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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY KINKADE CARTER,

Defendant and Appellant.

D058172

(Super. Ct. No. RIF135374)

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN JAPHETH NORTON,

Defendant and Appellant.

D058660

(Super. Ct. No. RIF135374)

CONSOLIDATED APPEALS from judgments of the Superior Court of Riverside County, Eric G. Helgesen, Judge. Affirmed in part, reversed in part, and remanded for further proceedings.

INTRODUCTION

A jury convicted Larry Kinkade Carter and Jonathan Japheth Norton of first degree murder (Pen. Code, § 187, subd. (a); count 1)¹ and active gang participation (§ 186.22, subd. (a); count 3). The jury additionally convicted Norton of being a felon in possession of a firearm (Former § 12021, subd. (a)(1), repealed and reenacted without substantive change as § 29800, subd. (a)(1), by Stats. 2010, ch. 711, §§ 4 [repeal] & 6 [reenactment], eff. Jan. 1, 2012; count 2.)

As to count 1, the jury found true allegations Norton personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)) (subdivision (d) firearm enhancement), and Norton and Carter were principals and at least one principal personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (e)(1)) (subdivision (e)(1) firearm enhancement). The jury also found true allegations Norton committed the offenses in counts 1 and 2 and Carter committed the offense in count 1 for the benefit of, or at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members (§ 186.22, subd. (b)) (gang benefit enhancement). The trial court additionally found true allegations Norton had two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12) and one prior prison conviction (§ 667.5, subd. (b)).

The trial court sentenced Carter to a determinate term of three years in prison for count 3 followed by an indeterminate term of 25 years to life in prison for count 1, plus a

¹ Further statutory references are also to the Penal Code unless otherwise stated.

consecutive term of 25 years to life for the subdivision (e)(1) firearm enhancement. The court stayed the gang benefit enhancement for count 1.

The trial court sentenced Norton to an indeterminate term of 25 years to life for count 1, tripled to 75 years to life due to Norton's prior strike convictions, plus a consecutive term of 25 years to life for the subdivision (d) firearm enhancement. The trial court did not impose any additional sentence for the count 1 gang benefit enhancement. For count 2, the trial court sentenced Norton to a consecutive term of 25 years to life, plus four years for the gang benefit enhancement. For count 3, the trial court sentenced Norton to a consecutive term of 25 years to life. Lastly, the trial court imposed a consecutive one-year sentence for Norton's prior prison conviction.

Norton and Carter both appeal.² Norton contends we must reverse his convictions because the trial court erroneously denied his pretrial motion to sever the trial of the active gang participation count and bifurcate the trial of the gang benefit enhancement allegations. In addition, he contends we must reverse his convictions because the trial court erroneously denied him the opportunity to represent himself during closing argument.

Norton also contends we must reverse his active gang participation conviction because there is insufficient evidence to support it.³ For the same reason, Norton and

² Norton and Carter separately appealed. We granted the People's motion to consolidate the appeals.

³ Carter raised the same contention in his opening brief, but withdrew it in his reply brief.

Carter both contend we must reverse the gang benefit enhancements and the count 1 subdivision (e)(1) firearm enhancement, which depends upon the existence of a valid gang benefit enhancement.

Norton further contends the trial court should have stricken the count 1 gang benefit enhancement since it imposed a sentence for the subdivision (d) firearm enhancement⁴ and both Norton and Carter contend the trial court should have stayed imposition of the sentences for their active gang participation convictions under section 654.

Lastly, Norton contends we must modify the abstract of judgment to reflect restitution and parole revocation fines of \$200, rather than \$5,000, because the record indicates the trial court did not intend to impose fines of \$5,000. Alternatively, Norton contends the record is ambiguous as to the trial court's intent and we must reverse the fines and remand the matter to the trial court for clarification.

We conclude the trial court should have stayed imposition of Carter's and Norton's sentences for their active gang participation convictions and order the trial court to modify the abstracts of judgment accordingly. We additionally conclude the trial court's intent regarding the amount of Norton's restitution and parole revocation fines is not clear from the record. We, therefore, reverse the fines and remand the matter to the trial court for further proceedings. We also direct the trial court to modify the abstract of judgment to reflect imposition of the alternate penalty provided in section 186.22, subdivision

⁴ Carter raised a similar contention in his opening brief, but withdrew it in his reply brief.

(b)(5), for Norton's count 1 gang benefit enhancement. In all other respects, we affirm the judgments.

BACKGROUND

Prosecution Evidence

Murder of Jonathan Fuller

Jonathan Fuller lived in an apartment complex in the Edgemont area of Moreno Valley. Joyce Lopez lived in the same apartment complex. At around 9:30 p.m. on June 10, 2006, Lopez heard footsteps and then two voices arguing loudly at the entrance of Fuller's apartment. One of the voices was Fuller's. She heard someone yell, "Get that nigga." A few seconds later, she heard two or three gunshots and footsteps running past her door. She heard a car door slam on the street in front of the complex and then she heard a car leave.

Around the same time, Gianna McComb drove to her grandmother's apartment, which was in the same complex where Lopez and Fuller lived. She parked her car in front of the gate to the complex. There were some Young Paperchasers gang members hanging out near the mailboxes. A white car pulled up and parked about a car length behind her, but away from the curb. Its lights were on and its engine was running.

After sending a text message, McComb got out of her car to go to her grandmother's apartment. As she did, she saw two African-American men outside Fuller's apartment and heard them yelling.

Before she reached the gate to the complex, she saw a flash and heard four to six gunshots fired in rapid succession. While the shots were firing, she ran back to her car,

got in it and ducked down. She looked up seconds later and saw two men run through the gate toward the street. Meanwhile, the white car had moved in front of her car and was inching away. The two men flagged the car down and it stopped. One man jumped into the front passenger seat, the other jumped into the back passenger seat, and the car drove away. She did not see either man with a gun. She could not identify either Carter or Norton as the men she saw that night.

When Riverside County Sheriff's Investigator Edwin Baeza arrived at Fuller's apartment, he found Fuller lying on the kitchen floor. There was blood pooling around Fuller's head and he had a gunshot wound below his right eye. There were bullet holes in his clothes near his left hip and leg and money laying on the floor near him. There was a baggie of a white rocklike substance that appeared to be rock cocaine on the kitchen counter. In the living room, there was a baggie with a green leafy substance that appeared to be marijuana on a table and a letter scale on top of a stereo.

There was a spent .380-caliber casing near Fuller's body and another in the entryway. Two other bullets traveled through a common wall into the adjacent apartment. A few days later, Fuller's aunt found two more casings while cleaning Fuller's apartment. One was on the kitchen counter behind the microwave and one was on an egg carton on top of the refrigerator.

The parties stipulated Fuller's body had five gunshot wounds: one in the right side of his face, one in the back of his head, one in his left thumbnail, one in his left hip, and one in the upper part of his left leg. He died from the gunshot wounds.

After the shooting, Fuller's cell phone and \$2,000 were missing from the apartment. Several outbound calls were made from his cell phone after his death. One of the calls was made to Fuller's cousin, Mario Fuller (Mario). The calls utilized a cell tower located approximately one mile from Norton's home in Perris.

On the day of Fuller's murder, Mario's sister heard Mario's cell phone receive a direct connect alert. She answered the phone and the voice on the other end said, "Help, help. These niggas just shot me. I'm in Edgemont." The caller used Fuller's cell phone and said he was Fuller, but the caller's voice was not Fuller's.

Julio Jefferson, an extended family member of Fuller's, was at a liquor store in Perris a few days after the shooting. He saw a white Pontiac Grand Am parked outside the store and three African-American men inside the store, including Norton and Carter. Norton was wearing a T-shirt with the words "Mafia IV Life" on the back. Carter was talking on a cell phone and Jefferson heard him say, "No it ain't. You know me. I don't be in Edgemont like that, so it couldn't have been me." Jefferson realized then that the men might be connected to the shooting. He called someone and had the person write down the Grand Am's license plate number, which he then gave to police along with a description of the three men. Norton was the registered owner of the vehicle and he was the one driving it.

Riverside County Sheriff's investigators searched Norton's home in Perris. In the master bedroom, they found a large T-shirt with the initials "MSMC" printed on the front and the phrase "Mafia IV Life" printed on the back. It appeared to be the same T-shirt Norton was wearing when Jefferson saw him at the liquor store.

Michelle Luckey knew Carter by the nickname "Killa" and Norton by the nickname "Tiny Mafia." Norton told her he was a member of the Main Street Mafia Crip gang (Main Street gang). In mid-or late June 2006, Luckey met with Norton and Carter at her home to braid one or both men's hair. Earlier in the day, she had received a call from someone who told her Carter had been involved in a shooting in the Edgemont area and had killed someone. She asked Norton and Carter about it. Carter denied being the shooter. Norton, however, bragged that he "noodled" a person because the person "was talking shit." Carter and a third person unknown to Luckey were present at the time of the shooting. Luckey asked what "noodled" meant and Norton explained that it was when someone is shot in the head and noodle-like brain fragments come out. Luckey had previously seen Norton with a handgun, which she thought he told her, was a .380-caliber gun.

According to Fuller's aunt, Norton, whom she knew as "J Rock," used to be Fuller's friend. Norton became angry with Fuller because Fuller lost some of Norton's furniture. After that, their friendship ended.

Riverside County Sheriff's Detective Randall Thomas interviewed Norton. Norton told Thomas he goes by the moniker "Tiny Mafia" and was a member of the Main Street gang, but was not active in the gang.

Thomas also interviewed Carter. Carter told Thomas he goes by the monikers "Little Larry" and "Killer." He said he thought there was going to be a shooting the night Fuller was killed, and he was sitting in the driver's seat of Norton's car when he heard the gunshots. He told Thomas a .380-caliber handgun had been used in the shooting. He

also said Fuller's phone had been taken and used. After the shooting, Carter received \$100. The money had blood on it.

Carjacking

On the morning of July 24, 2006, approximately one and a half months after Fuller's murder, James Jones was driving his wife's gray Ford Escort through an alley near his home when a red Toyota with three people inside, including a large man in the back seat, drove toward him from the opposite direction and pulled up beside him. The driver, a African-American man in his late teens or early twenties, with a little mustache, asked him if he needed anything and he replied, "Nope[,] I don't do drugs." Then, the man in the front passenger seat, later identified as Terrence White, jumped out of the Toyota, pointed a black automatic gun at Jones, and told him to get out of the Escort. Jones grabbed his cell phone and got out of the car. White took the Escort and drove away with it. The men in the Toyota also drove away.

While patrolling the area with his partner, Riverside County Sheriff's Deputy Jaime Morales encountered and pursued the fleeing Escort. At that time, Norton was driving it. Norton drove the car to April Staton's home and crashed it into another car. Norton and another African-American male got out of the Escort and ran into the home. Morales and other officers started checking the doors to the home and Morales heard someone say, "I have a gun, and there is people in here."

At the time of the carjacking, Staton was one of Carter's girlfriends. She knew him by the names Larry, "Little Larry," and "Killer." He sometimes drove around in a red car. He told her he was a member of the Farm Dog Compton Crip gang (Farm Dog

gang), but he had not been involved with the gang since he was teenager. She had never seen him involved in gang activities, although she knew he sold drugs.

The evening before the carjacking, White, who is an Orange County Crip, stayed at Staton's home with his girlfriend, Lorretta Turner. White left the next morning. Early that morning, Norton, Carter, and another African-American male stopped by and left within minutes of White. The men talked outside before leaving.

Sometime later, Staton heard sirens and went outside. Norton pulled up in a silver or gray car with White and someone he referred to as Mike. They all ran inside. Neither Norton nor White were carrying a gun. White jumped in the shower. Norton told Staton to act as if they were a couple and gave her his full name and birth date. He told Staton to take her clothes off, so it would appear he had been there the whole time. He took his clothes off and tried to rub his penis in her vagina to make it smell as if they had been having sex. He kept threatening to kill Carter if she did not do as he had asked.

Eventually, Staton and the others came out of the home. Staton lied to police and said, as Norton had directed her to, that Norton was her boyfriend, they had slept together the night before, and were just about to have sex when two men, one African-American and one Hispanic, broke into the home. She also said one of the men had a gun and held them hostage. She later recanted these statements.

Riverside County Sheriff's detective Eric Holland and investigator Jon Wade were assigned to search Staton's home and the Escort. However, neither of them or anyone working with them searched the Escort.

After the Escort was returned to Jones, he found an extra-large T-shirt in the backseat that did not belong to him or his wife. In addition, he found the gun used to carjack him under the driver's seat wrapped in a green handkerchief.

The gun was a Lorcin .380. A firearm examiner determined the cartridge casings and projectiles found in Fuller's body, Fuller's apartment and the adjacent apartment, were fired from the gun found in the Escort. There were no comparable fingerprints on the gun or the ammunition magazine.

Gang Evidence

Los Angeles Police Officer Samuel Marullo, a senior training officer in the Los Angeles Police Department's gang unit, testified the Main Street gang is one of the most organized gangs and has a clearly defined hierarchy. There is a kingpin, five or six lieutenants, street soldiers, and frontline members. The Main Street gang is also one of the more monetarily successful gangs and sustains itself chiefly through marijuana and cocaine sales. In addition to drug sales, the Main Street gang also engages in robbery, embezzlement and extortion activities.

Although the Main Street gang's primary territory is in Los Angeles, the gang's activities and influence extend to other states. At the time of Fuller's murder, the gang had approximately 300 active members. Members identify themselves using two different hand signs and the initials MSC for Main Street Crips, MSMC for Main Street Mafia Crips, and MSM for Main Street Mafia. In addition, they identify themselves by wearing blue and gold clothing. They also wear clothing with the slogan Mafia IV Life, which is associated with a rap record label owned by the gang's kingpin.

Gang members are required to "put in work" for the gang. This means doing things that will bring in money for the gang, such as committing robberies and selling narcotics, and doing things that will instill fear and raise the level of respect for the gang, such as shooting rivals and intimidating witnesses. The primary activities of the gang are selling narcotics; committing shootings, robberies, and burglaries; and possessing weapons.

The Main Street gang has numerous alliances with other gangs, including some Blood gangs. One of the Main Street gang's strongest allies is the Grape Street Crip gang (Grape Street gang).

Norton had tattoos referring to the Grape Street gang. He did not have any tattoos referring to the Main Street gang. However, the month following Fuller's murder, Norton admitted to a booking deputy that he was affiliated with the Main Street gang. He also had multiple items referring to the Main Street gang in his jail property box, including a thin piece of cardboard with the words "J. Norton aka Tiny Mafia" on it, a Bible with the words "Norton" and "Mafia" written in it, and other documents referring to the Main Street gang.

Answering a hypothetical question based on the facts of this case, Marullo opined a person similarly situated to Norton would have been an active participant in the Main Street gang at the time of Fuller's murder. The existence of Norton's Grape Street gang-related tattoos did not change Marullo's opinion because of the strong alliance between the Main Street and Grape Street gangs.

Los Angeles County Sheriff's Detective Rick Sullivan testified the Farm Dog gang was a small gang of roughly 30 members. They joined up with two other Crip gangs, Acacia Blocc and Spooktown, to increase their numbers and dominance within the community. The combined gang refers to itself as ATF, with A standing for "acacia," T for "town," and F for "farm." The Farm Dog gang is synonymous with the ATF gang. The ATF gang had approximately 200 members at the time of Fuller's murder. Although the ATF gang's territory is in Compton, the gang has expanded into other areas as its members have moved away from Compton. At the time of Fuller's murder, the primary activities of the ATF gang were homicides, assaults with deadly weapons, home invasion robberies, burglaries, car thefts, sales of marijuana and crack cocaine.

Between 1999 and 2006, Carter admitted to being a member of the Farm Dog gang nine times. His most recent admission occurred a few months after Fuller's murder. He has also admitted going by the monikers "Little Larry" and "Killer."

Carter has the initials FDC, which stands for Farm Dog Crips, tattooed on his right shoulder. He also has other tattoos associated with the Farm Dog gang. Answering a hypothetical based on the facts of this case, Sullivan opined a person similarly situated to Carter would have been an active member of the Farm Dog gang at the time of Fuller's murder.

Riverside Sheriff's Deputy George Reyes testified that the predominant gangs in the Edgemont area of Moreno Valley are the Edgemont Criminals, the Young Paperchasers, and the Dorner Blocc Crips gang, which have joined forces with one another. He further testified it is common for gang members from Los Angeles or other

areas to come into Moreno Valley and continue to represent their gangs. These transplant gang members will join forces with one another, even if they are from rival gangs, to accomplish common objectives, including illegal drug sales. Joining forces and continuing to commit crimes are indications transplant gang members are still active.

Answering a hypothetical based on the facts of this case, Reyes opined persons similarly situated to Norton and Carter were acting for the benefit of, at the direction of, or in association with the Crips because the men were active gang members and they committed Fuller's murder in association with one another.

Defense Evidence

Carter's Evidence

Carter testified and admitted that at the time of Fuller's death he was a member of the Farm Dog gang and went by the nicknames "Little Larry" and "Killer." He joined the gang when he was nine or 10 years old for protection. His dad was also a member of the gang. He moved to Moreno Valley for a short time when he was 13 and then returned just before he was 15. When he moved to Moreno Valley, he did not join a local gang. Although he testified that he did not necessarily consider himself a member of the Farm Dog gang any longer, he admitted getting a gang-related tattoo while he was in prison awaiting trial in this case. He also acknowledged that people associated him with the gang when he responded to questions about where he was from. The association kept people from trying to get him to join a local gang.

Carter did not know any other Farm Dog gang members in Moreno Valley and denied being involved in any gang activity in Moreno Valley. He admitted, however, he

had sold rock cocaine in Moreno Valley for seven years, including in the Edgemont area. According to him, the Farm Dog gang did not know he was selling drugs and he never gave a percentage of his drug sales to the gang. He also did not pay a "tax" on his drug sales to any of the Moreno Valley gangs.

He met Fuller through Fuller's uncle. He liked Fuller and there was no animosity between them. At the time of Fuller's murder, Carter was a transient. He owned a .357-caliber revolver for protection, but he never fired it. Carter admitted having two prior convictions for selling rock cocaine, one prior misdemeanor conviction for domestic violence, and one prior misdemeanor conviction for possessing a gun.

Carter had known of Norton since 1998, but he did not start hanging around with Norton until shortly before Fuller's murder. He did not know Norton well, although he knew Norton was a gang member and Norton knew Carter was a gang member. According to Carter, Norton currently claimed to be from the Main Street gang and went by the nickname "Tiny Mafia." However, he had previously been a member of the Playboy Hooride gang, formerly known as the Grape Street gang that migrated from Los Angeles to Moreno Valley. Carter denied there was any connection between the Farm Dog gang and Norton's gang. He also denied being involved in any gang business with Norton.

On the night of Fuller's murder, Carter was with Norton, Nicholas Gayton, who also claims to be from the Main Street gang, and a juvenile known to Carter as Mike.⁵ Norton had his gun with him, and Mike had Carter's gun. They went to Riverside to try to buy some marijuana. When the person they tried to buy it from would not sell them any, Gayton got out of the car and fired Norton's gun in the air in an ineffectual effort to change the person's mind. They then went to Moreno Valley. Norton was driving and Carter was in the passenger seat.

When they arrived at Fuller's apartment complex, Carter saw six men loitering near some mailboxes. He recognized three of them as members of the Edgemont Criminals gang. They knew him as a member of the Farm Dog gang.

Norton pulled up near the mailboxes and introduced himself to the men. After Norton told them he was "Tiny Mafia" from the Main Street gang, "they was cool. They shook his hand, and everything was, like, straight from that point." Norton asked where he could buy some marijuana and the men told him Fuller might have some. Norton then said, "I was going to holler at [Fuller]" because Fuller "is supposed to be reimbursing me."

Until then, there was no mention of Fuller by Norton or anyone else in Norton's car. The group did not go to the apartment complex with the intention of buying drugs from or having anything to do with Fuller. Carter testified he did not even know Fuller lived there.

⁵ It is not clear from the record whether this is the same Mike involved in the carjacking.

Nonetheless, Norton's remark about getting reimbursed by Fuller concerned Carter. Norton had previously told Carter he might do something to Fuller because Fuller had broken into his house and stolen something from him. Although, Norton subsequently told Carter he and Fuller had talked and "everything was cool," Carter thought there might be a shootout between the two men.

At some point, Gayton pulled out Norton's gun and cocked it. Norton went to Fuller's door and Carter got out of the car and stood on the sidewalk talking to Mike. Fuller let Norton in. After Norton had been in Fuller's apartment awhile, Carter became nervous about the gang members by the mailboxes and he and Mike went to the apartment to see what was taking so long.

Fuller embraced Carter and everything seemed to be fine in the apartment. The group smoked some marijuana and talked for a while. Then, Carter and Mike left the apartment, went back to Norton's car, and drove to the store. When they returned, they parked near the mailboxes again and went to Fuller's apartment. Carter saw Fuller with a scale weighing some rock cocaine. Norton indicated it was time for them to go. Carter shook Fuller's hand and then he and Mike went back to the car to wait for Norton. Carter got into the driver's seat and Mike got into the back. Five to 10 minutes later, Carter heard two gun shots. He thought Norton had gotten into an altercation with the gang members that had been by the mailboxes when they first arrived.

Carter started driving away and saw Norton running through the apartment complex gate. Norton yelled for him to wait. He stopped, Norton and Gayton got into the car, and then he drove off.

Carter asked Norton what happened. Norton told Carter he had shot Fuller because Fuller "started talking shit." A cell phone and some money were taken from Fuller's home. At some point after the shooting, the group went to Norton's home and Norton used the phone to make a call. He pretended to be Fuller, saying, "I'm hit, I'm hit" and "[t]hese niggas just shot me."

Also at some point after the shooting, Norton said to Gayton, "Give me the money." Gayton handed Norton some money. Norton then gave Carter and Mike each \$100. The money had blood on it. Carter took the money because he was afraid that if he did not, Norton would think he was going to report the matter and retaliate by harming Carter's kids.

When Carter went to Luckey's house with Norton, she was not going to let Carter in because she had heard he killed somebody in Edgemont. When Carter denied this, Norton admitted he had "noodled" Fuller.

Although, Carter acknowledged going to Staton's house on the morning of the carjacking, he denied having anything to do with the carjacking. The prosecution also had not charged him with the carjacking.

Norton's Evidence

Dionne Leaks lived with Norton and his family around the time of Fuller's murder. Norton never did anything that caused her to believe he was involved in gang activities. In addition, the Main Street gang never came up and she never saw any gang graffiti at the house. She acknowledged on cross-examination, however, that she was "not usually at the house."

Norton's wife, Catherine Delions, testified Norton primarily associated with their neighbors and their family. She never saw him "gang-bang" or use gang hand signs. In the first part of 2006, Norton stayed home to be with their newborn and their other children. He then found a job and started working. He did not take trips to Los Angeles.

Delions vaguely knew Carter. Carter came to their house once or twice. She knew Gayton, who was their neighbor. Norton and Gayton did not get together often. In the first part of 2006, Norton drove many different cars, including a 1999 Pontiac Grand Am.

Delions had heard of, but did not know anything about the Main Street gang. She did not use a nickname for Norton, and Norton did not have gang paraphernalia or writings in their home. The Mafia IV Life T-shirt referred to a Mafia IV Life car club.

Norton testified he met Carter in high school, but did not begin associating with him until the month before Fuller's murder. They got together to smoke marijuana. Sometimes, when Norton had business to take care of near Compton, he took Carter to Compton.

Norton knew Carter was affiliated with the Farm Dog gang. While Carter was in Moreno Valley, Norton saw Carter with gang-related clothing. He also saw Carter hang out with other gang members from Compton and engage in gang business with them. Norton initially knew Carter by the nickname "Little Larry." When they became reacquainted in 2006, Carter went by the nickname "Killer."

Norton met Fuller in 1996 or 1997 through one of Fuller's cousins. In 1999 Norton was convicted of first degree burglary and assault with the intent to commit a

specific sex offense. He went to prison and was released in 2004. He met Gayton that same year.

Norton grew up in Los Angeles. He moved to Moreno Valley in 1996, but regularly visited Los Angeles because his family lived there. He admitted being gang-affiliated as he associates with gang members; however, he only associates with gang members from Los Angeles as he does not respect the gang members in Moreno Valley. The gang with whose members he associates includes the Main Street and Grape Street gangs.

Norton denied ever being a member of the Grape Street gang. His tattoo of flames with the words "Watts ES" refers to the Watts riots in the 1960s. His tattoos of the initials GST and of grapes with the word "street" refer to a deceased relative who was a member of the Grape Street gang. Moreover, according to him, Playboy Hooride is not a gang. It is just a crew of approximately 10 men, primarily from the Edgemont area, who can fight.

Norton does not have any tattoos referring to the Main Street gang and denied ever being initiated into the Main Street gang, although he admitted he would have become a member of the gang had he not moved away from Los Angeles. He also acknowledged the Main Street gang is large and has branched out beyond its initial neighborhood territory.

Norton denied telling Staton he was a member of the Main Street gang. He also denied telling a booking deputy he was a member of the Main Street gang. Rather, he told the deputy he could be housed with Main Street gang members. He admitted he

probably told Carter he was a member of the Main Street gang. He also admitted he told Thomas he was a member of the Main Street gang.

Norton acquired the Mafia IV Life T-shirt at a low-rider car club event. Every person who participated in the event received a T-shirt regardless of whether the person was a member of the Main Street gang. He denied the Main Street gang-related items in his jail property box were his. He also denied knowing how they got there. He admitted, however, writing his name and "Tiny Mafia" on the piece of cardboard.

He denied going by any particular nickname, but admitted that in 2006 he jokingly told Luckey his nickname was "Mafia." He has also used this nickname in jail and with Staton. He told detective Thomas his nickname was "Tiny Mafia." He explained he did not want to say his nickname was "Mafia," which is the nickname of his neighbor and Main Street gang member, Reginald Sanders,⁶ and he could not think of anything else fast enough. He further explained his nickname is "whatever I tell you it is that day." He used different nicknames to make it more difficult for people to identify him.

While Norton was in prison for his prior burglary and assault convictions, Sanders paid Norton's mortgage. After Norton got out of prison, Norton delivered drugs and collected money for Sanders to pay Sanders back. Carter also worked for Sanders, but had different tasks. The day of the shooting Norton picked up Carter at a park in Perris. He drove his white Pontiac Grand Am. They went to Norton's house, picked up a package of drugs from Sanders, and waited for instructions.

⁶ Sanders was with Norton and Carter at the liquor store where Jefferson saw them.

They then went to Murrieta and delivered the package. It was the second or third time they had run drugs together. Norton trusted Carter to accompany him. The people with whom Norton transacted business also knew Carter and trusted him.

After that, they went to an apartment in Riverside. Carter picked up something at the apartment. They drove back to Perris and Carter delivered his acquisition to Sanders. Later in the evening, Norton, Carter, and Gayton went to Edgemont where Norton had to deliver more drugs. Mike was not with them.

None of them had a gun. Carter was supposed to have a gun and on other occasions Norton had seen him with a revolver and two semiautomatic weapons. Norton denied having a gun and further stated he was not supposed to have a gun because he would be sent to jail if he was caught carrying a gun and that would put Sanders at risk.

Norton parked by some men, three or four of whom he knew. Norton got out of his car and stated his business, indicating he wanted to see somebody who stayed in the area. He never told them he was from the Main Street gang. Rather, he stated that in Edgemont, he is known as "J Rock" from Playboy Hooride and Carter is known as "Killer" from the Farm Dog gang. Consequently, he believes Gayton must have claimed to be from the Main Street gang.

Norton went through the apartment complex to the alley and conducted a drug transaction. He then went back through the apartment complex and got into his car. Gayton and Carter were no longer in the car.

Norton pulled his car up and parked in front of Fuller's apartment complex. He got out of the car and went to Fuller's apartment. He denied having any animosity toward

Fuller. Fuller greeted Norton using the word "nigga" and invited Norton in. Carter and Gayton were already inside Fuller's apartment. Carter was smoking marijuana and Gayton was sitting on the couch.

A few minutes later, Norton left and went into the alley to conduct another drug transaction. While there, he saw some men grouping up in the alley. After concluding his transaction, he went through Fuller's complex back to his car to put away the proceeds. Carter and Gayton were still in Fuller's apartment.

As he was putting the proceeds away, he heard gunshots. They came from the alley where the men had been grouping up. He heard a second set of gunshots that appeared to come from the courtyard of the apartment complex. Norton got into the car and pulled forward. He contacted Carter and told him to come out. A few minutes later Carter and Gayton came out and Norton drove away.

The next day, at Sanders's house in front of Sanders and other Main Street gang members, Carter told Norton he killed Fuller because Fuller gave him "some bad dope." Norton and Carter ran drugs together a couple more times after Fuller's murder.

On the morning of the carjacking, Norton, Carter, White, Staton, Turner and another person left Staton's apartment in two cars: a white car and a red car. Norton was in the white car. The group was supposed to go to a convenience store, where an employee was going to assist them in stealing the store's money. Norton, himself, was not supposed to be directly involved in the theft. He explained at trial he was "distinctly told [by Sanders] what I'm supposed to do and what I'm not supposed to do."

The people in the red car, which included Carter, White, and Staton, deviated from the plan and carjacked a Ford Escort. Norton and the others in the white car returned to Staton's apartment. Staton and White subsequently arrived in the Escort and ran into Staton's apartment.

Norton made some phone calls in an effort to extricate himself from the situation. At some point, White left the apartment and told law enforcement officers that the man with the gun was still inside. Norton and Staton then worked out a story about being a couple held hostage. Although they took their clothes off, he denied attempting to put his penis into Staton's vagina. Eventually, everyone came out of the apartment.

After White and Norton were arrested for the carjacking, Norton wrote White a note. In the note, Norton asked White to lie and say he did not know Norton and Norton was not with him during the carjacking. He stated "on Main Street Crip" that if White helped him the carjacking victim would never make it to trial. The reference to "on Main Street Crip" was intended to be an assurance Norton's word was good and to provide White recourse through the Main Street gang if Norton did not, in fact, take care of the carjacking victim.

Norton admitted he knew Luckey and had a sexual relationship with her. He denied telling Luckey he was a member of the Main Street gang, although he did tell her his name was Mafia. He denied he and Carter ever went to her house together to get their hair braided by her. He denied ever telling her anything about a .380-caliber handgun or that he "noodled" Fuller or anybody else.

Rebuttal Evidence

Detective Thomas testified Carter told him Norton "needed . . . to stop at Edgemont because he need[ed] to be reimbursed." In addition, Carter said Gayton went into Fuller's apartment with Norton "to spot" Norton. He also said he thought there was going to be a shootout and either Norton or Fuller would be killed. He confirmed the gun used in the carjacking was the same gun used to kill Fuller.

At the time Luckey told Thomas about Norton's "noodled" remark, the location of Fuller's gunshot wounds had not been released to the public or to Fuller's family.

DISCUSSION

I

*Severance of Active Gang Participation Charge and
Bifurcation of Gang Enhancement Allegations*

A

Norton made a pretrial motion to sever the trial of the active gang participation charge and bifurcate the trial of the gang enhancement allegations. The People opposed the motion, arguing the gang evidence was relevant and admissible as to the other charges on the issues of motive and intent. The trial court denied the motion. Norton contends the trial court prejudicially erred in doing so. We conclude there is no merit to this contention.

B

Severance of Active Gang Participation Charge

A prosecutor may join charges connected together in their commission in the same accusatory pleading. (§ 954.) The active gang participation and other charges against Norton were connected together in their commission and, therefore, properly joined because they arose out of single course of conduct. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 946.) Nevertheless, the trial court had the discretion to order the active gang participation charge tried separately from the other charges against Norton in the interests of justice and for good cause shown. (§ 954.)

We review a trial court's decision to deny severance for abuse of discretion. (*People v. Vines* (2011) 51 Cal.4th 830, 855.) "When the statutory requirements are met, joinder is error only if prejudice is clearly shown. [Citations.] [¶] "In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, 'we consider the record before the trial court when it made its ruling.' " [Citations.] "The relevant factors are whether (1) the evidence would be cross-admissible in separate trials, (2) some charges are unusually likely to inflame the jury against the defendant, (3) a weak case has been joined with a strong case, or with another weak case, so that the total evidence may unfairly alter the outcome on some or all charges, and (4) one of the charges is a capital offense, or joinder of the charges converts the matter into a capital case." [Citation.] "[I]f evidence underlying the offenses in question would be 'cross-admissible' in separate trials of other charges, that circumstance normally is

sufficient, standing alone, to dispel any prejudice and justify a trial court's refusal to sever the charged offenses." ' ' " (*People v. Scott* (2011) 52 Cal.4th 452, 469-470.)

Here, the evidence related to the murder and firearm possession charges was admissible as to the active gang participation charge to show Norton willfully promoted, furthered, or assisted felonious criminal conduct by gang members. Similarly, the evidence related to the active gang participation charge was admissible to show Norton had a gang-related motive for possessing a firearm and murdering Fuller. Although there was evidence of another possible motive, the existence of other motive does not preclude the evidence of a gang-related motive from being relevant and admissible.

Even if the evidence had not been cross-admissible, severance was not required because the factors weighing in favor of severance were absent. (*People v. Scott, supra*, 52 Cal.4th at p. 473.) The evidence supporting Norton's guilt of the charged crimes was of comparable strength and the evidence relating to Norton's active gang participation was no more distressing than the evidence related to his firearm possession and Fuller's murder. In addition, joinder of the active gang participation charge did not convert the murder charge into a capital case. "A fortiori, defendant has not shown actual prejudice amounting to a denial of fundamental fairness and due process." (*Ibid.*)

Notwithstanding our conclusion the trial court's denial of Norton's motion for severance was correct when made, we must still determine whether, considering the same factors in hindsight, the joinder of the active gang participation charge with the other charges prejudiced Norton and deprived him of due process of law. (*People v. Soper* (2009) 45 Cal.4th 759, 783-784.) Norton has not persuaded us it did.

The relevance and cross-admissibility of the evidence became more apparent as the trial court progressed. Both Norton and Carter testified they were affiliated with Los Angeles-based gangs and knew each other's gang affiliation and nickname. Their friends and family members also knew their gang affiliations and nicknames. Neither Norton nor Carter knew one another well and they had no apparent common interests except for their work for Sanders, a Main Street gang member engaged in illegal drug transactions. According to Norton, Sanders specifically directed him to go to Fuller's apartment complex on the night of Fuller's murder. Carter, who also worked for Sanders, and Gayton, who is affiliated with Sanders and the Main Street gang, accompanied Norton to the complex. This evidence, along with the evidence Norton introduced himself as a Main Street gang member upon arriving at the apartment complex, one of his companions went with him to Fuller's apartment to "spot" him, and one of his companions stayed in the car to be a getaway driver, showed both that Norton actively participated in the Main Street gang and that he likely possessed a weapon and murdered Fuller for a gang-related motive.

The gang evidence adduced at trial did not alter the relative strength of the prosecution's case on the charges against Norton nor did it cause one charge to become more inflammatory than the other. It also did not convert the murder charge into a capital case. Thus, even reviewing the matter in hindsight, we conclude the trial court did not abuse its discretion and deprive Norton of due process of law by denying his motion to sever the active gang participation charge.

C

Bifurcation of Gang Benefit Enhancement Allegations

Just as the trial court had the discretion to sever the trial of the active gang participation charge under section 954, it had the discretion to bifurcate the trial of the gang benefit enhancement allegations under section 1044.⁷ (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*)). We review the trial court's decision to deny bifurcation for abuse of discretion. (*Id.* at pp. 1048, 1050) To establish an abuse of discretion, a defendant must show there was a substantial danger of prejudice necessitating bifurcation. (*Id.* at pp. 1050-1051.) Norton has not met this burden.

Generally, there is less need to bifurcate the trial of gang benefit enhancement allegations because they are inextricably intertwined with the charged offense to which they are attached. (*Hernandez, supra*, 33 Cal.4th at pp. 1048-1049.) Moreover, "[t]o the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary." (*Id.* at pp. 1049-1050.)

In this case, Norton injected his gang status into the case by identifying himself as a Main Street gang member when he arrived at Fuller's apartment complex and using his status to gain unimpeded access to Fuller's apartment. In addition, the evidence showed

⁷ Section 1044 provides, "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

Fuller's murder was a coordinated effort among three gang members: two who confronted Fuller and one who acted as the getaway driver. The gang experts' testimony helped the jury understand the significance of Norton's self-identification as a gang member, which was relevant to his motives for possessing a firearm and shooting Fuller. The gang experts' testimony about the alliances among Los Angeles-based gang members also helped explain why Norton and Carter were acting together and further supported the existence of a gang motive for their crimes. The other evidence provided by the gang experts was not so minimally probative or comparatively inflammatory that it created a risk of swaying the jury to convict Norton regardless of his actual guilt. Thus, we conclude Norton has not met his burden of establishing there was a substantial risk of prejudice necessitating bifurcation. (*Hernandez, supra*, 33 Cal.4th at pp. 1050-1051.)

People v. Albarran (2007) 149 Cal.App.4th 214, upon which Norton relies, is distinguishable. The issue in *Albarran* was whether the trial court properly admitted gang evidence under Evidence Code section 352, not whether the trial court properly denied severance of gang charges under section 954 or bifurcation of gang enhancement allegations under section 1044. (*Albarran, supra*, at pp. 222-223, 225.) Further, the *Albarran* court concluded the trial court had not properly admitted the gang evidence because the evidence was highly prejudicial and largely irrelevant as, apart from defendant's gang-affiliation, there was no indication the defendant's crimes were gang motivated. (*Id.* at p. 227.) In this case, however, there was evidence of a gang motive for Norton's crimes beyond just his gang affiliation. He announced his gang status shortly before committing the crimes. Two other gang members, whom he knew primarily from

their common dealings with another Main Street gang member, accompanied him to the crime scene and assisted him. Shortly after the crimes, in Carter's presence, he bragged about shooting Fuller to Luckey, who knew him and Carter by their gang personas. Thus, *Albarran* does not apply to or compel a different result in this case.

II

Denial of Self-Representation Request

A

Just before closing arguments were to commence, Norton's counsel informed the court Norton wanted to address the court. When the court inquired of Norton, Norton stated, "I was wondering if it would be possible for me to give my own closing when I was going pro per, because it wouldn't take me no hour and 30 minutes or whatever that they're setting for their selves." Norton explained he felt the prosecutor and Carter's counsel had "struck a final blow" by suggesting during their cross-examinations of him that he was having sex with Luckey's 16-year old sister.⁸ He felt this suggestion, in light of his prior conviction for assault with the intent to commit a specified sexual offense,

⁸ Carter's defense counsel raised the matter in the context of trying to establish that Luckey did not decide to inform the police of her conversation with Norton and Carter about Fuller's murder until after she learned Norton had a sexual relationship with her 16-year-old sister and Norton allegedly threatened to "rape her ass and hurt her kids" if she reported the sexual relationship. Both Carter's defense counsel and the prosecutor also attempted to question Norton about his remarks to Thomas that Fuller was accidentally killed and, at some unspecified point before he was killed, he had said to Norton, "Don't let me find out that you was messing with no 16-year-old girl." Norton, however, stated he did not remember making the remarks to Thomas and denied that a 16-year-old girl had anything to do with Fuller's murder.

poisoned the jury against him. He further stated he wanted "the jury to hear me to prove that I'm not running around killing people and sexing underage girls and raping people and stuff like this."

The trial court responded, "At this point in the proceedings, the evidence is closed. We heard the evidence. And it sounds to me like you're wanting to present new evidence to the jury in argument, I think, and I'm going to deny your request to address the jury personally at this point."

Norton's defense counsel then interjected, "Once again I have advised [Norton] against doing it, but he is inquiring whether or not or how it would work if he could go pro per potentially at closing argument stage." Norton explained, "I've seen it be done to where you go pro per with counsel or something like that." He further explained, "I'm not trying to introduce no new evidence. I just want to speak for myself. Because basically, the man struck a final blow with what he said. And it's right here that—I got it right here (indicating). I think that the prosecution should not, you know, strike hard blows or final blows at liberty. I got it right there. And that's exactly what they did. Nothing about this case involved no 16-year old girl, that is all they talked about, basically."⁹

The trial court gave the prosecutor and Carter's counsel an opportunity to respond. After clarifying the context for the statements about the 16-year-old-girl and indicating he

⁹ Defense counsel did not object to the references to the 16-year-old girl. They appear relevant to both Luckey's and Norton's credibility and comprised just a few pages of the 10-volume trial transcript.

was not going to include anything about the statements in his closing argument, the prosecutor remarked, "[I]f [Norton] is saying he wants to get up and further clarify what he meant by that, that is new evidence. That is not closing argument. That is what should have been done when he was on the stand. He didn't do that. He didn't take advantage of that. So he can't get up now in closing argument and say, hey, this is other stuff that you didn't hear. That is not what closing argument is for, and he is precluded by law from doing that." Carter's counsel joined in the prosecutor's remarks, agreeing Norton likely wanted to use closing argument to talk about matters not in evidence.

Norton's counsel responded, "First of all, you know, it's not my recommendation, obviously, for [Norton] to go pro per at this time. I think the Court needs to address the issue whether or not he has the right to go pro per at this stage and whether or not he wants to. And if he wants to and he has the—and the Court would be willing to allow it, then the issue is whether or not [Norton] can follow the procedures during closing argument, not what could potentially happen."

The prosecutor then pointed out "[Norton] hasn't formally asked to be pro per yet, and I know he is being advised not to. All he has requested at this point is to give a statement, and I think he wanted [his defense counsel] to also give a statement. So I don't know what his formal request is at this point."

The court then asked, "What is your formal request, [Norton]." Norton responded, "My formal request is I would like to know how do I go about being pro per?"

The court indicated it was not allowed to give Norton legal advice as it had to remain impartial. Norton's counsel interjected, "I think what he is asking is whether or not the Court will allow him to go pro per."

The court responded, "I think the first step is he—I have not heard a formal request yet that he wants to be pro per and fire you. Because I think that is what that would—that is what that would be, really, is taking you off the case at that point."

The court continued, "I think it's fairly safe to say you would not be allowed to address that by talking about how it was. All you could refer to is what was said on the stand, what the evidence was. That is what argument is, is to argue the evidence that has been presented, not to present new evidence."

Norton responded, "I just want to talk about what was said while I was on that stand. That's—I'm not trying to bring in an investigation."

The court explained, "But you can't say, 'But what I meant was' That is not evidence."

Norton replied, "No, not what I meant was. The D.A. just said that he was trying to clarify something because it sounded a certain way in the record. And that's clearly not what the man was doing. I know that you got to be impartial, but the man sit there and said—I can't even say his exact words, but he basically was implying that I was messing with a 16-year-old girl. First [Carter's counsel] started it, and then [the prosecutor] got involved in it. [¶] When I asked my attorney about it, he said to him, it sounds like this. But I know to the jury it didn't sound like that, because to me it didn't

sound like that. It's no way they could have got that from that one little clip of the report that they read. There is no kind of way they could have got that. And that—the only reason they did that is because of my prior first-degree burglary with assault with intent to commit a sex act. That is the only reason they did that."

The court concluded, "Again, I don't know reasons why anybody did anything at this point. But based on what I've heard, I'm going to bring the jury in and proceed, and I'm going to deny his right to argue at this point. I don't believe he can take over now as representing himself and follow the rules of the Court because he is indicating what he wants to do are things he can't do."

B

Norton contends we must reverse his convictions because his remarks to the trial court constituted an unequivocal and timely request for self-representation that the trial court had no discretion to deny. The People counter that Norton's request for self-representation was neither unequivocal nor timely and the trial court properly exercised its discretion to deny the motion. We agree with the People.

1

"A criminal defendant may waive the right to counsel and represent himself at trial. [Citation.] The right of self-representation is absolute, but only if a request therefor is knowingly and voluntarily made and is asserted a reasonable time before trial begins. [Citation.] Otherwise, requests for self-representation are addressed to the trial court's sound discretion." (*People v. Bradford* (2010) 187 Cal.App.4th 1345, 1353.)

On appeal, we examine the record de novo to determine whether a defendant's request for self-representation was unequivocal. (*People v. Stanley* (2006) 39 Cal.4th 913, 932.) For a defendant's request for self-representation to be unequivocal, the defendant must have evinced a true desire for self-representation. (*People v. Marshall* (1997) 15 Cal.4th 1, 23 (*Marshall*)). "[A]n insincere request or one made under the cloud of emotion may be denied." (*Id.* at p. 21.)

A "court faced with a motion for self-representation should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." (*Marshall, supra*, 15 Cal.4th at p. 23.)

"[T]he court's duty goes beyond determining that some of defendant's words amount to a motion for self-representation. The court should evaluate all of a defendant's words and conduct to decide whether he or she truly wishes to give up the right to counsel and represent himself or herself and unequivocally has made that clear." (*Marshall, supra*, 15 Cal.4th at pp. 25-26.)

After reviewing the record in this case, we cannot conclude Norton's statements represented "an unequivocal and sincere invocation of the right of self-representation." (*Marshall, supra*, 15 Cal.4th at p. 27.) He never indicated he desired to represent himself

during closing argument because he was displeased with his defense counsel. He never indicated he wanted to take over any other representation tasks remaining in the case. Rather, he indicated he wanted cocounsel status so he could personally address the jury during closing argument. His desire to do this was an impulsive response to his frustration at what he perceived were attempts by the prosecutor and Carter's defense counsel to turn the jury against him by portraying him as someone who had sexual relations with a minor. Moreover, he intended to counter this perceived strategy not by means defense counsel failed or refused to consider, but by impermissibly referring to facts not in evidence, which defense counsel procedurally and ethically could not do. Under these circumstances, we have no difficulty concluding Norton's desire to represent himself was equivocal rather than genuine and, consequently, he never invoked his right of self-representation. (*Id.* at p. 21; *People v. Valdez* (2004) 32 Cal.4th 73, 99.)

2

Even if Norton had invoked his right of self-representation, his invocation was untimely. "[I]n order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial." (*People v. Windham* (1977) 19 Cal.3d 121, 127-128.) The absence of a pretrial request amounts to a waiver of the unconditional right of self-representation. (*Id.* at p. 129.) Instead, "once a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court." (*Id.* at p. 128.) Among the

factors pertinent to determining whether to grant a midtrial request for self-representation "are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Ibid.*) "[A] reviewing court must give "considerable weight" to the court's exercise of discretion and must examine the total circumstances confronting the court when the decision is made.'" (*People v. Bradford, supra*, 187 Cal.App.4th at p. 1353.)

In this case, we cannot find fault with the representation Norton's counsel provided to him. Although there are numerous indications in the record Norton was a difficult client, Norton's counsel was able to form a respectful working relationship with him and present his version of events to the jury. Norton had not previously sought to relieve his counsel¹⁰ and, as discussed above, his reason for seeking self-representation did not stem from dissatisfaction with his counsel's representation. Moreover, the trial court could have reasonably determined from its colloquy with Norton that Norton was likely to get sidetracked on tangential issues and might violate procedural rules by improperly using closing argument as an opportunity to bring up matters not in evidence. (*People v. Bradford, supra*, 187 Cal.App.4th at p. 1354.)

¹⁰ Norton did move to relieve defense counsel several weeks after the trial for reasons unrelated to his perception of defense counsel's performance. The trial court granted the motion and appointed new counsel for purposes of investigating grounds for a new trial motion.

Further, Norton's interest in self-representation arose during the late stages of a lengthy trial and the trial court could have reasonably determined allowing him to represent himself would have delayed or disrupted the trial. While Norton suggested he was prepared to go forward with closing argument without a continuance, the trial court could have reasonably doubted this suggestion. Norton was preoccupied with a tangential part of the case and he initially expressed interest in assuming partial rather than full responsibility for closing argument. Both of these factors indicate Norton likely was not prepared to argue the entire case to the jury without a continuance.

People v. Miller (2007) 153 Cal.App.4th 1015 (*Miller*), upon which Norton relies, is distinguishable. In *Miller*, the defendant made a posttrial request to represent himself at his sentencing hearing. (*Id.* at pp. 1019-1020.) The trial court found the request untimely and exercised its discretion to deny the request. (*Id.* at p. 1020.) The appellate court, however, concluded the request was timely because "sentencing is a proceeding separate and distinct from the trial" and the defendant made his request within a reasonable time before sentencing. (*Id.* at pp. 1023-1024.)

Unlike sentencing, closing argument is an integral part of the trial. In addition, closing argument is much less discrete than the penalty phase of a capital prosecution, which the California Supreme Court has held is not a separate proceeding for purposes of determining the timeliness of a motion for self-representation. (*People v. Doolin* (2009) 45 Cal.4th 390, 454.) It is also much less discrete than a bifurcated trial on prior conviction allegations, which appellate courts have held is not a separate proceeding for such purposes. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1048; *People v. Givan*

(1992) 4 Cal.App.4th 1107, 1114.) We consequently conclude closing argument is also not a separate proceeding for such purposes.

III

Sufficiency of Evidence for Active Gang Participation Conviction and Gang Benefit Enhancement Findings

Norton contends there is insufficient evidence to support his conviction for active gang participation under section 186.22, subdivision (a). He and Carter similarly contend there is insufficient evidence to support the true findings on the gang enhancement allegations under section 186.22, subdivision (b)(1).

"When a defendant challenges the sufficiency of the evidence, "[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] [Citations.] 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.] [Citation.] We "' 'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " " " (*People v. Clark* (2011) 52 Cal.4th 856, 942-943.) " 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.] [Citation.]

A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

A

Active Gang Participation Conviction

To establish a violation of section 186.22, subdivision (a), the prosecution must prove three elements. "Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, is the first element The second element is 'knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,' and the third element is that the person 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.' " (*People v. Lamas* (2007) 42 Cal.4th 516, 523; accord, *People v. Albillar* (2010) 51 Cal.4th 47, 56.)

The prosecution may meet its burden by presenting testimony from a gang expert. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-620; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.) "For example, an expert may properly testify about the size, composition, or existence of a gang; 'motivation for a particular crime, generally retaliation or intimidation'; and 'whether and how a crime was committed to benefit or promote a gang.' " (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512.)

In this case, gang experts familiar with the Main Street gang, its allies, and the activities of its members and the members of other Los Angeles-based gangs who migrated to Moreno Valley opined Norton was an active gang participant in the Main

Street gang at the time of Fuller's murder. The experts based their opinions on Norton's admissions to gang affiliation, his gang tattoos and possession of gang paraphernalia before and after the shooting, his use of a nickname, and his friends', family members', and third parties' knowledge of his nickname and gang affiliation. They also based their opinions on his announcement of his nickname and gang affiliation to other gang members upon arriving at Fuller's apartment complex and his bragging about Fuller's murder after the fact to a person who knew him by his gang persona. Further supporting the gang experts' opinions was the evidence of his post-arrest letter to White in which he used the Main Street gang name to vouch for his integrity, and his conduct on the day of Fuller's murder, which included engaging in illegal drug transactions at Sanders's direction with the assistance of Carter and Gayton. Collectively, this evidence provides ample support for the jury's implied finding Norton's gang participation was more than nominal or passive.

In addition, there is substantial support for the jury's implied finding Norton knew members of the Main Street gang engaged in or have engaged in a pattern of criminal activity. A gang expert testified to predicate offenses committed by Main Street gang members. Norton did not dispute this evidence. Moreover, on the day of the shooting, Norton admitted he was engaged in illegal drug transactions at the direction of Sanders, a Main Street gang member. Therefore, a jury could reasonably infer Norton knew Main Street gang members engaged in or have engaged in a pattern of criminal activity.

There is also substantial support for the jury's implied finding Norton willfully promoted, furthered, or assisted in felonious criminal conduct by Main Street gang

members and their allies. Norton testified he went to the Edgemont area at the direction of Sanders. Fuller's murder was consistent with one of the Main Street gang's primary activities and Norton committed the murder in the presence of and with the assistance of other gang members who worked for or were affiliated with Sanders. In addition, the crime occurred at a location where Norton is known by his gang persona and occurred shortly after Norton informed local gang members who he was and what gang he was from. Furthermore, the crime was of the type to engender fear, which the gang experts testified is a key objective for the Main Street gang as greater fear equates to greater respect.

As there is substantial evidence to support each element of the offense of active gang participation, we conclude there is substantial evidence to support Norton's conviction for this offense. Although Norton identified evidence from which the jury could have found he was not an active gang participant, this evidence does not affect our conclusion. "[T]he sufficiency of the evidence showing active participation is not altered by the existence of other evidence offered by defendant to show he was not an active participant in the gang. Resolution of conflicting evidence and credibility issues was for the jury to decide. [Citation.] It is clear from the verdict finding defendant guilty of street terrorism that the jury believed he was actively participating in the gang. Because substantial evidence supports this determination, " 'that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " " (*People v. Williams* (2009) 170 Cal.App.4th 587, 626.)

B

Gang Benefit Enhancement Findings

To establish the truth of a gang benefit enhancement allegation under section 186.22, subdivision (b)(1), the prosecutor must prove: "first, that the defendant committed a felony (a) for the benefit of, (b) at the direction of, or (c) in association with a criminal street gang; and second, that in connection with the felony, the defendant harbored the *specific intent* to (a) promote, (b) further, or (c) assist in any criminal conduct by gang members." (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1358 (*Daniel C.*); accord, *People v. Gardeley*, *supra*, 14 Cal.4th at pp. 616-617; *People v. Williams*, *supra*, 170 Cal.App.4th at p. 625.) As with the crime of active gang participation, the prosecution may meet its burden of proving a gang benefit enhancement allegation by presenting testimony from a gang expert. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 820; *People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1047-1048; *People v. Gardeley*, *supra*, at pp. 617-620.)

Regarding the first prong, gang experts opined that Norton was a member of Main Street gang and Carter was a member of the Farm Dog gang. Norton and Carter subsequently admitted these gang affiliations. In addition, Norton and Carter each admitted knowing the other's gang affiliation and associating with one another, which one of the gang experts testified was a common occurrence among Los Angeles-based gang members living in the Moreno Valley area. Moreover, they accompanied one another and a third person affiliated with the Main Street gang to Fuller's apartment and aided one another in shooting Fuller, a crime typical of those among their gangs' primary activities.

The jury could have reasonably inferred from this evidence that Norton and Carter committed the shooting and Norton possessed the firearm used in the shooting in association with one another's gangs. (*Daniel C.*, *supra*, 195 Cal.App.4th at p. 1358-1359 [evidence defendant committed a crime in the company of known gang members and affiliates sufficient to establish defendant committed the crime in association with a criminal street gang].)

Regarding the second prong, the evidence shows the shooting occurred in an area where Norton and Carter were known by their gang personas and occurred shortly after Norton informed the local gang members who he was and what gang he was from. The evidence further shows the men intended to shoot Fuller and acted in concert to achieve their objective. In addition, the shooting was committed in a manner that tended to engender fear and earn respect for Norton, Carter, and their respective gangs. In fact, Norton bragged about the shooting afterwards. The jury could have reasonably inferred from this evidence Norton and Carter committed the shooting with the specific intent to promote, further, or assist in criminal conduct by gang members. (*People v. Leon* (2008) 161 Cal.App.4th 149, 163; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198-1199; see also *People v. Vang* (2011) 52 Cal.4th 1038, 1048; *People v. Albillar*, *supra*, 51 Cal.4th at p. 63 [an expert's opinion particular criminal conduct benefited a gang can be sufficient to establish the defendant committed the conduct for the benefit of the gang].)

Daniel C., upon which Norton relies, is distinguishable in this regard as, unlike in this case, there was no evidence in *Daniel C.* that the defendant acted in concert with his companions. In addition, unlike in this case, there was no evidence in *Daniel C.* the

defendant and his companions did anything to identify themselves as gang members or affiliates, or that the victim knew they were gang members or affiliates. (*Daniel C.*, *supra*, 195 Cal.App.4th at pp. 1361, 1363.)

IV

Sentence for Firearm Enhancements

A

Carter

Carter contends we must reverse his sentence for the subdivision (e)(1) firearm enhancement because this enhancement only applies where the underlying offense was committed for the benefit of a criminal street gang (§§ 186.22, subd. (b), 12022.53, subd. (e)(1)(A)) and there was insufficient evidence to support the gang benefit enhancement finding in this case. We reject this contention because, for the reasons discussed in part III.B, *ante*, we conclude there is ample evidence to support the gang benefit enhancement finding.

B

Norton

Norton also contends we must reverse his sentence for the subdivision (e)(1) firearm enhancement because there is insufficient evidence to support the gang benefit enhancement findings. We reject this contention for the same reason stated above. We further reject this contention because the trial court did not sentence Norton for the subdivision (e)(1) firearm enhancement. Instead, the trial court sentenced Norton for the subdivision (d) firearm enhancement. Unlike the subdivision (e)(1) firearm

enhancement, the subdivision (d) firearm enhancement does not require a corresponding gang benefit enhancement. Consequently, even if Norton's contention regarding the sufficiency of evidence to support the gang benefit enhancement had merit, there is no subdivision (e)(1) firearm enhancement sentence for us to reverse.

V

Failure To Strike Gang Enhancement

After imposing a sentence for Norton's subdivision (d) firearm enhancement, the trial court stated there would be no gang benefit enhancement imposed for count 1; however, the trial court did not state it was striking or staying the gang benefit enhancement. The abstract of judgment lists the gang benefit enhancement, but shows the trial court imposed no prison time for it.

In his briefs, Norton contends that since the trial court intended to impose no punishment for the gang enhancement, the trial court was required to strike the enhancement under section 1385 and we should order the abstract of judgment modified accordingly. The People counter that, while the trial court had the discretion to impose, stay, or strike the enhancement, the trial court could only strike the enhancement in an unusual case after specifying on the record and in the court minutes the circumstances indicating the interests of justices would be best served by doing so. Since the trial court did not make the necessary findings to strike the enhancement, the People argue the trial court must have intended to stay the enhancement.

The record, however, does not support either party's position. The probation officer's report recommended the trial court handle the sentence for the gang

enhancement under section 186.22, subdivision (b)(5), and *People v. Lopez* (2005) 34 Cal.4th 1002 (*Lopez*). Section 186.22, subdivision (b)(5) provides, with certain exceptions not applicable here, that "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served." In *Lopez*, the California Supreme Court held this alternative penalty provision applies to first degree murders committed for the benefit of a gang. (*Lopez*, at pp. 1004, 1006-1007.)

Moreover, we recently held a trial court has no discretion to dismiss or strike the gang enhancement and refuse to impose the alternate penalty. (*People v. Campos* (2011) 196 Cal.App.4th 438, 454.) Thus, the only action the trial court could have taken with respect to the gang enhancement for count 1 was to impose the alternate penalty under section 186.22, subdivision (b)(5).¹¹ Although the trial court's remarks at the sentencing hearing could have been more clear, it appears from the record as a whole that this is what the trial court intended to do. As the abstract of judgment does not reflect the imposition of the alternate penalty, we order the trial court to modify it to do so.

¹¹ As neither Norton nor the People discussed these authorities in their briefs, we provided them an opportunity to submit supplemental letter briefs addressing the application of these authorities to this case. Both the People and Norton acknowledge these authorities dictate a single course of action, although Norton disagrees with our analysis in *Campos* for reasons we considered and rejected in that case.

VI

Failure to Stay Sentence for Active Gang Participation Conviction

Carter and Norton contend the trial court should have stayed the sentences for their active gang participation convictions under section 654. We agree.

Under section 654, a defendant may only be punished once "for '[a]n act or omission that is punishable in different ways by different provisions of law.'" (*People v. Mesa* (2012) 54 Cal.4th 191, 193.)¹² Thus, " 'section 654 precludes multiple punishment for both (1) gang participation, one element of which requires that the defendant have "willfully promote[d], further[ed], or assist [ed] in any felonious criminal conduct by members of th[e] gang," [citation], and (2) the underlying felony that is used to satisfy this element of gang participation.'" (*Id.* at pp. 197-198.)

In this case, the record indicates Carter's active gang participation conviction was based on his participation in Fuller's murder and Norton's active gang participation conviction was based on his participation in Fuller's murder as well as his unlawful possession of a firearm. Although there was evidence Carter and Norton committed an uncharged robbery in connection with Fuller's murder, the record does not show the robbery was a basis for the active gang participation convictions. The trial court did not instruct the jury to consider the robbery evidence for this offense nor did the prosecutor argue the jury should do so. In fact, the prosecutor did not mention the robbery evidence

¹² As the California Supreme Court decided *People v. Mesa* while this case was pending, we provided the parties an opportunity to submit supplemental letter briefs addressing the application of the decision to this case.

at all in his closing argument. Since the trial court imposed sentences for the felonies underlying Carter's and Norton's active gang participation convictions, the trial court should have stayed imposition of the sentences for their active gang participation convictions under section 654, and we direct the trial court to modify the abstract of judgment accordingly.

VII

Correction of Abstract of Judgment

A

The probation report prepared for Norton's sentencing hearing recommended Norton pay restitution and parole revocation fines of \$5,000 each. As part of its oral pronouncement of sentence, the trial court followed this recommendation, stating, "I'm going to order that [Norton] pay a restitution fine in the amount of \$5,000 pursuant to [section 1202.4]." The trial court continued, "He is to pay an additional parole revocation restitution fine in the amount of \$5,000 pursuant to [section 1202.45]."

The trial court then ordered Norton to pay another assessment and was about to state Norton's total sentence when defense counsel interjected a few points. Among those points, Norton's counsel stated, "With regards to the \$5,000 restitution fine, I believe—and I'm not certain—that the Court has to make a finding of [Norton's] ability to pay. And being that he is indigent and has indigent counsel and he is going to be serving substantial time in state prison, I don't think he has the ability to pay \$5,000."

The trial court offered the prosecutor an opportunity to comment on defense counsel's remarks. The prosecutor commented about some of the remarks, but not the remarks related to Norton's ability to pay the restitution fine.

The trial court then responded to defense counsel's remarks. As to the restitution fine, the court stated, "I think what you have to say is well-taken. I would find no ability to pay on that."

The trial court did not discuss the restitution fine further. The abstract of judgment reflects imposition of a \$5,000 restitution fine and a \$5,000 parole revocation fine.

B

Norton contends we must order the abstract of judgment corrected because the trial court's remarks indicate it did not actually impose a restitution fine. Norton nevertheless recognizes the trial court was required to impose a restitution fine of at least \$200 under section 1202.4, subdivision (b)(1), notwithstanding an inability to pay. He requests we order the abstract of judgment modified to reflect a restitution fine of this amount. He also requests we order the abstract of judgment modified to reflect a parole revocation fine of this amount since section 1202.45 requires the parole revocation fine to be in the same amount as the restitution fine. Alternatively, he requests we strike the restitution and parole revocation fines and remand the matter to the trial court for further consideration.

The People contend the trial court's finding of inability to pay did not preclude the trial court from imposing a \$5,000 restitution fine, as ability to pay is only one of the

factors bearing on the amount of a restitution fine. The People further contend the seriousness of Norton's offenses, the trial court's inability to strike the restitution fine altogether, and the trial court's failure to modify the restitution fine after making the inability to pay finding demonstrates the trial court actually intended to impose a \$5,000 restitution fine. Should we conclude the trial court's intention was ambiguous, the People assert the appropriate remedy would be to remand the matter to the trial court as Norton alternatively suggests.

C

At the time of Norton's sentencing, the trial court was required to impose a restitution fine, unless it found compelling and extraordinary reasons for not doing so and stated those reasons on the record. (Former Pen. Code, § 1202.4, subd. (b), added by Stats. 2010, ch. 351, § 9, eff. Sept. 27, 2010.)¹³ The trial court could not consider Norton's inability to pay a compelling and extraordinary reason not to impose a restitution fine. (§ 1202.4, subd. (c).)

The trial court had the discretion to set the amount of the restitution fine between \$200 and \$10,000, commensurate with the seriousness of the offense. (§ 1202.4, subd. (b)(1).) In deciding whether to set the amount of the fine above the \$200 minimum, the trial court was required to consider any relevant factors, including Norton's "inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which

¹³ Further references to section 1202.4 are to this version of the statute.

any other person suffered any losses as a result of the crime, and the number of victims involved in the crime." (§ 1202.4, subds. (c) & (d).) Since Norton's inability to pay was only one of the factors bearing on the trial court's decision, it would not necessarily have precluded the trial court from setting the restitution above \$200. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1321 [a defendant's assertion of inability to pay does not compel a court to impose a lesser fine].)

Unfortunately, we cannot determine the trial court's intent from the record. It is possible, as Norton contends, the trial court no longer intended to impose a restitution fine after it determined Norton did not have the ability to pay the fine. It is also possible, as the People contend, the trial court, because of other relevant factors, intended to impose a restitution fine of \$5,000 notwithstanding Norton's inability. Yet another possibility is the trial court mistakenly believed it could not impose any restitution fine unless it found Norton had the ability to pay the fine. Rather than attempt to discern the trial court's true intent, we believe the appropriate course is to remand the matter to the trial court for further consideration as Norton alternatively proposed.

DISPOSITION

As to both defendants, the trial court is directed to modify the abstract of judgment to show the imposition of the sentences for their count 3 active gang participation convictions are stayed under section 654. As to defendant Norton, the restitution and parole revocation fines are reversed and the matter is remanded to the trial court to determine the appropriate amount of the fines. In addition, the trial court is directed to modify the abstract of judgment for Norton's count 1 gang benefit enhancement to reflect

the imposition of the alternate penalty under section 186.22, subdivision (b)(1). In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

AARON, J.