore imposed against Jerry Beard is stricken. Subject to this modification, and in all other respects, the judgment as to Jerry Beard is affirmed.

GOMES, J.

WE CONCUR:

HILL, P.J.

FRANSON, J.