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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DOUGLAS CORTEZ,

Defendants and Appellants.

B244720

(Los Angeles County  
Super. Ct. No. SA072463)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Katherine Mader, Judge. Affirmed as modified.

Christine C. Shaver, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Douglas Cortez (defendant) appeals from his conviction of attempted murder and other felony counts. He contends that the trial court should have excluded evidence of gang activity under Evidence Code section 352, and seeks a corrected abstract of judgment as to the sentences imposed as to counts 3 and 4. Respondent contends that the sentences imposed as to counts 2 and 5 were unauthorized and must be modified. We reject defendant's challenge to the trial court's ruling on the evidence, find that the sentences as to counts 2 and 5 were incorrectly articulated, and agree that the abstract of judgment contains errors with regard to the sentences imposed as to counts 3 and 4. We thus modify the judgment and affirm the judgment as so modified, and direct the trial court to issue amended abstracts.

## **BACKGROUND**

### **Procedural history**

The original information charged defendant and codefendant Salvador De La Cruz (De La Cruz)<sup>1</sup> in counts 1 and 2 respectively, with the attempted, willful, deliberate, and premeditated murder of Jose Romo Soto (Soto) and Isaias Lopez (Lopez), in violation of Penal Code sections 664/187, subdivision (a).<sup>2</sup> The original information also charged the defendants with one count of evading an officer (count 3), in violation of Vehicle Code section 2800.2, subdivision (a), as well as unlawfully driving or taking of a vehicle (count 4), in violation of Vehicle Code section 10851, subdivision (a), and shooting at an inhabited dwelling (count 5), in violation of section 246. It was further alleged as to all counts that the defendants personally inflicted great bodily injury on the victims, within the meaning of section 12022.7, subdivision (a), and that the offenses were gang related within the meaning of section 186.22, subdivision (b). As to counts 1, 2, 3, and 4, the information alleged that a principal personally and intentionally discharged a firearm, within the meaning of section 12022.53, subdivisions (b), (c), (d), and (e)(1). The trial

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<sup>1</sup> De La Cruz entered into a plea agreement prior to trial. Defendant was tried alone.

<sup>2</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

court dismissed the special allegations under sections 12022.7, subdivision (a) and 12022.53, subdivision (d), from counts 3 and 4, as well as the allegation that defendant had suffered a prior juvenile adjudication that qualified as a “strike” under sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i).

Defendant was convicted as charged in counts 3 and 4. The jury found the offenses to be gang related, but was unable to reach verdicts as to the remaining counts. The court declared a mistrial as to counts 1, 2, and 5, which were then re-filed in an amended information, along with the firearm and gang allegations. After the second trial, a jury found defendant guilty of counts 2 and 5 as charged, and found true the firearm and gang allegations, but found defendant not guilty of count 1, the attempted murder of Soto.

On October 17, 2012, the trial court sentenced defendant on count 2 to a term of life in prison with a 15-year minimum parole eligibility period, plus 25 years to life due to defendant’s personal use and discharge of a firearm as alleged pursuant to section 12022.53, subdivision (d). An identical term was imposed as to count 5, to run concurrently with the term on count 2. As to count 3, the court imposed a consecutive term of two years plus a three-year gang enhancement, and as to count 4, the court imposed a consecutive term of eight months plus a one-year gang enhancement. Defendant received 1,314 days of presentence custody credit and was ordered to pay mandatory fines and fees. Defendant filed a timely notice of appeal.

### **Prosecution evidence**

Lopez lived in an area claimed by the Santa Monica 13 gang of which he was a member. Santa Monica 13 is a longtime rival of the Venice 13 gang. On September 30, 2009, Lopez was riding his bicycle near his home in Santa Monica, when he encountered two men in a stolen truck. One of the men got out of the truck with a gun and fired multiple shots in Lopez’s direction. Lopez suffered a through-and-through bullet wound to one leg. A stray bullet hit Soto in his leg as he was trimming a tree in his front yard. Another bullet struck a parked car, and other bullets entered a nearby apartment, causing some damage but no injuries.

Witnesses quickly reported the shooting to police, giving the license plate number and a description of the truck and its occupants. As the truck sped away from the scene, it passed Santa Monica Police (SMPD) Sergeant John Hudson on his way to investigate the shooting from nearby police headquarters. Soon officers were in pursuit of the truck on the freeway. Near the Centinela Avenue off ramp, the two occupants abandoned the truck, ran along Bundy Avenue, and hid from the officers. With the assistance of K-9 officers and their dogs, defendant and De La Cruz were found hiding separately in the area. Defendant resisted arrest after he was pulled from behind a fountain by K-9 Officer Kohno's dog Anton. De La Cruz also resisted officers' efforts to handcuff him and take him into custody.

Later, Lopez told the police that the shooter wore a "hoodie," and he testified that the shooter came out of the truck's right side. Soto testified that the shooter was about 18 to 20 years old, wore a black hooded sweatshirt, and fired a gun he held with both hands. Sergeant Hudson observed the truck's passenger wearing a dark long-sleeved shirt of some sort when he jumped out of the truck. Defendant was wearing a short-sleeved white shirt when he was removed from his hiding place and arrested. Gloves and a hoodie were later recovered by officers in a yard on Bundy Avenue.

Witness Polly Schaffner (Schaffner) testified that she heard what she thought were firecrackers and saw a white truck stopped in the middle of the street with the driver's door open. She then saw a man wearing a white hat run out of the alley and jump into the driver's seat, but could not tell whether or not there was a passenger. She memorized the license plate number as the truck sped away.

Another witness, Oliver Noble Haldorsen (Haldorsen), testified that the truck passed close by him shortly after he heard gunfire. He described the passenger as 17 to 21 years old, Hispanic, and wearing a black hoodie, while the driver wore a straw hat and sunglasses. Haldorsen saw the passenger retract what looked like a nine-millimeter handgun through the window just before he rolled it up. When questioned after the shooting, Haldorsen selected two photographs from a photographic lineup as resembling the passenger. One of the photographs was of defendant. Haldorsen identified defendant

in court as resembling the selected photographs and testified that the driver was not in court. The straw hat had been left in the truck by its owner and was later found on the ground near where the truck was abandoned. Haldorsen identified the hat as the one he had seen on the driver and the hoodie as the one the passenger had been wearing.

A fingerprint matching De La Cruz's left thumb was found on the driver's side door of the truck. Particles of gunshot residue were found both on defendant De La Cruz and on defendant's hoodie. A firearms examiner determined that the nine-millimeter ammunition found at the scene of the shooting had been fired from a single firearm.

The prosecution presented the testimony of two gang experts, SMPD Officer Shaun Cooney, who was also one of the arresting officers, and Los Angeles Police Department (LAPD) Officer Angel Gomez. Officer Cooney testified that the "13" in the names of the Santa Monica and Venice gangs represented affiliation with the Mexican Mafia, which collected "taxes" from affiliated gangs and provided protection for their members in and out of custody. The failure to pay taxes or any sign of disrespect for the Mexican Mafia could cause an affiliate to lose its good standing and become "green-lighted" for violent retribution.

Officer Cooney testified the rivalry between the Santa Monica gang and the Venice gang dated from the 1950's and had been almost constant. The intensity of the rivalry alternated over the decades, but in 2009, tensions between them were high. Several months before the shooting, a Venice 13 gang member and a Mexican Mafia "tax collector" attended a car show at Virginia Park, an area claimed by the Santa Monica gang. After some Santa Monica gang members "disrespected" the tax collector, the Mexican Mafia issued a green light against the Santa Monica gang, and over the next few months there were several shootings of Santa Monica gang members (the Virginia Park incident). Just five days before this shooting, the Venice High School football team played against the Santa Monica High School team at Santa Monica College. A fight broke out when several Santa Monica gang members attacked a suspected Venice gang member and stabbed him (the football game stabbing).

The day following the shooting, Lopez was “posted up” on his street, meaning that he was brazenly displaying himself in gang attire with a fellow gang member to show the community and rival gang members that he represented his neighborhood and was not intimidated. Two weeks later while Lopez was again standing with his fellow gang member, he told Officer Cooney that a Venice 13 member had shot him but he would provide no other information. Lopez said he would handle it on his own.

Officer Gomez testified that in 2009 the Venice 13 gang had from 270 to 280 documented active members, plus associates or affiliates. Its territory included the area around Venice High School and other parts of the Venice neighborhood of Los Angeles. The most prominent clique or subset of the Venice 13 gang was the Venice Gangsters or “Venice G’s” which included the gang’s youngest members. In 2009, the gang’s two primary rivals were the Culver City Boys and the Santa Monica 13, and its primary criminal activities were vandalism, tagging, narcotics sales, street robberies, extortion, murder, and attempted murder. Officer Gomez presented certified felony conviction records of two active Venice 13 gang members. Its members wore the color blue and used common signs and symbols, which was often used in graffiti and tattoos.

According to Officer Gomez the gang’s graffiti was intended to send messages, often derogatory, to rival gangs. For example, in a photograph of Venice gang graffiti, Officer Gomez pointed out the words “Venice 13” followed by “GS” for the Gangsters clique, with “SM 187” underneath. He explained that the SM was crossed out to express disrespect for the Santa Monica gang, and the 187, the Penal Code section for murder, was meant to send a threatening message to the Santa Monica gang. Other graffiti identified the Venice gang with “smack killer” written underneath. Officer Gomez explained that “smack” was a derogatory term for Santa Monica gang members.

In Officer Gomez’s opinion defendant was a member of the Venice 13 gang, with a gang moniker of “Little Stomper.” Defendant’s tattoos supported that opinion: a “V” on the right side of his face, near corner of his right eye; “X3” on his index finger; one dot on his right wrist and three dots on his left wrist, signifying 13 or “my crazy life,” a tattoo commonly seen on Hispanic gang members; another V between the thumb and

index finger; and a dot on one leg with three on the other. Defendant had all these tattoos when he was arrested on September 30, 2009. While in custody awaiting trial defendant had his right forearm tattooed with “Venice G’s” and his left arm with “Fuck CRASH.” Officer Gomez testified that CRASH was the name of the LAPD gang unit in the 1980’s, and although the current term was “Gang Enforcement Detail” many people still referred to the detail as CRASH. Officer Gomez’s opinion was also based upon field interview cards which documented several contacts between defendant and police in 2007 and 2008. In 2007, officers observed a gang related tattoo on defendant leading them to conclude that he was a “possible associate” of the Venice 13 gang. During several stops in 2008, officers observed additional gang tattoos, encountered defendant in the company of another Venice 13 gang member, discovered his gang moniker was Little Stomper, and concluded that he was a member of the Venice 13 gang.

Officer Gomez had many contacts with De La Cruz and was of the opinion that De La Cruz was a Venice 13 gang member whose gang moniker was “Wormy.” De La Cruz also had gang tattoos, including “Venice 13” on the back of his neck, with “Gangsters” underneath, and a skull wearing a warrior headdress with a “V” on it. Officer Gomez identified photographs of defendant with De La Cruz and several other Venice 13 gang members, including the sister of a very prominent Venice 13 gang member. De La Cruz admitted to officers that he had been a Venice 13 gang member “since [he] was little,” and two years before the shooting, officers documented a field interview of De La Cruz while he was in defendant’s company.

The prosecutor described hypothetical facts mirroring the evidence in this case, and then elicited Officer Gomez’s opinion that the hypothetical shooting was gang related. Significant facts supporting his opinion were that Venice 13 entered rival gang territory using a stolen truck, which gang members and other criminals commonly do when committing a crime. In addition, the gun was not recovered, suggesting the shooter disposed of it. Also, gloves were used, apparently to eliminate fingerprint evidence.

In Officer Gomez’s opinion the shooting was committed with the specific intent to promote, further or assist the Venice 13 gang. His opinion was based upon three factors:

first, eliminating rival members to increase its own relative membership made the gang stronger; second, enhancing the gang's reputation for violence within the community made people afraid to cooperate with the police, and thereby facilitated the gang's criminal behavior; and third, the shooter's loyalty and devotion to the gang was demonstrated by his willingness to commit the ultimate criminal act of trying to kill someone with a gun. Officer Gomez explained that not all gang members were willing to kill, so the more tested "street soldiers" a gang had, the stronger it became.

In another hypothetical question the prosecutor added facts consistent with the football game stabbing. The spectators at the game included several Venice gang members with their families. When approached by several Santa Monica gang members, a fight ensued. There were several fist fights and one person (who later recovered) was stabbed four times in the torso. The stabbing, along with the Virginia Park incident earlier that year, served to heat up the rivalry between the two gangs. In Officer Gomez's opinion, the September 30, 2009 shooting was committed in retaliation for the football game stabbing.

## **Defense**

Defendant did not testify or present witnesses. The parties stipulated that the DNA of at least five individuals was obtained from the recovered hoodie and the DNA of three individuals was obtained from the gloves. A comparison to defendant's DNA was inconclusive.

## **DISCUSSION**

### **I. Evidence of gang activity**

Defendant contends he objected under Evidence Code section 352 to the admission of evidence regarding the Virginia Park incident and the football game stabbing on the grounds that any probative value of the evidence was outweighed by its potential for undue prejudice. Defendant asserts that the trial court erred in admitting the evidence over his objection. "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." (Evid. Code, § 352.) We review the

trial court's ruling for an abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) We uphold the trial court's admission of gang evidence unless its "ruling falls outside the bounds of reason." (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1434.)

We need not reach the issue unless it appears that defendant objected to the evidence in the trial court on the ground urged here, as "[a] party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct" [citation] . . . ." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 991.) Though defense counsel mentioned Evidence Code section 352 in a pretrial hearing, he did not make the specific objection defendant claims. Prior to the second trial, defendant filed a motion to exclude the gang expert's opinion that the shooting was committed in retaliation for the football game stabbing, among other opinions. Defendant based this part of the motion on Evidence Code section 801, subdivision (a), arguing that a desire for vengeance was not a concept beyond the understanding of most jurors, and thus not a proper subject of expert opinion. The prosecutor argued that the ongoing rivalry between the two gangs would support the expert's opinion that the shooting was retaliatory.

The pretrial motion was not an effort to exclude the evidence of the two incidents, and defendant did not argue that the court should exclude evidence of the two gangs' rivalry. Furthermore, defendant did not object to the evidence when either of the two officers testified about the incidents.<sup>3</sup> Defense counsel argued the two incidents did not support an expert opinion that the shooting was retaliatory because there was no nexus between defendant and the incidents: "nothing to indicate that [defendant] was anywhere near the park or anywhere near a football game."

Counsel mentioned Evidence Code section 352 briefly, arguing that without evidence that defendant knew about the two incidents, "it's also pulling into a picture of

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<sup>3</sup> Defendant claims the trial court noted defense counsel's continuing objection. While the trial court did note a continuing objection to the admission of field interview cards and the expert's opinion that the shooting was committed in retaliation for the Virginia Park incident and football game stabbing, the court ruled the field interview cards and the opinion were admissible, but indicated it would exclude any hypothetical question which included facts not in evidence.

the defendant under [Evidence Code section] 352 which is highly prejudicial. [The jury] might very well get the impression that he was at that football game or at that park.” It is not clear whether the trial court understood this statement as an objection to the evidence of the two incidents or a request to weigh the probative value of the evidence against its potential prejudicial effect. Nevertheless, the court did weigh the probative value of the two incidents against the threat the jury might get the impression that defendant attended the football game or the car show at Virginia Park. The trial court implicitly found the evidence to be highly probative, as it concluded that excluding the evidence would eliminate the substance of the prosecution evidence demonstrating a rivalry between the two gangs. To dispel any potential undue prejudice, the trial court offered to give a limiting instruction to the effect that the evidence was not intended to suggest defendant’s presence at the events or his participation in either incident.

Assuming counsel’s brief mention of Evidence Code section 352 preserved the issue for review, we find no abuse of discretion. Defendant concedes that evidence of gang rivalry may be relevant to the issue of motive. Indeed, “[t]he People are entitled to “introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent.” [Citation.]’ [Citation.]” (*People v. McKinnon* (2011) 52 Cal.4th 610, 655.) The testimony of a gang expert is admissible to establish the activities of street gangs, gang rivalries, and the ““motivation for a particular crime, generally retaliation or intimidation.”” (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1120.)

Here, gang activity was alleged as a sentence enhancement, which required the prosecution to prove that the crime was committed for the benefit of a criminal street gang, at the direction of the gang, or in association with it, and with the specific intent to promote, further, or assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1); *People v. Albillar* (2010) 51 Cal.4th 47, 61, 67-68.) Motive is relevant to that element, and evidence of the defendant’s gang membership, his gang’s rivalry, and crimes committed by or upon his gangs rivals may be probative of motive. (See *People v. Hill, supra*, 191 Cal.App.4th at pp. 1120, 1122-1123 & fn. 9, 1139-1140.) The probative value of such evidence is not outweighed by undue prejudice *simply because defendant did not*

*participate in or know about the crimes.*<sup>4</sup> (See *People v. Rivas*, *supra*, 214 Cal.App.4th at pp. 1434-1435 & fn. 11; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518-1519.)

““[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.” [Citations.]’ [Citation.]” (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 655; see also *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Defendant points out that gang evidence should nevertheless be carefully scrutinized to avoid the risk that the jury will improperly convict the defendant due to a perceived criminal disposition. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) We reject any suggestion that the trial court failed to carefully scrutinize the evidence, as our summary of the trial court proceedings demonstrated the court found the two incidents were essential to the prosecution’s need to prove the gangs’ rivalry and thus suggest a gang motive.

The court’s ruling was well within the bounds of reason: the evidence of an intense rivalry that had recently violently escalated was highly probative of the Venice 13 gang’s motive to shoot at Santa Monica gang members, particularly when viewed with the evidence of defendant’s close connection with his gang and that he committed the crime with another member of his gang. And as respondent points out, the evidence of the two incidents was brief and a great deal less inflammatory than the unchallenged evidence of defendant’s and De La Cruz’s gang membership, defendant’s enmity for the Santa Monica gang, and other gang activity.

Defendant responds by noting it was just such unchallenged gang evidence that caused the two incidents to be unduly prejudicial. Defendant provides a lengthy summary of the gang evidence and contends that the Virginia Park incident and football game stabbing evidence was cumulative of all other gang evidence. Relevant, cumulative evidence may be excluded when it would result in an undue consumption of time. (*In re*

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<sup>4</sup> We agree with respondent that the authorities cited by defendant, including *People v. Albarran* (2007) 149 Cal.App.4th 214 and *People v. Avitia* (2005) 127 Cal.App.4th 185, do not hold otherwise.

*Romeo C.* (1995) 33 Cal.App.4th 1838, 1843-1844.) However, as defendant did not object to the evidence on the ground that it was cumulative, and thus did not give the trial court the opportunity to make that determination, he has not preserved that issue for appeal. (*People v. Valdez* (2012) 55 Cal.4th 82, 138.)

Regardless, the evidence was not cumulative. The gang membership of defendant and De La Cruz, Lopez's defiance following the shooting, and the examples of graffiti and tattoos were all indicative of the two gangs' 60-year-old rivalry that may have been more or less intense during the relevant time, but did not demonstrate the recent intensity that provided motivation for this shooting. On the other hand, evidence of crimes committed by other members of the defendant's gang provides a contemporary context for the shooting, without which the shooting could appear meaningless, "and a theory resting on a seemingly meaningless act could strike the jury as an implausible theory." (*People v. Rivas, supra*, 214 Cal.App.4th at pp. 1434-1435.)

In any event, had the court erred, any such error would be harmless. "No judgment shall be set aside . . . on the ground of . . . the improper admission or rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; see also Evid. Code, § 353.) Whether a miscarriage of justice resulted from the erroneous admission of the type of gang evidence challenged here is determined under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Hill, supra*, 191 Cal.App.4th at p. 1140.) That standard requires defendant to demonstrate a reasonable probability that error affected the outcome of the trial. (*People v. Watson, supra*, at p. 836; see *People v. Valdez* (1997) 58 Cal.App.4th 494, 511-512.)

In his cross-examination of Officers Cooney and Gomez, defense counsel brought out there was no evidence that Lopez, defendant, or De La Cruz attended the car show at Virginia Park or the football game, or that defendant stabbed or disrespected anyone. The prosecutor did not argue that defendant knew about the Virginia Park incident or football game stabbing or had a personal motive due to those events. Indeed the trial

court instructed the jury to “consider the evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose and knowledge that are required to prove the gang related crime and enhancements or the defendant had a motive to commit the crimes charged. . . . You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.” Jurors are presumed to have understood and followed their instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Further, as respondent observes, defendant’s acquittal of the attempted murder of Soto demonstrates the jury did not, in fact, rest a finding of guilt on conclusions about defendant’s character drawn from either the Virginia Park incident or the football game stabbing.

Defendant contends that the evidence of his identity as the shooter was weak because it was circumstantial and the witnesses’ descriptions varied. For example, defendant points to the obviously reluctant testimony of Lopez, who described the shooter as African-American in what appeared to be an effort to avoid a “snitch” label. Defendant also notes Schaffner’s testimony that she saw the driver enter the truck after she heard gunfire, and did not see a passenger. He also concludes that the case was a close one because the jury asked for read-back of the testimony of Soto, Schaffner, and Haldorsen, as well as the criminalist who analyzed the gunshot residue tests.

This was not a close case. Despite some conflicts and circumstantial evidence, the evidence clearly established defendant’s identity as the shooter and De La Cruz as the driver. Although Lopez was a reluctant live witness, he previously identified the shooter as the passenger who was wearing a hoodie, and told Officer Cooney that the shooter was a Venice 13 gang member. Soto testified the shooter wore a black hooded sweatshirt. Haldorsen saw two people fleeing in the truck, and observed that defendant resembled the passenger with the handgun and hoodie. Schaffner and Haldorsen saw the driver wearing a hat. Sergeant Hudson saw the truck speeding toward the freeway shortly after the shooting, and observed two people abandon the truck and flee on foot into an area where De La Cruz and defendant were soon found hiding.

The other evidence of gang motivation was equally persuasive. The expert's opinion, based upon defendant's and De La Cruz's tattoos and prior contacts with law enforcement, established that they were both Venice 13 gang members. There was no contrary evidence. Further, defendant knew De La Cruz was a member of his gang, and they were in each other's company during one of the law enforcement recorded field interviews. Thus sufficient evidence established that defendant intentionally committed the crime in association with a known gang member, such that a jury could reasonably infer that defendant harbored the specific intent to promote, further, or assist in any criminal conduct by gang members, as required by section 186.22, subdivision (b)(1). (See *People v. Albillar*, *supra*, 51 Cal.4th at pp. 67-68; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.) Given these circumstances, it is not reasonably probable that absent the challenged evidence the jury would not have determined the crime was gang related. We thus conclude defendant has not met his burden to establish a miscarriage of justice.

## **II. Sentencing errors**

Respondent contends the trial court erroneously referred to the terms imposed on counts 2 and 5 each as "40 years to life" rather than life in prison with a 15-year minimum parole eligibility period, plus 25 years to life. Though defendant disagrees, it appears respondent is correct. It also appears the trial court meant to articulate the sentence in the correct manner, but its use of the shorthand, "15 to life" and "40 years to life" created the error.

The trial court pronounced sentence as follows: "As to count 2, . . . the court imposes a sentence of 15 to life. As to the added allegation of [section] 12022.53[, subdivision] (d), the court imposes 25 to life, which comes to 40 years to life on count 2. And there is also a special allegation of [section] 186.22[, subdivision] (b)(5) with respect to the gang allegation. And that merely means that the minimum parole date is 15 years. So as to count 2, the sentence is 40 years to life." As to count 5, the court imposed "40 years to life . . . calculated in the identical manner [as] count 2" to run concurrently with count 2.

The authorized sentence for attempted, willful, deliberate, and premeditated murder is life in prison with the possibility of parole, not 15 years to life. (§ 664, subd. (a).) Thus the trial court should have sentenced defendant to prison for life with the possibility of parole and then set the minimum parole eligibility at 15 years pursuant to section 186.22, subdivision (b)(5), before adding the firearm enhancement of 25 years to life, to run consecutively to the life term. (Cf. *People v. Lopez* (2005) 34 Cal.4th 1002, 1007-1009; *People v. Garcia* (2004) 118 Cal.App.4th 987, 993.) We modify the judgment accordingly.

Defendant and respondent both observe that the abstract of judgment for counts 3 and 4 contain incorrect or missing check marks in the boxes used for indicating whether a term is the full consecutive term or one-third the middle term. The trial court imposed a sentence of five years as to count 3, composed of the full middle term of two years for a violation of Vehicle Code section 2800.2 (Pen. Code, § 18), plus a three-year gang enhancement. However it is the box for one-third the middle term which is checked. The court imposed a consecutive one-third middle term of eight months as to count 4, but no box is checked. Accordingly, we direct the trial court to issue a corrected abstract of judgment.

### **DISPOSITION**

The judgment is modified as to counts 2 and 5 as follows: defendant is sentenced to life in prison with the possibility of parole as to count 2, with the minimum parole eligibility set at 15 years, plus a consecutive firearm enhancement of 25 years to life; the same term is imposed as to count 5 and shall run concurrently with count 2. The court is ordered to issue an amended abstract of judgment to reflect the modified judgment. The sentences as to counts 3 and 4 remain unmodified, but the court is ordered to issue an amended abstract of judgment with the correct indications. The superior court is further directed to forward the corrected abstracts to the Department of Corrections and

Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, P. J.  
BOREN

\_\_\_\_\_, J.  
ASHMANN-GERST