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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMON ENRIQUEZ MENDEZ,

Defendant and Appellant.

C063386

(Super. Ct. No. SF106859B)

Defendant was convicted by a jury of first degree murder (Pen. Code, § 187), attempted robbery (*id.* § 664/211), and active participation in a criminal street gang (*id.* § 186.22, subd. (a)). (Further undesignated section references are to the Penal Code.) The jury also found the murder was committed during the attempted robbery (§ 190.2, subd. (a)(17)(A)), both the murder and the attempted robbery were committed for the benefit of a criminal street gang (§§ 186.22, subd. (b), 190.2, subd. (a)(22)) and a principal in the offenses discharged a firearm causing great bodily injury (§ 12022.53, subds. (d) & (e)).

On the murder conviction, defendant was sentenced to life without the possibility of parole (LWOP) plus consecutive terms of 25 years to life and 10 years for the firearm discharge and gang enhancements respectively. On the attempted robbery, defendant received a consecutive, one-third middle term of one year, plus enhancements of 25 years to life and 10 years for the firearm discharge and gang enhancements, to run concurrently to the terms on the murder charge. Finally, on the gang offense, defendant received a concurrent middle term of two years.

Defendant appeals contending: (1) the trial court erred in denying his motion for mistrial after a prosecution gang expert presented improper testimony; (2) he received ineffective assistance of counsel when his attorney elicited testimony from a witness suggesting, incorrectly, that another witness had provided damaging testimony during the preliminary hearing; (3) there is insufficient evidence to support the robbery special circumstance; (4) there is insufficient evidence to support the gang charge and enhancements; (5) the jury was not properly instructed on the gang special circumstance; (6) the jury was not properly instructed on the firearm enhancement; (7) the LWOP sentence constitutes cruel and unusual punishment; (8) the 10-year gang enhancements were improperly imposed in addition to the 25-to-life firearm enhancements; and (9) the court was required to stay the sentences on the attempted robbery and gang charges.

We agree with defendant that the gang special circumstance findings on the murder and attempted robbery offenses must be reversed due to instructional error, the gang enhancements on those offenses must be stricken because they cannot be imposed in addition to the firearm use enhancements, and the separate punishments for the robbery and gang charges must be stayed pursuant to section 654. In all other respects, we affirm the judgment.

FACTS AND PROCEEDINGS

On the afternoon of December 9, 2007, defendant, Jose Cardenas, Martha M., and Carina G., along with several others, attended a gathering at the home of Jose P. in Stockton. All of the attendees were members of the Surenos criminal street gang. Defendant and Cardenas were members of the Vickystown subset of the Surenos, while Martha and Carina were members of the Playboys subset.

Cardenas, Martha M. and Carina G. arrived in a car driven by Carina, who parked in an alley behind Jose P.'s home. Defendant arrived separately. At some point during the afternoon, defendant and Cardenas stood among a group of men who were passing around a handgun. Defendant had the gun in his pocket or waistband either before or after it was passed around.

Later in the afternoon, Cardenas, Martha and Carina got into Carina's car to leave and were waiting for defendant to join them. About that time, 19-year-old Francisco Montejo walked passed them down the alley talking on a cell phone. Cardenas made a comment to the effect that he liked the man's phone and should take it from him. A couple of minutes later, Cardenas asked to be let out of the car and walked to the back of it. Defendant joined him there and they talked for a couple of minutes. The two then walked up the alley in the direction of Montejo.

Defendant and Cardenas approached Montejo and announced they were Surenos. Cardenas held Montejo at gunpoint, while defendant attempted to search him. However, before defendant could take anything, Cardenas shot Montejo in the chest.

Defendant and Cardenas fled and shortly thereafter were picked up by Carina G. and left the area. Montejo later died from the bullet wound.

Defendant and Cardenas were charged with murder, attempted robbery and active participation in a criminal street gang, along with various special circumstances and

enhancements, as described above. They were tried together before separate juries. Defendant was convicted as charged and sentenced as previously indicated.

DISCUSSION

I

Motion for Mistrial

During cross-examination of the prosecution's gang expert, Officer James Ridenour, counsel for codefendant Cardenas asked how the offenses charged in this matter could have benefited the Surenos gang in light of the fact the defendants had not been wearing gang clothing, they did not flash gang signs, and no graffiti was produced proclaiming responsibility. Ridenour answered:

“Since this crime has happened, all the way up Cinco de Mayo, or actually it was May 3rd of this year, when I have talked to Norteno gang members, especially on May 3rd, I actually stopped and talked to them on the alley off Charter, okay, this alley that enters off MLK is actually a spot I stopped and talked to this kid. We were just talking and I was asking him what was going on with his gang, what's going on with the fighting, has he been shot at lately, has he been--what's going on with him, the Nortenos, with the Nortenos and Surenos. We talked for a while, and I said--.”

At that point, counsel for defendant objected on hearsay grounds, and counsel for Cardenas objected that the answer was not responsive to the question. The trial court overruled the objections.

Ridenour continued: “We talked for a while, and he said the Surenos are starting to step it up. I asked him what he meant by that.”

Counsel for Cardenas again objected, this time based on *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*). The trial court again overruled the objection.

Ridenour then completed his answer: “And he said they are starting to step it up and that they have been killing a lot of us lately. I said, what are you talking about, and he said they killed their own people here in the alley a couple of years ago. During that same year, they were driving around in a truck just shooting Nortenos like they were nothing, and then they were talking about the homicide that happened at AM/PM, when they stabbed and shot the guy at AM/PM. He said they’re just stepping up. They’re not playing no more with us, they’re trying to make a move. That’s one way.

“I have also talked to citizens in that area, right after this homicide happened, a couple of months, and since then going through that area, asking them--I see people standing, mowing their yards and stuff like that, I just ask them what the neighborhood is like, they tell me they’re tense, they’re tense because of the shootings, they’re tense because--and they say both Nortenos and Surenos, both Nortenos and Surenos seem like they are getting more violent, they’re shooting people in the alley, they’re shooting people in the streets.”

At that point, counsel for defendant objected that the answer was not responsive and asked that it be stricken and to approach the bench. After an unreported bench conference, questioning moved on to other matters.

At the next break, counsel for defendant moved for a mistrial. Counsel indicated that, while the answer may have been responsive to the question, defendant “shouldn’t be saddled with bad questions” asked by a co-defendant’s counsel. Cardenas’s counsel again asserted the testimony violated *Crawford*.

The trial court denied the motion. The court explained the question was legitimate and the answer was responsive, but “probably went too far.” The court indicated the answer did not suggest that either defendant was involved in the other crimes described by the officer but instead the reference was to Sureno crimes in general.

Defendant contends admission of the foregoing testimony was so prejudicial as to render his trial fundamentally unfair, in violation of state and federal due process. He

argues the trial court therefore erred in denying his motion for mistrial. Of course, implicit in this argument is that the trial court erred in overruling counsels' objections to the testimony in the first place. Defendant raises a number of separate arguments in this regard, including a claim that admission of the evidence violated his constitutional right of confrontation as recognized in *Crawford*.

Inexplicably, the People respond only to this *Crawford* argument, thereby apparently conceding the others. However, we do not accept that implicit concession and shall consider each argument in turn.

Defendant first contends the court erroneously reasoned there was no prejudice from the foregoing testimony because it was not directed at him personally, but only at the Surenos gang generally. He points out: "The unidentified Norteno directly referred to the charged crimes ('they killed their own people here in the alley a couple of years ago'). Similarly, the neighbors' statements that they were tense because of the 'shootings' was solicited from those witnesses by Ridenour 'right after the homicide happened.' " Defendant argues the unidentified Norteno stated "they killed" rather than "they accidentally shot" the victim, thereby going to "one of the most hotly disputed issues in the trial."

The foregoing arguments do not suggest any misuse of the indicated testimony. The question asked of Officer Ridenour was how the gang could benefit from the crime. The fact that people on the street were aware of the crime and that it was perpetrated by Surenos answered that question. The fact neighbors may have been tense following the crime is no surprise, since tension and anxiety is exactly what such gang crimes are intended to create. Officer Ridenour was essentially explaining how the crimes caused their intended result. There is no suggestion either defendant was tied to any of the other described crimes.

Defendant also takes issue with the trial court's suggestion that he would not be prejudiced by the mention of other crimes committed by Surenos in general. He argues:

“It is well established that improperly admitted gang evidence creates a substantial danger of undue prejudice precisely because it creates a risk that the jury will improperly infer that the defendant has a criminal disposition.”

Defendant cites as support *People v. Cardenas* (1982) 31 Cal.3d 897 (*Cardenas*), where the Supreme Court found an abuse of discretion under Evidence Code section 352 in the admission of evidence that the defendant and several of his witnesses were members of the same criminal street gang. In that case, there were no gang charges; the evidence was admitted instead to show bias of the witnesses. The high court concluded such evidence was cumulative in light of other evidence showing the close relationship between the defendant and the witnesses. Hence, the minimal probative value of the evidence was outweighed by its prejudicial effect. (*Cardenas*, at pp. 904-905.)

Cardenas is clearly inapposite. The court there concluded the evidence was improperly admitted under Evidence Code section 352 because its slight probative value was outweighed by its prejudicial effect. Defendant here did not raise an Evidence Code section 352 objection, so there was no occasion for the trial court to weigh probative value against prejudicial effect. Defendant did not initially object to the evidence as unduly prejudicial. He asserted it should be excluded because it was hearsay and not responsive.

Defendant’s argument that “improperly admitted gang evidence creates a substantial danger of undue prejudice” merely begs the question of whether the evidence was improperly admitted. And while *improperly* admitted evidence could create a substantial danger of prejudice, so too could *properly* admitted evidence.

“The rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay.” (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209.) “Evidence Code section 801 permits an expert to testify to an opinion ‘[b]ased on matter . . . perceived by or

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, unless an expert is precluded by law from using such matter as the basis of his opinion.*' (Evid. Code, § 801, subd. (b))" (*People v. Coleman* (1985) 38 Cal.3d 69, 90 (*Coleman*), disapproved on other grounds in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.)

The questioning by defense counsel went to the expert's opinion that the shooting of Montejo was for the benefit of the Surenos gang. Ridenour was asked an open-ended question about how the crime could have benefited the gang, thus inviting an open-ended answer. Ridenour explained how the public, and the Nortenos in particular, came to view the crime as part of an increase in violent criminal activity by the Surenos. The answer was responsive.

Defendant argues evidence of other crimes committed by someone else, such as the AM/PM stabbing and shooting mentioned by Ridenour, is not admissible to prove defendant's guilt of the charged offenses. However, while that may be true as far as it goes, the evidence here was not admitted to prove defendant committed the offense but to prove that such offense was for the benefit of the gang. Defense counsel's questioning suggested no such connection existed and challenged the witness to explain otherwise. The witness did so by indicating word on the street was that the murder was part of a pattern of increased gang violence.

Defendant next contends "an expert 'may not under the guise of reasons bring before the jury incompetent hearsay evidence,' " quoting from *Coleman, supra*, 38 Cal.3d at page 92. According to defendant, "[i]n cases 'where the risk of improper use of the hearsay outweighs its probative value as a basis for the expert opinion it may be necessary to exclude the evidence altogether.' " Defendant argues this is such a case, because the trial court placed no restriction on the jury's use of the evidence. Hence, the

jury was not restricted to using the evidence only to test the basis of the expert's opinions.

In *Coleman*, the high court cautioned: "California law gives the trial court discretion to weigh the probative value of inadmissible evidence relied upon by an expert witness as a partial basis for his opinion against the risk that the jury might improperly consider it as independent proof of the facts recited therein." (*Coleman, supra*, 38 Cal.3d at p. 91.) The court continued: "[W]hile an expert may give reasons on direct examination for his opinions, including the matters he considered in forming them, he may not under the guise of reasons bring before the jury incompetent hearsay evidence. [Citation.] Ordinarily, the use of a limiting instruction that matters on which an expert based his opinion are admitted only to show the basis of the opinion and not for the truth of the matter cures any hearsay problem involved, but in aggravated situations, where hearsay evidence is recited in detail, a limiting instruction may not remedy the problem." (*Id.* at p. 92.) Finally, the court stated: "[T]he trial court must exercise its discretion pursuant to Evidence Code section 352 in order to limit the evidence to its proper uses. The exercise of this discretion may require exclusion of portions of inadmissible hearsay which were not related to the expert opinion. [Citation.] Or it may be necessary to sever portions of the testimony in order to protect the rights of the defendant without totally destroying the value of the expert witness' testimony. [Citation.] In still other cases where the risk of improper use of the hearsay outweighs its probative value as a basis for the expert opinion it may be necessary to exclude the evidence altogether." (*Id.* at pp. 92-93.)

Defendant's argument that an expert may not present *incompetent* hearsay evidence under the guise of explaining the basis for his opinions again begs the question of whether this was incompetent hearsay evidence. Likewise as to defendant's further argument that an expert cannot base an opinion on *unreliable* hearsay. Defendant asserts "[s]tatements made to police by victims and witnesses are not considered trustworthy."

However, these are the very things gang experts are reasonably expected to rely upon. In this instance, for example, how else would Officer Ridenour have learned about the perception in the community regarding the charged crime. While the hearsay evidence may not have been admissible to prove a stabbing and shooting occurred at an AM/PM, it would nevertheless be admissible to show how the public viewed the charged crime in context, thereby supporting the expert's opinion that the crime was gang-related.

Defendant points to nothing to suggest the indicated information was any more or less competent or reliable than other such evidence routinely relied upon by gang experts.

Lastly, defendant contends introduction of the hearsay evidence violated his right of confrontation. "In all criminal prosecutions, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, 'to be confronted with the witnesses against him'" (*People v. Thomas, supra*, 130 Cal.App.4th at p. 1208.) "In *Crawford*, the Supreme Court held that out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant." (*Ibid.*)

The People contend defendant has forfeited this argument by failing to object below on the basis of *Crawford*. However, because the issue was raised by co-counsel, we conclude it is properly before us.

The initial question in any *Crawford* analysis is whether the out-of-court statements were testimonial in nature. The United States Supreme Court did not provide a comprehensive definition in *Crawford* of what would be considered testimonial, but did provide the following examples: (1) "'*ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,'" and (2) "statements . . . made under circumstances which would lead an objective witness reasonably to believe

that the statement would be available for use at a later trial.” (*Crawford, supra*, 541 U.S. at pp. 51-52 [158 L.Ed.2d at p. 193].)

There can be no reasonable dispute that the statements at issue here fall outside the examples mentioned by the United States Supreme Court. These were not custodial examinations of percipient witnesses to the crimes but merely general statements regarding the word on the street as to the effect of the crimes. There is nothing to suggest the individuals questioned by Officer Ridenour would reasonably have expected their comments to be used in court.

Defendant cites *United States v. Mejia* (2d Cir. 2008) 545 F.3d 179, to support his contention that the statements at issue here were testimonial. However, *Mejia* is clearly inapposite, as it involved an expert who was also the investigating officer in the case and who recited to the jury information that was obtained from a gang member who had been interrogated while in police custody. (See *id.* at p. 199.)

“ ‘Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned.’ [Citations.] ‘The rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay. [Citations.]’ [Citation.] . . . [A]dmission of expert testimony based on hearsay will typically not offend confrontation clause protections because ‘an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert’s opinion.’ ” (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154.)

The question here is whether the trial court erred in denying defendant’s motion for mistrial. “In reviewing rulings on motions for mistrial, we apply the deferential abuse of discretion standard. [Citation.] ‘A mistrial should be granted if the court is apprised

of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.

[Citation.]’ [Citation.]” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.)

Any prejudice to defendant was minimal, inasmuch as the expert recounted other Surenos crimes as the basis for his opinion that a primary purpose of the gang was committing crimes.

Furthermore, contrary to defendant’s assertions, this was not a close case. Defendant relies on his own self-serving statements to police that he tried to talk Cardenas out of the crime and only followed behind him as he approached the victim. But even accepting this as true, the fact remains that, after defendant was unable to talk Cardenas out of it, he accompanied Cardenas up the alley knowing full well Cardenas’s intent. Other evidence also shows defendant readily participated in the crime thereafter.

We conclude the trial court did not abuse its discretion in denying defendant’s motion for mistrial.

II

Ineffective Assistance

During her trial testimony, Martha M. testified that, when defendant and Cardenas returned to Carina’s car after the shooting, they were laughing. She also acknowledged telling the police that, when defendant and Cardenas got into the car, they were a little jumpy as if they were in shock. She further testified nobody said anything in the car about anyone being shot and claimed not to remember telling police otherwise. She did not testify that defendant said anything about going through the victim’s pockets before the shooting.

During the defense case, counsel for defendant questioned Detective Rodriguez about his interview of Martha M. and Carina G. Rodriguez testified that both Carina and

Martha told him that when Cardenas got back in the car he said he thought he shot someone. He further testified that they confirmed this in their preliminary hearing testimony. Rodriguez indicated Martha did not say anything to him about hearing defendant say he went through the victim's pockets before the shot. Counsel then continued along this line:

“BY [counsel for defendant]: Q. You had a discussion with Martha [M.] in December, correct?”

“A. Correct.”

“Q. You heard her say in court that my client, [defendant], told her that he went through the victim's pockets, correct?”

“A. Yes.”

“Q. When you interviewed her in December, did she tell you the same thing?”

“A. No.”

“Q. What did she tell you?”

“A. That she had no knowledge if [defendant] had gone through the pockets.”

“Q. She told you that she never heard anything in that car about [defendant] bragging about going through the guy's pockets, correct?”

“A. Correct.”

Defendant contends counsel's question to Detective Rodriguez about hearing Martha M. say in court she heard defendant say he went through the victim's pockets, which elicited a positive response, amounted to ineffective assistance, inasmuch as Martha did not so testify, either at trial or in the preliminary hearing. He argues there could have been no possible tactical reason for eliciting this incorrect testimony, which was then used by the prosecution in closing arguments.

The People respond that, while it is true Martha M. did not testify defendant said he went through the victim's pockets, she did testify that defendant was going to search the victim when he heard the shot. Thus, the People argue, “the fact that [defendant's]

counsel attempted to discredit [Martha's] testimony that was slightly different from what she actually testified to was of no consequence.”

The problem with the People's argument is that it was not Martha M., but Carina G., who testified that defendant was about to search the victim's pockets when the shot occurred. Martha M. did not testify about anything defendant said in the car. Nevertheless, as we shall explain, we find no ineffective assistance in connection with the indicated testimony.

Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [80 L.Ed.2d 674, 691-692]; *People v. Pope* (1979) 23 Cal.3d 412, 422.) This right “entitles the defendant not to some bare assistance but rather to *effective* assistance.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

“To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings.” (*People v. Lewis* (1990) 50 Cal.3d 262, 288.)

If the record does not show why counsel acted in the manner challenged, we must affirm the judgment unless there simply could be no satisfactory explanation for counsel's conduct. (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

In this instance, one might readily surmise trial counsel was simply confused as to who had testified about defendant saying he was about to go through the victim's pockets. Counsel was asking Detective Rodriguez about statements made by both Martha M. and Carina G., including their respective testimony. Rodriguez too apparently confused the two women. An honest mistake does not necessarily amount to ineffective assistance. A criminal defendant is entitled to effective assistance, not perfect assistance.

(*United States v. Cronin* (1984) 466 U.S. 648, 656-658 [80 L.Ed.2d 657, 666-667]; *People v. Wallin* (1981) 124 Cal.App.3d 479, 484-485; *People v. Hartridge* (1955) 134 Cal.App.2d 659, 666-667.) The question is whether counsel's conduct met the standard of a reasonably competent attorney.

At any rate, in light of Carina's testimony about defendant preparing to go through the victim's pockets before the shooting, any error in attributing that testimony to Martha was clearly harmless. And whether defendant said he went through the victim's pockets or was about to do so is of no moment. Either way, it demonstrates defendant was an active participant in the attempted robbery.

Defendant argues he was prejudiced because the prosecutor relied on the erroneous testimony during argument to the jury. However, the prosecution's argument could as easily have been a reference to Carina's testimony rather than Martha's. Because defendant has failed to demonstrate any prejudice from the erroneous testimony, his ineffective assistance claim is rejected.

III

Robbery Special Circumstance

Under section 190.2, a defendant found guilty of first degree murder is subject to a penalty of death or life without the possibility of parole (LWOP) if one of various special circumstances is found true. One such special circumstance is where "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit" one or more of various enumerated felonies, including robbery. (§ 190.2, subd. (a)(17).) For the actual killer, intent to kill is not an element of the special circumstance charge. However, for an aider and abettor, the prosecution must prove the defendant either intended to kill (§ 190.2, subd. (c)) or was a major participant in the underlying felony and acted with reckless indifference to human life (§ 190.2, subd. (d)).

Defendant contends there is no evidence either that he intended to kill the victim or that he acted with reckless indifference to the victim's life. Hence, he argues, the special circumstance finding cannot stand. According to defendant, there is insufficient evidence he knew before the actual shooting that Cardenas was likely to fire or was likely to harm anyone. Rather, defendant argues, "the evidence tended to show that *both* defendants were completely surprised when the gun went off, as they immediately ran away in a panic without taking the victim's property." Furthermore, defendant first tried to talk Cardenas out of the crime and eventually went along only because Cardenas promised the victim would not be hurt.

“ ‘ “To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rationale trier of fact could find the defendant guilty beyond a reasonable doubt.” ’ [Citations.] ‘ “If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.” ’ [Citations.] The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

As commonly understood, the term “reckless indifference to human life” means “that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death.” (*People v. Estrada* (1995) 11 Cal.4th 568, 577.)

In *People v. Hodgson* (2003) 111 Cal.App.4th 566 (*Hodgson*), the Court of Appeal found sufficient evidence to support a robbery special circumstance where the defendant held open the electric gate of an underground parking garage to facilitate the escape of his fellow gang member, Salazar, who robbed and shot to death a woman who had opened the gate to enter. (*Hodgson*, at p. 568.) While the defendant stood at the gate,

Salazar approached the victim's car and shot out one of the windows. After the car rolled forward and into a pillar and a parked car, Salazar fired another bullet through the window and into the victim's head. (*Id.* at p. 570.)

The court concluded the defendant was a major participant in the crime, notwithstanding the fact he did not supply the murder weapon, was not himself armed, and did not take anything from the victim. (*Hodgson, supra*, 111 Cal.App.4th at p. 579.) The court explained there were only two participants in the crime, rather than a "coterie of confederates," and the defendant's actions were essential in assisting his fellow gang member's escape. (*Id.* at pp. 579-580.) The court further concluded a rational trier of fact could have found sufficient evidence that the defendant acted with reckless indifference to human life. The court explained: "Even after the first shot it must have been apparent to appellant Ms. Nam had been severely injured and was likely unconscious. Her car rolled into the garage and collided with a pillar and another car. Appellant had to be aware use of a gun to effect the robbery presented a grave risk of death. However, instead of coming to the victim's aid after the first shot, he instead chose to assist Salazar in accomplishing the robbery by assuming his position at the garage gate and trying to keep it from closing until Salazar could escape from the garage with the loot." (*Id.* at p. 580.)

In *People v. Smith* (2005) 135 Cal.App.4th 914, Taffolla stood outside the victim's motel room while Smith entered and beat her to death in the course of a robbery. The Court of Appeal found sufficient evidence to support the finding that Taffolla acted with reckless indifference to human life for purposes of a robbery special circumstance finding. According to the court: "Even if Taffolla remained outside [the victim]'s room as a lookout, the jury could have found Taffolla gained a 'subjective awareness of a grave risk to human life' during the many tumultuous minutes it would have taken for [the victim] to be stabbed and slashed 27 times, beaten repeatedly in the face with a steam iron, and had her head slammed *through* the wall. In addition, when Smith emerged from

her room covered in enough blood to leave a trail from the motel to McFadden Street, Taffolla chose to flee rather than going to [the victim]'s aid or summoning help.” (*Id.* at p. 927.)

In neither of the foregoing cases did the defendant participate in the actual killing except as a lookout. In the present matter, defendant's participation was more direct. He stood alongside Cardenas as they attempted to rob the victim. On the other hand, in the foregoing cases, the defendant had an opportunity to intervene to stop the killing while it was in progress but chose not to do so. In the present matter, there was only one shot, after which defendant and Cardenas immediately fled.

Defendant relies on two out-of-state decisions: *Jackson v. Florida* (Fla. 1991) 575 So.2d 181 (*Jackson*); and *State v. Lacy* (Ariz. 1996) 929 P.2d 1288 (*Lacy*). In *Jackson*, the evidence established that the defendant and his brother were at the scene of a murder and the defendant had previously expressed an intent to rob the victim. However, there were no eyewitnesses to the actual killing. The defendant was convicted of felony murder and sentenced to death, but the Florida Supreme Court reversed the sentence. The court explained that, while the defendant was clearly a major participant in the underlying felony, there was insufficient evidence that he acted with a reckless disregard for human life. In particular, there was no evidence the defendant possessed or fired a weapon, harmed the victim, intended to harm the victim when he entered the store, or expected violence to erupt. (*Jackson*, at pp. 192-193.) There was also no evidence that the defendant had a chance to prevent the murder, since it happened quickly. (*Id.* at p. 193.)

In *Lacy*, two women were found dead in an apartment. One woman had been shot three times and received a blunt force injury to her head and scratches on her arm. The other woman had been shot twice, once in the face and once in the back of the head. (*Lacy, supra*, 929 P.2d at pp. 1292-1293.) The defendant later gave a statement to police implicating himself and a man named Stubblefield in the killings. However, the

defendant claimed Stubblefield alone had killed the women while the defendant tried to get him to depart. The defendant eventually grabbed a microwave and ran out the door of the apartment. Stubblefield later picked him up and took him home. The two men were tried separately and Stubblefield was acquitted. However, the defendant was convicted of first degree murder and sentenced to death. (*Id.* at p. 1293.)

The Arizona Supreme Court reversed the sentence, finding insufficient evidence that the defendant acted with reckless indifference to human life. The only evidence of what occurred inside the apartment was the defendant's statement to police. According to the court: "Here, other than what defendant described, there is little to establish his involvement in the deaths of these young women. We know that, at a minimum, he stole a microwave after one of the murders and did nothing to prevent either victim's death. While this may demonstrate callousness and a shocking lack of moral fiber, it does not alone rise to the level of reckless indifference." (*Lacy, supra*, 929 P.2d at p. 1300.) The court continued: "We do not suggest that defendant's tale must be accepted at face value. Without his statement, however, we are left with an almost complete void as to what occurred that night. His fingerprints were nowhere to be found, it is unclear whether he knew Stubblefield had a gun, and it is uncertain that he should have anticipated violence." (*Ibid.*)

Similar to the foregoing cases, there is no evidence here as to what occurred in the alley other than defendant's statements to the police and the testimony of Martha and Carina about what defendant and Cardenas said after they returned to the car. However, in the present matter, there is evidence that defendant conspired with Cardenas to rob the victim, defendant was either armed or knew Cardenas was armed with a handgun, and the two proceeded in the direction of the victim to carry out their plan. It is also clear that, after the shooting, defendant ran from the scene with Cardenas rather than render aid to the victim.

In *People v. Mora* (1995) 39 Cal.App.4th 607 (*Mora*), Mora and Arredondo conspired to rob a drug dealer named Minard. Minard and a friend named Nale were at Minard's home at 1:30 a.m. watching television and smoking marijuana when Mora knocked on the door. Nale had previously introduced Mora to Minard for the purpose of buying drugs and admitted Mora into the home. Arredondo later knocked on the door, and Mora asked if his friend could come in and use the bathroom. However, when the door was opened, Arredondo pushed his way in pointing a high-powered rifle. Arredondo instructed Minard to "get his boxes of shit," and, as Minard began to get up, Mora grabbed him. A tussle ensued during which Arredondo fired a shot into Minard's chest. Minard fell to his knees, Mora pushed him the rest of the way down, and Arredondo shot Minard in the back. Each gun wound was fatal. (*Mora, supra*, 39 Cal.App.4th at p. 611.) Mora later gave a statement to police claiming that he never intended that anybody die. (*Id.* at p. 612.)

The Court of Appeal concluded there was sufficient evidence to support a finding that Mora acted with reckless disregard for human life. Even assuming Mora did not intend that the victim be killed, he "admitted planning to go to a drug dealer's home at night to rob him by having Arredondo enter with a rifle which fired three-inch bullets. [Mora] had to be aware of the risk of resistance to such an armed invasion of the home and the extreme likelihood death could result. [Citation.] According to [Mora]'s own statement he did not know whether Minard was dead or alive. He did not attempt to aid the victim but instead carried through with the original plan to steal the victim's drugs. [Mora] personally carried away the loot, left the victim there to die, and threatened the remaining victim Nale." (*Mora, supra*, 39 Cal.App.4th at p. 617.)

In the present matter, the jury was not required to accept defendant's self-serving description of the offenses at face value. Defendant first denied even being present at Jose P.'s house. After being told the police knew he was there, defendant admitted being present, but claimed Cardenas wanted him to go along but he refused, Cardenas went

alone, and defendant heard a gunshot. However, when told that bank surveillance cameras showed him with Cardenas in the alley, defendant admitted he went along but claimed he first tried to talk Cardenas out of it. He also claimed he did not know Cardenas was armed. Defendant then said he ran away after the shooting only because Cardenas ran and that Cardenas claimed when he got to the car that the gunshot had been accidental. It is clear from the foregoing that defendant revealed to police only as much as he was required to reveal based on what the officers claimed they already knew.

Both Martha M. and Carina G. testified that Cardenas expressed an intent to steal the victim's cell phone and, a couple minutes later, engaged in a discussion with defendant at the rear of Carina's car. The two then departed up the alley in the direction of the victim. Shortly thereafter, the shooting occurred and both defendants fled the scene, leaving the victim lying in the alley. Martha testified she saw the two men running and, when they got in the car, they were laughing. Carina testified she told the police that defendant said he told Cardenas just to scare the victim and defendant was going to search the victim when he heard the gunshot. There was also testimony that defendant had been seen earlier in a group of men with Cardenas passing around a handgun.

As in *Mora*, the two perpetrators planned to rob the victim at gunpoint. Also as in *Mora*, defendant was actively assisting his armed confederate in the attempted robbery when the latter shot the victim. Further as in *Mora*, both perpetrators fled the scene without rendering assistance following the allegedly unintended shooting. The only difference here, which also distinguishes this matter from *Hodgson*, is that the victim was not shot twice and, hence, defendant did not have as great an opportunity to intervene and stop the killing. However, we do not find this distinction to be significant under the circumstances. When defendant accompanied his confederate up that alley to assist in a robbery, he knew Cardenas was armed and had to be aware of the risk of resistance to such a crime and the extreme likelihood death could result. This is sufficient to support the finding that he acted with reckless disregard for human life.

IV

Active Gang Participation

Defendant contends his conviction for active participation in a criminal street gang must be reversed because the prosecution failed to prove the Surenos are a criminal street gang within the meaning of section 186.22.

Section 186.22, subdivision (a), reads: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.”

A criminal street gang is defined in section 186.22 as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (§ 186.22, subd. (f).)

A “pattern of criminal gang activity” requires “the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons: [33 offenses identified].” (§ 186.22, subd. (e).)

Defendant does not contest that the Surenos are an “ongoing organization, association, or group of three or more persons” (§ 186.22, subd. (f)) or that he is a member of the Vickystown subset of the Surenos. He contends there is insufficient evidence that a primary activity of the Surenos is the commission of one or more of the crimes enumerated in section 186.22, subdivision (e). Defendant acknowledges that Officer Ridenour, the prosecution’s gang expert, testified a primary activity of the “gang” is the commission of “[h]omicide, carjacking, robbery, drug sales, burglary, stolen autos, possession of handguns, felon in possession of weapons, [and] burglary,” which are all listed crimes. However, he argues Ridenour never clarified whether the “gang” to which he was referring was the Surenos in general or one of its subsets.

The People respond that the context of Officer Ridenour’s testimony makes it “perfectly clear” he was referring to the Surenos in general. However, as support, the People cite nothing more than the testimony indicated above. They provide no “context” for that testimony. Nevertheless, we have reviewed the entire trial transcript and note that, in earlier testimony, Ridenour was discussing the two primary Hispanic gangs, the Surenos and the Nortenos, and not any particular subsets. Ridenour made no attempt to distinguish crimes committed by a particular subset from those committed by other Surenos. Thus, there is no reason to believe he was referring to any subset of the Surenos.

Defendant next contends Officer Ridenour was never asked for the basis of his opinion that a primary activity of the Surenos was commission of the enumerated offenses. Defendant argues an expert opinion alone does not constitute substantial evidence but must be backed by sufficient facts.

The People fail to respond to this argument. Instead, they refer to Ridenour’s testimony identifying the various offenses constituting the gang’s primary activities and assert those offenses qualify under section 186.22, subdivision (e). However, that point is not contested. Next, the People cite Martha M.’s testimony that the criminal activity of

the Playboy Surenos, to which she belonged, was “pretty crazy,” in that “[e]verybody was going to jail for doing stupid things.” Without more details, this testimony obviously had no probative value as to the primary activities of the Surenos. Finally, the People point out that defendant was an admitted member of the Vickystown Surenos and “there is little doubt that the Stockton Vickystown [S]urenos were a criminal street gang within the definition of the Penal Code.” This argument merely begs the question.

“The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group’s ‘chief’ or ‘principal’ occupations. (See Webster’s Internat. Dict. (2d ed. 1942) p. 1963 [defining ‘primary’].) That definition would necessarily exclude the occasional commission of those crimes by the group’s members.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) “Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony” (*Id.* at p. 324.)

In *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, the Court of Appeal found the evidence insufficient to prove a primary activity of the gang at issue--the Family--was committing crimes enumerated in section 186.22. The gang expert in that case testified that a primary activity of the Family was to commit crimes, and enumerated the crimes he had in mind. However, only one of those crimes qualified for the gang enhancement. According to the court: “[T]he evidence is insufficient to show a primary activity of the Family is commission of one or more of the eight specified offenses, as required by section 186.22, subdivision (f). This is not to say that the evidence failed to show that criminal conduct is a primary activity of the Family. But the statute’s focus is much narrower than general criminal conduct; evidence must establish that a primary activity of the gang is one or more of the listed offenses.” (*Id.* at p. 1004, fn. omitted.) The court went on to explain the gang expert admitted the Family was based in an area of the state

other than the expert's jurisdiction. Thus, the expert's opinion about primary activities "did not relate specifically to the Family and its activities." (*Id.* at p. 1005.)

The Court of Appeal in *In re Alexander L.* (2007) 149 Cal.App.4th 605 likewise found insufficient evidence that a primary activity of the gang in question was committing one or more of the enumerated crimes. In that case, the gang expert provided the following testimony on the issue of primary activities: " 'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' " (*Id.* at p. 611.) However, there was no testimony regarding the basis of the expert's knowledge. (*Id.* at pp. 611-612.) On cross-examination, the expert acknowledged the vast majority of cases with which he was familiar involved graffiti. (*Id.* at p. 612.)

In *In re Leland D.* (1990) 223 Cal.App.3d 251, the gang expert testified the primary purpose of the gang in question was engaging in criminal activity and further indicated the gang engaged in narcotics sales, vehicle thefts and assaults. (*Id.* at pp. 255, 259.) The court concluded this was insufficient to establish a pattern of criminal activity. (*Id.* at p. 258.) There was no evidence of any specific crime committed by the gang other than a single drug offense committed by the minor. (*Ibid.*) Furthermore, the sources of the expert's opinion "appear to have been hearsay statements from unidentified gang members and information pertaining to arrests of purported gang members all made without a definite timeframe being established." (*Id.* at p. 259.)

The present matter is readily distinguishable from the foregoing cases. Officer Ridenour testified one of the primary activities of the Surenos is the commission of crimes listed in section 186.22, subdivision (e). In particular, he identified homicides, carjacking, robberies, drug sales, burglaries, stolen vehicles, possession of firearms, and being felons in possession of firearms. As the basis for his opinion, Ridenour indicated he participated in the investigation of over 500 Sureno gang crimes and has personally

arrested 200 to 500 gang members. Ridenour testified that, in order to keep current on gang activities, he contacts gang members on nearly a daily basis, both in and out of custody, talks to family members and girlfriends, talks to other police officers who handle gang matters, belongs to several associations that deal with gang activities, and receives e-mails and updates throughout the week about Hispanic gangs.

Defendant argues Officer Ridenour's opinion alone is insufficient to establish the elements of the gang charge without the facts on which that opinion is based. Apparently, defendant is not satisfied with Ridenour's explanation that he has investigated over 500 Sureno gang crimes and talks with gang members, family and friends, and other officers about gang activities constantly. Defendant would presumably have Ridenour provide specific details on each of those 500 plus crimes and all of his various discussions.

In *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*), the prosecution's gang expert testified that, "based on investigations of hundreds of gang-related offenses, conversations with defendants and other Family Crip members, as well as information from fellow officers and various law enforcement agencies, it was his opinion that the Family Crip gang's primary purpose was to sell narcotics, but that the gang also engaged in witness intimidation and other acts of violence to further its drug-dealing activities." (*Id.* at p. 612.) No further details were provided. The Supreme Court found the foregoing to be sufficient evidence to support a finding that a primary activity of the gang in question was the commission of enumerated crimes. (*Id.* at p. 620.)

As in *Gardeley*, the gang expert here was not required to provide details about all the matters he used to form his opinions about the gang's primary activities. Defendant was free to test the basis of Ridenour's information on cross-examination as the codefendant did regarding Ridenour's opinion that the instant crime benefited the gang.

Defendant next contends there is no way to determine from Ridenour's testimony whether he was relying on gang offenses that occurred before or after the charged

offenses. Defendant argues: “Both logic and fundamental principles of due process would preclude the imposition of punishment for gang-related conduct based on proof that an organization to which the defendant belonged became a criminal street gang *after* the commission of the crime of which he was convicted.” The People once again fail to respond to this argument.

To support his argument, defendant cites Ridenour’s testimony regarding specific crimes committed by Surenos and points out that Ridenour failed to indicate when most of them occurred. However, this argument goes to a different element of the gang charge--whether the gang engaged in a pattern of criminal activity. Defendant does not raise any challenge on appeal to that element. Even without the testimony regarding specific, undated crimes committed by gang members, Ridenour’s opinion about the primary activities of the gang, based on his investigation of over 500 Sureno gang crimes and his discussions with gang members, family and friends, and other officers about gang activities, was sufficient to support the primary activities finding without any further specifics. (See *Gardeley, supra*, 14 Cal.4th at p. 620.)

V

Gang Special Circumstance Instruction

After instructing on the felony murder special circumstance, the court instructed the jury on the elements of the gang special circumstance pursuant to CALCRIM No. 736. As given by the court, that instruction read:

“The second special circumstance the defendant is charged with is committing the murder while an active participant in a criminal street gang in violation of Penal Code Section 190.2(a)(22). To prove this special circumstance is true, the People must prove that:

“1. The defendant intentionally killed Francisco Montejo;

“2. At the time of the killing, the defendant was an active participant in a criminal street gang;

“3. The defendant knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; and

“4. The murder was carried out to further the activities of the criminal street gang.

“Active participation means involvement in a criminal street gang in a way that is more than passive or in name only.

“The People do not have to prove that the defendant devoted all or even a substantial part of his time or efforts to the gang, or that he was an actual member of the gang. . . .”

The court also instructed the jury on the intent requirement for an aider and abettor pursuant to CALCRIM No. 703 as follows:

“If you decide that the defendant is guilty of first degree murder but was not the actual trigger puller, then, when you consider the special circumstances of felony murder and murder by a gang member, you must also decide whether the defendant acted either with intent to kill or with a reckless indifference to human life.

“In order to prove these special circumstances for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor, the People must prove either that the defendant intended to kill, or the People must prove all of the following:

“1. The defendant’s participation in the crime began before and continued during the killing;

“2. The defendant was a major participant in the crime; and

“3. When the defendant participated in the crime, he acted with reckless indifference to human life.

“A person acts with reckless indifference to human life when he knowingly engages in criminal activity that he knows involves a grave risk of death.

“The People do not have to prove that the actual killer acted with intent to kill or with reckless indifference to human life in order for the special circumstances to be true in this case.

“If you decide that the defendant is guilty of first degree murder but you cannot agree whether the defendant was the actual killer, then in order to find this special circumstance to be true you must find either that the defendant acted with intent to kill or you must find that the defendant acted with reckless indifference to human life and was a major participant in the crime.

“If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that he acted either with the intent to kill or with reckless indifference to human life and was a major participant in the crime for the special circumstances to be true. If the People have not met this burden, you must find these special circumstances have not been proven true for this defendant.”

Defendant contends the combination of the foregoing instructions, as applied to an aider and abettor, erroneously permitted the jury to find the gang special circumstance true without a finding that he intended to kill the victim. The gang special circumstance, section 190.2, subdivision (a)(22), applies where “[t]he defendant *intentionally killed* the victim while the defendant was an active participant in a criminal street gang . . . and the murder was carried out to further the activities of the criminal street gang.” (Italics added.) According to defendant, a finding that he was a major participant in the crime and acted with reckless indifference will not support a finding under this provision.

The People concede error. Section 190.2, subdivision (a)(22), applies both to an actual killer and an aider and abettor. However, in either case, the prosecution must prove the defendant acted with intent to kill. (See *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1085-1086; § 190.2, subd. (c).)

The first paragraph of CALCRIM No. 703 reads: “If you decide that (the/a) defendant is guilty of first degree murder but was not the actual killer, then, when you

consider the special circumstance[s] of _____ <insert felony murder special circumstance[s]>, you must also decide whether the defendant acted either with intent to kill or with reckless indifference to human life.” (CALCRIM No. 703) In place of the blank line, the trial court inserted the words “felony murder and murder by a gang member.” However, “murder by a gang member,” under section 190.2, subdivision (a)(22), is not a felony murder special circumstance. The felony murder special circumstances are listed in section 190.2, subdivision (a)(17).

“[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.” (*People v. Green* (1980) 27 Cal.3d 1, 69.) The jury here was instructed that, if it concluded defendant was not the shooter, it could find the gang special circumstance true based on a finding either that defendant intended to kill or he was a major participant and acted with reckless indifference to human life. The latter theory was legally incorrect.

The People argue the error was harmless under the circumstances of this case. They assert: “The evidence shows that [defendant] was aware that Cardenas had a gun and that he went to assist him in robbing Montejo. [Citations.] After Cardenas attempted to intimidate Montejo by claiming sureno gang membership, Cardenas shot him. [Defendant] and Cardenas were both laughing about the shooting immediately afterwards while in the car. [Citation.] It was also undisputed that [defendant] was a Vickystown sureno gang member and that the murder was committed to benefit his gang. [Citations.]” Presumably, from the foregoing, the People surmise the evidence shows defendant clearly intended to kill the victim.

However, it is readily obvious the People’s recitation of the facts is completely one-sided and ignores contrary evidence in the record that defendant accompanied Cardenas reluctantly and only after he was unable to talk Cardenas out of it. In his

interview with police, defendant said he tried to talk Cardenas out of robbing the victim because the victim was Mexican like them. He also told officers he did not know Cardenas was armed at the time. Defendant further explained he did not think anything would happen to the victim when they went after him.

Although Martha M. testified that when defendant and Cardenas got in the car after the shooting they were laughing, she later acknowledged telling police that when they got in the car they were jumpy and appeared to be in shock. Carina G. acknowledged telling police that, when defendant and Cardenas got in the car, she heard defendant say he was going to search the victim when he heard a pop and defendant had told Cardenas only to scare the victim. Carina denied the two were laughing when they got in the car but instead indicated they were sweaty, pale and nervous.

While the jury certainly was not required to accept defendant's self-serving statements to police or the inconsistent statements and testimony of Martha and Carina, that evidence was nevertheless before the jury and would have supported a finding that defendant did not intend to kill the victim.

“An instruction that omits a required definition of or misdescribes an element of an offense is harmless only if ‘it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” ’ ” (*People v. Mayfield* (1997) 14 Cal.4th 668, 774.)

On the present record, we cannot say beyond a reasonable doubt that the court's instruction did not contribute to the jury's true finding on the gang special circumstance. That finding must therefore be reversed.

VI

Firearm Enhancement Instruction

Section 12022.53 provides for an enhancement in the event a designated offense, including murder (§ 12022.53, subd. (a)(1)), is committed with the use of a firearm. If

the defendant personally *used* a firearm in the commission of the offense, the enhancement is 10 years. (§ 12022.53, subd. (b).) If the defendant personally and intentionally *discharged* a firearm, the enhancement is 20 years. (§ 12022.53, subd. (c).) If the defendant personally and intentionally discharged a firearm and caused great bodily injury or death, the enhancement is an indeterminate term of 25 years to life. (§ 12022.53, subd. (d).) Finally, if the offense was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b), any principal in the offense is subject to the same enhancement as the person who used or discharged the firearm. (§ 12022.53, subd. (e).)

The trial court instructed the jury on the gun use enhancement pursuant to CALCRIM No. 1402 as follows:

“[I]f you find the defendant guilty of either of the crimes charged in Counts 1 and 2, murder or attempted robbery, and you find that the defendant committed those crimes for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in any criminal conduct by gang members, you must then also decide whether, for each crime, the People have proved the additional allegation that one of the principals in the crime personally used or personally and intentionally discharged a firearm during the commission of that crime, which caused Mr. Montejo’s death. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.

“To prove this allegation, the People have to prove that:

“1. *Someone who was a principal in the crime personally used or discharged a firearm during the commission or attempted commission of the robbery; and*

“2. That person intended to discharge the firearm; and

“3. That person’s act caused the death of another person who was not an accomplice to the crime.

“A person is a principal in a crime if he directly commits or attempts to commit the crime, or if he aids and abets someone else who committed the crime or attempted to commit the crime.

“A principal personally uses a firearm if he intentionally does any of the following:

“1. Displays the firearm in a menacing manner;

“2. Hits somebody with it; or

“3. Fires the firearm.

“An act causes death if the death is the direct, natural and probable consequence of the act and the death would not have happened without it. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.” (Italics added.)

Defendant contends that, by virtue of the italicized portions of the foregoing instruction, the jury was free to find this firearm enhancement true based on a finding merely that Cardenas “used” the firearm by displaying it in a menacing manner. Defendant asserts that, on the evidence presented, the jury could have determined the discharge of the firearm was accidental, whereas the enhancement requires an intentional discharge. The jury could have concluded Cardenas displayed the firearm to the victim in a menacing manner, i.e., used it, in an attempt to get the victim to give up his property. However, such menacing display would be insufficient to support a life term under section 12022.53, subdivisions (d) and (e).

The People contend the instruction was correct because it required the jury to find Cardenas intentionally discharged the firearm. However, in making this argument, the People completely ignore the italicized portions of the instruction, which clearly gave the jury a choice between finding an intentional discharge of the firearm or a use of it, where such use was defined to include displaying in a menacing manner.

In the original CALCRIM version of the instruction, the first italicized portion above reads: “[1.] Someone who was a principal in the crime personally (used/discharged) a firearm during the commission [or attempted commission] of the _____ <insert appropriate crime listed in Penal Code section 12022.53(a)(./;)” (CALCRIM No. 1402.) The Bench Note to the instruction states: “In this instruction, the court **must** select the appropriate options based on whether the prosecution alleges that the principal used the firearm, intentionally discharged the firearm, and/or intentionally discharged the firearm causing great bodily injury or death.” (Bench Note to CALCRIM No. 1402, p. 1169.) The note also directs that the second italicized portion of the instruction given by the court, which concerns “use” of the firearm, should be given “only if the prosecution specifically alleges that the principal ‘personally used’ the firearm.” (*Ibid.*) It further instructs not to give that portion “if the prosecution alleges intentional discharge or intentional discharge causing great bodily injury or death.” (*Ibid.*)

The information here charged that, in the commission of the crimes, “a principal intentionally and personally discharged a firearm” and “proximately caused great bodily injury . . . or death” The verdict forms were likewise limited to discharge of the firearm. Thus, under the use notes, the trial court should not have included in the instruction the language relating to use of a firearm.

However, the instructional error was harmless in this instance. The evidence here showed it was the discharge of the firearm into the victim’s chest that caused his death. In addition to instructing the jury that it must find a principal either used or discharged a firearm, the jury was told it must find a principal “intended to discharge the firearm” and the principal’s “act caused the death of another person who was not an accomplice to the crime.” Thus, in order to find the charge true, the jury had to conclude both that a principal intended to discharge the firearm and that such act, i.e., the discharge, caused the death of the victim. An intentional use of the firearm by displaying it in a menacing

manner did not cause the death of the victim. In order to find the charge true, it would not be enough for the jury to conclude a principal displayed the firearm in a menacing manner and it went off accidentally. The jury was also required to find the principal intended to discharge the firearm.

“It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” (*People v. Burgener* (1986) 41 Cal.3d 505, 538-539.) Absent a contrary indication in the record, we assume the jury followed the instructions as given by the court. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.)

VII

Cruel and Unusual Punishment

Defendant contends that, given his young age, disadvantaged family background and limited intelligence, coupled with his minor role in the attempted robbery and murder, the LWOP sentence imposed in this matter amounts to cruel and unusual punishment. Defendant points out he turned 18 only a few months before the offenses, was one of 15 children born to a Mexican immigrant family, still lived with his parents, dropped out of school in the tenth grade, had been an agricultural field worker since the age of 17, could not spell his own middle name or the name of his brother, jumped into the Vickystown Surenos at the age of 16, and had no adult convictions or history of violence. As to the offenses, defendant contends he was a reluctant participant and the only evidence to the contrary came from the questionable testimony of two possible accomplices. Defendant asserts he “specifically obtained Cardenas’s assurance that the victim would not be hurt” and “reluctantly” participated in an attempted robbery “that went awry when the gun held by his codefendant accidentally went off.”

The Eighth Amendment to the United States Constitution “ ‘forbids only extreme sentences that are “grossly disproportionate” to the crime.’ ” (*People v. Cartwright*

(1995) 39 Cal.App.4th 1123, 1135.) A punishment also may violate the California Constitution if “it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted (*Lynch*)). In *Lynch*, the California Supreme Court suggested three areas of focus: (1) the nature of the offense and the offender; (2) a comparison with the punishment imposed for more serious crimes in the same jurisdiction; and (3) a comparison with the punishment imposed for the same offense in different jurisdictions. (*Id.* at pp. 425-427.) Disproportionality need not be established in all three areas. (*People v. Dillon* (1983) 34 Cal.3d 441, 487, fn. 38.)

The United States Supreme Court has identified two classes of cases that violate the proportionality standard. “The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions” (*Graham v. Florida* (2010) ___ U.S. ___ [176 L.Ed.2d 825, 836].) This second classification, in turn, “consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender.” (*Id.* at p. ___ [176 L.Ed.2d at p. 836].) Under the first subset, the high court has barred capital punishment for non-homicide offenses committed by anyone. (*Kennedy v. Louisiana* (2008) 554 U.S. 407, ___ [171 L.Ed.2d 525, 534].) Under the second, the court has barred capital punishment for minors, even if they commit murder. (*Roper v. Simmons* (2005) 543 U.S. 551, 578 [161 L.Ed.2d 1, 28].)

Defendant clearly does not qualify under either of the categorical prohibitions. This case involves a murder, and defendant was not a minor at the time of the killing. Thus, defendant’s claim is that the LWOP sentence is disproportional to the crime and/or the criminal. However, in this regard, defendant’s claim is premised on a false and misleading narrative.

Regarding the offender, defendant asserts both that he was barely 18 at the time of the offenses and he had no adult convictions. Of course, since defendant had been an adult for only a few months, it is not surprising he had no adult convictions. Defendant would had to have committed a crime and been convicted of it in a very short span of time. At any rate, defendant admitted to probation that he had stolen cars with other gang members, and the probation report indicates he had juvenile offenses that “are numerous or of increasing seriousness.”

The fact that defendant was one of 15 children born of Mexican immigrants would not appear to provide any excuse for his actions. The probation report indicates defendant reported that all his family members are hard workers, his older siblings are married with children, and he was not a victim of abuse, neglect or molestation. Nor would the facts that defendant was employed as a field worker and lived with his parents have any bearing on his susceptibility to crime. And while defendant may have dropped out of school in the 10th grade, this coincides with his having joined the gang at the age of 16 and suggests nothing more than that defendant voluntarily chose to pursue the gang lifestyle rather than an education. Finally, there is nothing in this record to suggest defendant’s purported regular use of alcohol and drugs contributed to the offenses in this matter.

More importantly, defendant’s characterization of his involvement in these offenses is based exclusively on his own self-serving statements to police. Those statements came during an interview in which defendant repeatedly demonstrated his willingness to lie to the officers in an effort to downplay his culpability. Defendant revealed only as much as he thought the officers already knew. Other evidence showed defendant was fully aware that Cardenas was armed and voluntarily accompanied his fellow gang member in pursuit of the victim in order to commit a robbery. Defendant asserts the gun accidentally went off, but there is no evidence to support this claim.

In light of the circumstances of the offenses and the offender, we cannot agree an LWOP sentence constitutes cruel and unusual punishment under either the state or federal Constitution.

VIII

Separate Sentences for Gang Enhancements

Defendant contends the trial court erred in imposing enhancements for both gang participation (§ 186.22, subd. (b)) and discharge of a firearm causing death (§ 12022.53, subd. (e)(1)). As explained earlier, because the evidence suggested defendant was not the actual shooter, the firearm enhancement required a finding that the offense was committed for the benefit of a gang. Where such a firearm enhancement is imposed on a non-shooter, section 12022.53, subdivision (e)(2), provides: “An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.”

The People concede error. In *People v. Brookfield* (2009) 47 Cal.4th 583, the high court held section 12022.53, subdivision (e)(2), precludes double punishment whenever the fact that a crime was committed for the benefit of a criminal street gang is used both to increase the punishment for the crime and for purposes of a firearm enhancement under section 12022.53, subdivision (e)(1). (*Brookfield*, at p. 592.) Where both a gang enhancement and a firearm enhancement apply, the court must impose the greater of the two. (*Id.* at p. 596; see § 12022.53, subd. (j).) Here, that would be the firearm enhancement. Hence, the gang enhancements on the two offenses must be stricken.

IX

Section 654

Defendant received separate punishments for the murder, attempted robbery and active gang participation offenses. He contends the terms imposed on the latter two offenses must be stayed, because all three were committed for the same intent and objective. The People concede the term imposed on the robbery conviction must be stayed, but argue the objective of the gang participation offense was different from that of the other two.

Section 654, subdivision (a) reads in part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . .” Although section 654 speaks in terms of “an act or omission,” it has been judicially interpreted to include situations in which several offenses are committed during a course of conduct deemed indivisible in time. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) The key inquiry in a section 654 analysis is whether the objective attending more than one crime committed during a continuous course of conduct was the same. (*People v. Brown* (1991) 234 Cal.App.3d 918, 933.) “[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ ” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The question whether a defendant entertained multiple criminal objectives is one of fact for the trial court. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.) “A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.” (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

The record here contains no discussion of section 654 or the intent and objective of defendant in the commission of the three offenses. Hence, we presume the trial court found there were separate objectives for those offenses.

However, there is no evidence in this record to suggest the murder was committed for a purpose other than the attempted robbery. The evidence showed defendant and Cardenas pursued the victim to rob him. Whether the firearm discharged accidentally or intentionally in the course of that attempted robbery, there is no evidence to suggest the two perpetrators harbored any other objective.

As for the active gang participation offense, the California Supreme Court recently held a criminal defendant cannot be punished both for active participation in a criminal street gang and for the predicate offense underlying the gang charge. In *People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*), the defendant, an admitted gang member, shot two victims in two unrelated incidents and was convicted of three offenses for each incident--assault with a firearm, possession of a firearm by a felon, and active participation in a criminal street gang. (*Id.* at pp. 193-195.) The evidence there established that an element of the gang participation offense was commission of the underlying assault or weapon possession offenses. (*Id.* at p. 197.)

The high court noted that section 654 bars multiple punishments where a single act or omission violates more than one criminal provision. (*Mesa, supra*, 54 Cal.4th at p. 195.) The court further explained multiple punishments for a single act would occur were a defendant to be punished both for active gang participation and for the underlying crime that is the basis of the active gang participation charge. (*Id.* at pp. 197-198.) Thus,

the question is not whether the defendant harbored multiple objectives but whether he is being punished multiple times for the same act. The high court concluded section 654 barred separate punishment for the gang participation convictions in *Mesa*, because an element of those offenses was the commission of the assault and firearm possession offenses. (*Id.* at p. 200.)

In the present matter, the jury was instructed on the street terrorism charge that it must find, among other things, defendant “willfully assisted, furthered or promoted felonious criminal conduct by members of the gang.” The jury was further instructed that “[f]elonious criminal conduct means committing or attempting to commit any of the following crimes, namely robbery and murder.” There was no evidence of any other crimes committed by defendant for the benefit of the Surenos other than the attempted robbery and murder for which he was charged in this matter. Thus, under *Mesa*, defendant cannot be punished both for those crimes and for active participation in a criminal street gang. His punishment for the latter must therefore be stricken.

DISPOSITION

The gang special circumstance findings on counts one and two are reversed, the 10-year gang enhancements on counts one and two are stricken, and the separate punishments on counts two and three are stayed. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the foregoing and to forward a copy to the Department of Corrections and Rehabilitation.

HULL, J.

We concur:

BLEASE, Acting P. J.

MURRAY, J.