

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HUNG QUOC NGUYEN,

Defendant and Appellant.

A135195

(Contra Costa County  
Super. Ct. No. 05-100134-6)

Based on two drive-by shootings, one of them fatal, defendant Hung Quoc Nguyen was convicted of first degree murder (Pen. Code, § 187),<sup>1</sup> conspiring to commit murder (§§ 182, subd. (a)(1), 187), shooting a firearm from a motor vehicle (former § 12034, subd. (c)),<sup>2</sup> conspiring to shoot a firearm from a motor vehicle (§§ 182, subd. (a)(1), 12034, subd. (c)), street terrorism (§ 186.22, subd. (a)), and shooting at an occupied motor vehicle (§ 246). The jury also found that the murder, conspiracy, and shooting from a motor vehicle offences were committed to benefit a street gang (§ 186.22, subd. (b)(1)), that a principal in those offenses used a firearm resulting in the death of the victim (§ 12022.53, subd. (e)(1)), and that defendant intentionally used a firearm when shooting at an occupied vehicle (§ 12022.53, subd. (c)). The court sentenced defendant to prison for 73 years to life.

<sup>1</sup> All further section references are to the Penal Code except as noted.

<sup>2</sup> Former section 12034 was repealed and re-enacted as section 26100 without substantive change. (Stats. 2010, ch. 711, § 4.)

Defendant appeals his conviction on multiple grounds. He claims that (1) the prosecutor introduced testimonial statements of an absent witness in violation of defendant's right to confront witnesses against him; (2) the prosecutor committed misconduct by arguing facts not in evidence during closing argument to the jury; (3) a gang expert's testimony that gangs retaliate against informants, and his opinion that the victim here was killed for testifying against a gang member, was admitted without proper foundation because the expert's opinion was based on police reports and transcripts collected by the prosecutor rather than the expert's own police investigations; (4) the court clerk failed to read aloud the jury's verdict on the street terrorism count, thus invalidating the verdict ; and (5) the firearm enhancement for shooting at an occupied vehicle is statutorily unauthorized and must be stricken. The Attorney General concedes the last claim. We will strike the unauthorized firearm enhancement and affirm the judgment in all other respects.

### **Statement of Facts**

Three young men—defendant, Alberto Alejandre, and Martin Cerda, Jr.—were jointly charged in the drive-by shooting of 20-year-old Francisco Perez. Defendant and Alejandre were also charged with a second drive-by shooting. Cerda was tried separately from the others. (See *Bruton v. United States* (1968) 391 U.S. 123, 126.) In two separate trials each man claimed the others shot Perez, but all three were convicted and have appealed separately. (*People v. Alejandre* (Sept. 5, 2013, A131367) [nonpub. opn.]; *People v. Cerda* (Sept. 5, 2013, A133103) [nonpub. opn.].) The following statement of facts is based upon the evidence presented at the joint trial of defendant and Alejandre.

#### ***The August 3, 2009 freeway shooting***

Defendant and his friends went out drinking late on the night of August 2, 2009, to celebrate Alejandre's 24th birthday and their party extended into the early morning hours of the next day. The group consisted of defendant, Alejandre, Cerda (Alejandre's cousin), and Claude Richards. According to the police, defendant, Alejandre and Cerda are Sureño street gang members.

Around 1:00 a.m. on August 3, the group headed home with Richards driving defendant's white van. They crossed the Carquinez Bridge and were driving on Interstate 80 when someone in the group opened the van's sliding side door and fired gun shots at another vehicle. A police officer who viewed a surveillance video of the van and its occupants recorded at the Carquinez Bridge toll plaza testified that Nguyen matched the victim's physical description of the shooter. At trial, defendant admitted the group's involvement in the shooting but claimed that Cerda was the shooter.

### ***Surveillance of Alejandro's vehicle used in the shooting***

The police used the Carquinez Bridge surveillance video to obtain the license plate number of the van used in the shooting. Motor vehicle records showed the registered owner sold the van to Alejandro. The police went to Alejandro's house on the afternoon of August 3, 2009, the day of the freeway shooting, and saw the van parked nearby. Later that day, the police placed a global positioning system (GPS) electronic tracking device on the van.

The GPS device permitted the police to monitor the movement, location, and speed of the van from a laptop computer. The device alerted the police when it detected motion and police officers then responded to the scene and followed the van, sometimes keeping the van under direct visual observation but often monitoring the van's movement at a distance with the GPS device. At trial, the police explained that covert surveillance of the van was necessary to preserve evidence of the freeway shooting until they could obtain a search warrant for Alejandro's vehicle and home.

The GPS device was placed on the van late on August 3, 2009, and no motion was detected until around 11:00 p.m. on August 4, about 24 hours later. The police followed the movements of the van throughout the night of August 4 and into the early morning hours of August 5 as the van traveled to multiple locations around the East Bay. The police were never close enough to identify the van occupants or observe their activity, but during the course of tracking the van the police discovered a parked vehicle with its tires and rims removed. At trial, defendant admitted that he, Alejandro, and Cerda spent the night driving in the van, stealing wheel rims from cars along the way.

The van returned to Alejandro's San Pablo home around 5:00 a.m. on August 5. At 6:30 a.m., the van left the house and the police followed the van with the aid of the GPS device. At 6:55 a.m., a police officer saw a van occupant repeatedly open and close the vehicle's sliding side door; the officer thought the van occupant was practicing for another shooting. The van then drove down a small street and the surveillance officer did not follow directly behind for fear of being observed by the van occupants. The officer used the GPS device to monitor the van's location over the next few minutes. The device showed that the van slowly drove back and forth through the neighborhood of 23rd and Maricopa Streets in San Pablo, making two U-turns and stopping at that intersection at 7:06 a.m.

### ***The August 5, 2009 shooting***

Francisco Perez lived on Maricopa Street. Perez was a former Sureño gang member. Years earlier, in 2003, Perez was with Martin Cerda's older brother, Victor, when Victor shot and killed a rival Norteño gang member. Perez testified against Victor, and Victor was convicted of murder and sentenced to prison.

In 2009, Perez lived with his grandmother and worked as a roofer, leaving for work around 7:00 a.m. On the morning of August 5, Perez left his home for work and a fusillade of gunfire erupted. Perez's grandmother saw a man in a white van shooting at her grandson. A bullet grazed Perez's head and another bullet pierced his liver, heart, and left lung. Perez collapsed on the street and died at his grandmother's feet.

The police arrived at the scene and found 19 shell casings from two different firearms. The recovered shell casings were nine-millimeter and .40 caliber. The police also obtained a surveillance videotape from a nearby store that shows a white van driving back and forth on Maricopa Street in the minutes before the shooting. The videotape shows Perez initially walking toward the store then running from the van as it drove slowly towards him with its side door open.

Cell phone records revealed several calls from defendant's and Alejandro's phones to a known Sureño gang member minutes after the shooting. Defendant's calls were transmitted by cell phone towers along the route traveled by defendant's white van. The

police arrested defendant, Alejandro, and Cerda. A search of Alejandro's house found the two handguns used in the Perez shooting; one of those guns had been used in the earlier freeway shooting.

Defendant and Alejandro were tried together.<sup>3</sup> At trial, defendant admitted that he, Alejandro and Cerda were at the Perez shooting. Defendant denied planning the shooting. Defendant said Alejandro was driving the van, looking for more tire rims to steal, when Cerda saw the man who "snitched" on Cerda's brother and directed Alejandro to make a U-turn. Defendant said Alejandro and Cerda spoke together in Spanish and Alejandro made several turns to bring the van back to Perez. Cerda dropped to his knees, opened the van's sliding door, pulled a gun from under his jacket, and fired multiple rounds at Perez. Defendant said he could not see if Alejandro was also shooting at Perez but, when confronted with the fact that two guns were used in the shooting, defendant said the second shooter had to be Alejandro.

### ***Gang evidence***

Sergeant Jeff Palmieri of the San Pablo Police Department testified as a gang expert. He testified to the rivalry between Sureño and Norteño street gangs and described their history, criminal activities, and symbols. Palmieri testified that gangs rely on violence and fear to maintain territory and retain control over its members. He said a gang member who talks to the police puts his life in danger and is labeled a "snitch." The sergeant said a Sureño gang member who snitches on another gang member will be "put in check" by the gang with "a good beat down" or "worse." On cross-examination, Palmieri conceded that the specific instances of Sureño retaliation against cooperating witnesses that he knew about were drawn from police reports and other documents compiled by the prosecutor, not prior personal experience. In closing, the sergeant opined that Perez's killing was done to benefit the gang: "what more of a powerful statement

---

<sup>3</sup> Cerda made a pretrial admission that implicated defendant and Alejandro and was thus tried separately. (*Bruton v. United States*, *supra*, 391 U.S. at p. 126.) The three men have separately appealed. (*People v. Alejandro*, *supra*, (Sept. 5, 2013, A131367) [nonpub. opn.]; *People v. Cerda* (Sept. 5, 2013, A133103) [nonpub. opn.]

could a gang make . . . than everybody in the area knows that this individual was involved [as] a witness in a crime and now . . . he's dead in the street.”

### **Discussion**

*I. The trial court properly admitted portions of a third party's statement to the police after defense counsel introduced other portions of the same statement.*

Defendant contends that the police statement of a witness who did not testify at trial was wrongly admitted in violation of defendant's right to confront witnesses against him. (*Crawford v. Washington* (2004) 541 U.S. 36, 59 (*Crawford*)). The claim fails because defendant's trial counsel introduced part of the witness statement, which permitted the prosecution to introduce other parts to provide a clear record of the witness's remarks. (Evid. Code, § 356.)

The witness statement concerned the August 3, 2009 freeway shooting. The victim testified that the occupant of a van fired shots at her vehicle shortly after the vehicles passed through the Carquinez Bridge toll plaza. A surveillance videotape of the bridge shows the victim's car and Alejandro's van stopping at the toll plaza at the same time, in different lanes. At the toll plaza, defendant opened the van's rear sliding door and gestured in the victim's direction.

A police officer testified that he interviewed the toll takers during his investigation but did not relate the contents of his interviews on direct examination. On cross-examination, defendant's counsel asked the officer to relate portions of one of the toll taker's police statement. Over the prosecutor's hearsay objection, the court admitted the toll taker's statement that there were “occupants” in the van, which established that defendant was not the lone occupant. The defense also established that the toll taker, who was manning the lane traveled by the victim's car, was Asian and had the same name as defendant, Hung Nguyen. Defendant later testified that he opened the van door at the toll plaza to gesture to the toll taker who was his cousin, not to gesture to the victim.

Defendant claimed he did not notice the victim until later, when Richards raced up to her car and Cerda opened the sliding door and fired shots. On redirect examination of the investigating police officer, the prosecutor addressed defendant's claimed familiarity with

the toll taker, which had been alluded to in the opening statement, by eliciting the toll taker's statement that he could not identify any of the van occupants.

On appeal, defendant claims the prosecutor improperly introduced testimonial statements of the toll taker without an opportunity for cross-examination. (*Crawford, supra*, 541 U.S. at p. 59.) The claim fails because the prosecutor was entitled to introduce evidence that completed a statement previously introduced by defendant. (Evid. Code, § 356.)

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” (U.S. Const., 6th Amend.) Under the confrontation clause, testimonial statements of witnesses absent from trial are generally inadmissible unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. (*Crawford, supra*, 541 U.S. at p. 59.) The confrontation clause, however, does not preclude the prosecution from introducing evidence that completes a statement previously introduced by the defendant. (Evid. Code, § 356; *People v. Vines* (2011) 51 Cal.4th 830, 862-863.)

Evidence Code section 356 provides: “Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.”

“ ‘The purpose of [Evidence Code section 356] is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.’ ” (*People v. Vines, supra*, 51 Cal.4th at p. 861.) The rule survives *Crawford*. “ ‘[A] party who elects to introduce a part of a conversation is precluded from objecting on confrontation clause grounds to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood.’ ” (*Vines, supra*, at p. 862.)

“Application of Evidence Code section 356 hinges on the requirement that the two portions of a statement be ‘on the same subject.’ ” (*People v. Vines, supra*, 51 Cal.4th at

p. 861.) Defendant contends the statute is inapplicable because the portion of the toll taker's statement introduced by the prosecutor constituted a different subject from the one introduced by the defense. We disagree.

In eliciting the hearsay statement of the toll taker, the defense sought to establish that defendant was one among several occupants of the van and innocently opened the van's sliding door to say hello to the toll taker, not to gesture to the victim who was shot at from that door moments later. In bringing out the toll taker's name and ethnicity, he sought to provide confirmation of defendant's testimony that the toll taker was his cousin. The prosecutor was properly permitted to expand the officer's recitation of what the toll taker had said to include his denial of familiarity with the van occupants. While the defense emphasized that the toll taker said he observed multiple occupants, the further statement that he did not recognize any of the occupants was not an unrelated subject. “ “In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry.” ’ ’ ( *People v. Vines, supra*, 51 Cal.4th at p. 861.) The portions of the statement introduced by both the defense and prosecution related to the toll taker's observations at the bridge toll plaza. The introduction of one portion without the other would have left a misleading impression.

Defendant argues, as an alternative claim, that trial counsel rendered ineffective assistance of counsel in allowing the prosecution to introduce portions of the toll taker's police statement, particularly the portion denying familiarity with the van occupants, because that information undermined defendant's explanation for opening the van's door and weakened his credibility overall. To establish a claim for ineffective assistance of counsel, defendant must establish that his attorney's performance fell below an objective standard of reasonableness and that the result of the proceedings likely would have been more favorable absent the deficiency. (*Strickland v. Washington* (1984) 466 U.S. 668.) Defendant has done neither.

Trial counsel appears to have made a tactical decision to introduce portions of the toll taker's statement with a full understanding that other portions could be admitted. A knowing decision is suggested by the fact that he introduced the subject over the

prosecutor's hearsay objection and never joined in co-counsel's objection to the prosecutor's counter evidence. The decision was not unreasonable. Counsel may well have thought it helpful to establish that defendant was not alone in the van and, thus, not the only possible shooter, and had an innocent reason for opening the van door. Some explanation was needed because a videotape clearly showed defendant opening the van door at the toll plaza and looking toward the victim's traffic lane. On the evidence presented, we cannot say that defense counsel was incompetent in introducing the toll taker's testimony.

As the Supreme Court has explained, "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (*Strickland v. Washington, supra*, 466 U.S. at p. 689.) Defendant has failed to overcome that presumption.

Even if defense counsel was incompetent in introducing the challenged evidence, the error was not prejudicial. There was direct evidence of defendant's guilt that overshadows the slight injury to defendant's credibility occasioned by the toll taker's statement undermining defendant's claim of kinship. A videotape shows defendant at the toll plaza looking in the victim's direction moments before the shooting. Defendant admitted being the man depicted in the videotape. The victim could not identify defendant in a photo line-up but did testify that the man she saw at the toll plaza was the same man who shot at her. The nine-millimeter handgun used in the freeway shooting

was used in another shooting days later. Defendant admitted being at both shootings. A search of defendant's car found a magazine clip and a box of ammunition for a nine-millimeter handgun. Defendant's cell phone contains a photo taken one day before the freeway shooting that shows a handgun sitting on the floor of his car and defendant admitted frequent visits to the shooting range despite being a convicted felon forbidden to possess firearms. Given the state of the evidence, there is no reasonable likelihood that the jury would have returned a verdict more favorable to defendant had the toll taker's statement been excluded.

## II. *The prosecutor did not commit misconduct during closing argument.*

Defendant contends the prosecutor committed misconduct during closing argument by arguing facts not in evidence. "We review claims of prosecutorial misconduct pursuant to a settled standard. 'Under California law, a prosecutor commits reversible misconduct if he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action "so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" [Citations.] In addition, "a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" [Citation.] Objection may be excused if it would have been futile or an admonition would not have cured the harm." (*People v. Dykes* (2009) 46 Cal.4th 731, 760.)

Defendant did not object to the prosecutor's closing argument and thus forfeited his argument of prosecutorial misconduct. However, he also claims trial counsel rendered

ineffective assistance of counsel in failing to object and thus we must consider whether the prosecutor's comments were objectionable.

We conclude that the prosecutor's comments constituted a permissible attack upon defendant's credibility. The prosecutor discussed evidence that defendant lied during his police interview and trial testimony and used that evidence to discredit defendant's claim that he did not knowingly participate in the shootings. The prosecutor asked the jurors to "[t]hink to yourself for a minute why do people lie? They lie to cover up something bad that they've done. They lie when they think they're wrong. This is why his lies are evidence of his guilt. Mr. Nguyen's lies . . . prove his guilt."

In listing defendant's lies, the prosecutor referred to defendant's testimony on cross-examination denying traveling to Sacramento with Cerda on August 1, 2009, days before the first shooting. The prosecutor pressed defendant to admit his travels and defendant refused, insisting that he (and his cell phone) were in Oakland. The prosecutor suggested that defendant was hiding something and asked defendant if "something bad happened" in Sacramento he did not want to disclose. The prosecutor asked defendant, "Is that where you got the gun?" Defendant said no. Defendant's testimony insisting that he was in Oakland on the day in question was refuted by cell phone records showing his presence in Sacramento.

In a portion of the closing argument challenged on appeal, the prosecutor asked rhetorically: "Why lie about August 1st, 2009? Well, I don't know what it is that happened in Sacramento on August 1st, 2009. Maybe it's when they went and got the guns. Maybe that's a part of it. Why does he need to put the distance between himself and Mr. Cerda? . . . Well, maybe it's when they got the guns. I don't know. Maybe something else bad happened up there. I don't know why he lied so blatantly about August 1st of 2009. But he lied because he was covering something up. I don't know what that was. And I don't think we'll ever know for sure."

The prosecutor returned to the topic on rebuttal. The prosecutor told the jurors: "the only way [defendant is] not guilty of these crimes is to believe all the fabrications" but "how can you possibly believe everything Mr. Nguyen says when he sat up there on

the stand and lied to your faces about being in Reno or Sacramento on August 1st? How can you believe him? [¶] And it was posed by Mr. Alejandro's attorney [that] they could have been in Reno for anything, birthday, who cares. Okay. Then why lie? Why lie? Why not say, yeah, we went up there to party for Mr. Alejandro's birthday? That's not a crime. [¶] If there's an innocent explanation behind it, why lie? Which is something you apply to all of Mr. Nguyen's testimony. Why lie to the cops? Why sit up here and lie? Why do you lie? Because you've done something wrong and you know it. That's why you lie."

Defendant argues that the prosecutor wrongly implied that defendant went to Sacramento to obtain guns when defendant's purpose in going to Sacramento was never proven. It is true that the prosecutor mentions, as a possibility, that defendant obtained guns in Sacramento but the thrust of the prosecutor's argument was that defendant lied in denying the trip and, thus, his testimony as a whole should be distrusted. Contrary to defendant's claim on appeal, the prosecutor did not offer his own "unsworn testimony" that defendant went to Sacramento to obtain guns. The prosecutor said, "I don't know what it is that happened in Sacramento on August 1st, 2009. Maybe it's when they went and got the guns. . . . I don't know. Maybe something else bad happened up there. . . . But he lied because he was covering something up. I don't know what that was. And I don't think we'll ever know for sure." The prosecutor's point was that defendant lied and that his lies show a consciousness of guilt: "Why do you lie? Because you've done something wrong and you know it. That's why you lie."

When read in context, the prosecutor was making the permissible argument that defendant was not credible. "The prosecution is given wide latitude during closing argument to vigorously argue its case and to comment fairly on the evidence, including by drawing reasonable inferences from it." (*People v. Lee* (2011) 51 Cal.4th 620, 647.) It is well-established that a " 'prosecutor is permitted to urge, in colorful terms, that defense witnesses are not entitled to credence . . . [and] to argue on the basis of inference from the evidence that a defense is fabricated.' " (*People v. Boyette* (2002) 29 Cal.4th 381, 433.) The prosecutor's remarks were proper and defense counsel was not remiss in choosing not to object.

*III. Sufficient foundation was provided for the gang expert's opinion that the victim was killed for testifying against a Sureño gang member.*

As noted above, Sergeant Jeff Palmieri of the San Pablo Police Department testified as a gang expert. He testified that gangs rely on violence and fear to maintain territory and to retain control over its members, and will retaliate against those who cooperate with the police. Palmieri opined that the killing of Perez, who had testified against Sureño gang member Victor Cerda, was done to benefit the gang. Defendant contends there was insufficient foundation for Palmieri's opinion because it was based on evidence of gang retaliation contained in police reports and transcripts of testimony selected and provided to the officer by the prosecutor and not on the officer's personal knowledge of gang assaults or information he personally collected. Defendant contends that admission of the officer's opinion of a gang-related motive was prejudicial because the other alleged participants in the shooting had a family relationship with Victor Cerda, suggesting a possible personal motive.

The foundation for the officer's opinion was properly established in a pretrial hearing. (Evid. Code, § 402.) At that hearing, Sergeant Palmieri testified that Sureño and other street gangs have a practice of inflicting injury or death upon those who provide information to law enforcement agencies. The Sureños retaliate against "snitches" to "keep the gang strong and send a message that snitching or telling on the gang will not be tolerated." The officer said the Sureños believe that "if the gang did not punish those individuals who were involved in giving up information, the gang would become weak and soon would not be able to operate." Palmieri acknowledged that he had not personally investigated cases where Sureños retaliated against cooperating witnesses but knew of multiple cases of retaliation from documents provided by the prosecution. The officer read and relied upon police reports and excerpts of grand jury transcripts to describe in detail five specific instances in which Sureños attacked, or tried to attack, cooperating witnesses. Defendant objected that there was no proper foundation for Palmieri's opinion because it was based on documents provided by the prosecutor rather than information personally known or independently obtained. The court overruled the

objection, stating that it “goes to the weight not the admissibility” of the officer’s testimony.

The evidence was properly ruled admissible. An expert witness’s testimony need not be based on information which he personally collected. An expert witness may base his opinion on matter “personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . .” (Evid. Code, § 801, subd. (b), italics added.) Sergeant Palmieri reasonably relied on police reports and grand jury transcripts provided to him by the prosecutor before the hearing that detailed Sureño gang retaliation against cooperating witnesses. The defense reviewed the materials and cross-examined Palmieri at length about the basis for his opinion. No evidence was presented, then or now, that the information was faulty. The foundation for the officer’s opinion was properly established.

*IV. The court clerk’s failure to read aloud the verdict on one count was harmless.*

Defendant contends that the jury’s verdict on count five for street terrorism must be vacated because the written verdict was not read aloud and affirmed by the jurors. Defendant forfeited this contention by failing to object in the trial court. Moreover, the inadvertent omission was harmless.

The jury returned 38 pages of written verdict forms addressing 12 counts with multiple findings as to both defendants Nguyen and Alejandro. The jury foreperson verbally affirmed that the jury had reached its verdict and handed the forms to the court bailiff. The forms record a guilty verdict and true finding on all six counts alleged against Nguyen. The court clerk proceeded to read the verdict forms and the jury panel affirmed the verdict “as read.” The clerk failed to read aloud the verdict on count five finding defendant guilty of street terrorism. (§ 186.22, subd. (a).) The clerk skipped from count four to count six. The clerk then individually polled the jurors, asking: “As to defendant Hung Nguyen, count 1 through count 6, and each finding, is this your verdicts as read,” and each juror said “yes.” The court directed the court clerk to “record the verdicts as read.” The minute order lists all verdicts, including the guilty verdict on count five.

Defendant argues that the absence of an oral jury verdict is a structural error mandating reversal. That argument has been eclipsed by a recent California Supreme Court case issued after defendant's opening brief was filed on appeal. (*People v. Anzalone* (2013) 56 Cal.4th 545.) In *Anzalone*, the trial court read aloud written jury verdicts finding the defendant guilty on multiple counts but failed to ask the jury foreperson or jurors to affirm the verdicts. (*Id.* at pp. 549-550.) Section 1149 provides: "When the jury appear they must be asked by the court, or clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same." The court held that "a defendant who does not object to the trial court's failure to comply with section 1149 forfeits the argument that the trial court erred." (*Anzalone, supra*, at p. 551.) The court also found that the lack of an oral acknowledgement of the verdict in open court is not a structural defect but a procedural error subject to harmless error review. (*Id.* at pp. 555-560.)

Defendant here failed to object to the omission of count five when the verdicts were read and thus forfeited his complaint of noncompliance with Penal Code section 1149. Even were we to reach the merits, it is clear that the omission was harmless. The jury returned written verdict forms and, when doing so, the jury foreperson affirmed the verdicts. The court asked "has the jury reached verdicts" and the foreperson said "we have, Your Honor." The only error occurred in the failure to read one of the counts and obtain the individual jurors' affirmation of that count. The jurors were individually polled as to "the verdicts to count 1 through 6," which suggests juror affirmation of all counts, although the polling was itself flawed in referring to the "verdicts as read." These slight procedural errors were harmless. The jurors returned written verdicts and unanimously affirmed their agreement with "the verdicts to count 1 through 6." The jury was clearly instructed on the requirement of unanimity and the record fails to show any disagreement among the jurors or indication that the juror's verdict on count five was anything but unanimous. The error was plainly harmless.

*V. The firearm enhancement imposed for shooting at an occupied vehicle is unauthorized and must be stricken.*

Defendant contends that a firearm enhancement for shooting at an occupied vehicle is statutorily unauthorized and must be stricken. The Attorney General agrees and says the enhancement should be dismissed and the matter remanded for resentencing.

Defendant was found guilty of shooting at an occupied vehicle in connection with the freeway shooting (§ 246), and the jury found that defendant used and intentionally discharged a firearm in committing the crime (§ 12022.53, subs. (b), (c)). The court sentenced defendant to the lower term of three years in prison for shooting at an occupied vehicle (§ 246) and imposed a 20-year enhancement for intentionally discharging a firearm (§ 12022.53, subd. (c)).

The sentence enhancement for intentionally discharging a firearm is prescribed for only certain, enumerated felonies. (§ 12022.53, subs. (a), (c).) Shooting at an occupied vehicle is not among them.<sup>4</sup> (§ 12022.53, subd. (a).) Defendant is therefore correct in stating that the enhancement is unauthorized and must be stricken.

The proper remedy is to remand for resentencing to permit the trial court to reconsider its sentencing scheme as a whole in light of the changed circumstances. (*People v. Navarro* (2007) 40 Cal.4th 668, 681.) “ ‘[A]n aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components.’ ” (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258.) When one of those components is stricken, the trial court should be given an opportunity to reconsider all sentencing choices constrained only by the generally applicable principle that the aggregate prison term imposed on all counts not be increased on remand. (*Id.* at pp. 1258-1259.)

---

<sup>4</sup> The enhancement statute does apply to the offense of shooting at an occupied vehicle when an intentional shooting causes great bodily injury or death. (§ 12022.53, subd. (d).) That provision was not pled and is inapplicable. No person was injured by the shooting.

**Disposition**

The firearm enhancement (§ 12022.53, subd. (c)) imposed for shooting at an occupied vehicle (§ 246) on count six is stricken and the matter is remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.

---

Pollak, Acting P.J.

We concur:

---

Siggins, J.

---

Jenkins, J.