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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO HERNANDEZ ZABALZA et  
al.,

Defendants and Appellants.

D058181

(Super. Ct. No. INF055034)

APPEAL from judgments of the Superior Court of Riverside County, John J. Ryan, Judge. (Retired Judge of the Orange Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

A jury convicted Armando Hernandez Zabalza, Victor Garcia and Roberto Rodriguez of first degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a)) with special circumstances that the murder was committed during an attempted robbery (§ 190.2,

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise specified.

subd. (a)(17)(A)) and for criminal street gang purposes (§ 190.2, subd. (a)(22)). The jury also convicted Zabalza, Garcia and Rodriguez of first degree or deliberate and premeditated attempted murder (§§ 664/187, subd. (a))<sup>2</sup> and assault with a firearm (§ 245, subd. (a)(2)). With respect to all three counts, the jury sustained allegations that each defendant acted for the benefit of a criminal street gang (§ 186.22, subd. (b)). In connection with the murder count, the jury found one of the principals personally discharged a firearm, causing death (§ 12022.53, subs. (d), (e)). With respect to the attempted murder count, the jury found one of the principals intentionally used a firearm (§ 12022.53, subs. (b), (e)). In connection with the assault with a firearm count, the jury found each defendant personally used a firearm (§§ 12022.5, subd. (a), 1192.7, subd. (c)(8)).<sup>3</sup>

On the murder count with special circumstances, the trial court sentenced each defendant to life without the possibility of parole, plus 25 years to life for the allegations under section 12022.53, subdivisions (d) and (e). For each defendant, the court imposed a concurrent term of 15 years to life on the first degree attempted murder count plus a concurrent enhancement of 10 years pursuant to section 12022.53, subdivisions (b) and (e). For the assault with a firearm count, the court imposed a stayed sentence of 17 years under section 654 on each defendant, which consisted of the middle term of three years

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<sup>2</sup> Throughout this opinion, we will use first degree attempted murder, and deliberate and premeditated attempted murder interchangeably.

<sup>3</sup> A fourth defendant was acquitted of all charges.

on the assault, the middle term of four years for the gun use under section 12022.5, subdivision (a), and 10 years for the gang allegation under section 186.22, subdivision (b)(1)(C).

Zabalza and Rodriguez, joined by Garcia,<sup>4</sup> contend the trial court erred by not discharging a juror who expressed concern about his family's safety.

Garcia contends the trial court erred by denying a motion to bifurcate the gang allegations and allowing the gang expert to relate testimonial hearsay of declarants who were not present for cross-examination. Garcia also claims his trial counsel was ineffective because he did not prevent the prosecution from presenting evidence of his parole status and prior prison incarceration.

Rodriguez, joined by Zabalza and Garcia, contends the trial court gave an erroneous instruction on the elements of a criminal street gang and improperly sentenced him on the assault with a firearm count. Also, Rodriguez, joined by his codefendants, contends the court's minute order and the abstract of judgment are incorrect.

Rodriguez, joined by Garcia, contends there was insufficient evidence to support the gang special circumstance, and the instruction on the attempted murder count was erroneous.

## FACTS

Zabalza, Garcia and Rodriguez are documented members of the Penn West criminal street gang, which gets its name from the Penn West housing development in the

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<sup>4</sup> See California Rules of Court, rule 8.200 (a)(5).

southeast portion of Indio. The crimes took place at the most "active" gang area in the territory of the Penn West gang.

On the evening of March 17, 2006, Gloria Rodarte saw Marcos Esqueda, Jr., who was her friend's husband, at the Fantasy Springs Casino. They decided to buy methamphetamine, and Rodarte suggested they purchase it from Homer Valle, who previously had sold drugs to her. Valle lived in the Penn West neighborhood, and Esqueda drove Rodarte in his white pickup truck to Valle's residence at the corner of Cardinal Avenue and Bobolink Street. By the time they arrived, it was early morning on March 18. Ten or 12 people had congregated in the intersection. They were drinking and partying. After Esqueda parked his truck, Rodarte asked someone in the crowd to get Valle from his house.

Valle approached Esqueda's truck and agreed to sell them a gram of methamphetamine. Esqueda and Rodarte waited in the truck while Valle went inside to get the methamphetamine. Four or five men who had gathered in the intersection, including Rodriguez, Garcia and Zabalza, walked up to Esqueda's truck. Rodriguez was the first to approach the truck and asked Esqueda where he was from. Esqueda replied he was from nowhere and was not in a gang. Esqueda also said he had a cousin from Penn West. Rodriguez and the others asked if Esqueda and Rodarte had any money and tried to get them to get out of the truck. Rodarte wanted to leave, but Esqueda insisted on staying because they had already paid Valle for the methamphetamine. When one of the men opened Esqueda's door, he and the others insisted Esqueda and Rodarte get out of the truck. Rodarte again told Esqueda to leave. The men surrounding the truck told

Esqueda not to start the engine. When Esqueda turned on the truck and put it in reverse, the men pulled out guns and started shooting.

After the shooting, the men around Esqueda's truck ran to other vehicles.

Rodriguez and Zabalza drove away in one vehicle, and Garcia left in another vehicle.

One bullet struck Esqueda in the neck as he turned his head to the right to back up the truck. Rodarte, who had stooped down in her seat, was not hit. When the shooting stopped, Rodarte ran to Valle, who called 911. Rodarte hid in a car when the police arrived. Later, she left in a taxi after some Penn West gang members took her bloody jacket and told her to be careful about whom she talked to about what had happened.

When police arrived, Esqueda's pickup truck was in the middle of the intersection of Bobolink Street and Cardinal Avenue. Esqueda was slumped over with his head against his right shoulder over the center console. Esqueda had no pulse. There were five bullet holes in the truck and the driver's headrest.<sup>5</sup> Police found five expended bullets, one expended bullet core, two expended jackets and four shell casings on the street. Police also found a bullet hole and an expended bullet in a residence on Cardinal Avenue.

Scattered throughout the immediate area were several beer bottles and cigarette butts. Zabalza's DNA was on one beer bottle, and Rodriguez's DNA was on one cigarette butt.

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<sup>5</sup> After Esqueda's truck was impounded, police found another bullet embedded in the rear of the truck.

Esqueda died from the bullet to his neck, which severed the cervical spinal cord. The bullet was fired from a distance of at least one or two feet. Esqueda had a small amount of methamphetamine in his system when he died.

Later that day, police stopped Zabalza's vehicle for a traffic violation. When officers searched the vehicle, they found a loaded .357 Smith & Wesson revolver and six unspent .38-caliber bullets hidden by the car battery under the hood. Neither the gun nor the ammunition was used in the shooting of Esqueda. Police also seized two cell phones. One of the cell phones had numerous video clips that featured Zabalza, Garcia, Rodriguez and Valle. There were 27 references to the Penn West gang. Rodriguez, Garcia and Zabalza were addressed by their gang monikers in the clips.

Also that day, a district attorney's investigator interviewed Rodriguez, who admitted he was present at the shooting. Rodriguez told the investigator that he was the one who had first approached the driver and had "hit him up" — that is, asked him where he was from. Rodriguez claimed he did not shoot anyone and did not know that anyone was armed. Rodriguez admitted he was a Penn West gang member.

The prosecution relied heavily on Rodarte's pretrial statement and testimony. About 10 days after the shooting, Rodarte told police that she recognized one of the men gathered around the car as "Wicked," which is Rodriguez's gang moniker. She circled Rodriguez's picture in a photographic lineup and was 100 percent sure he was involved in the shooting. Rodarte also pointed to a picture of Zabalza and said she was 60 percent sure he was involved in the shooting. The police interview was videotaped and played for the jury. Rodarte's testimony was largely consistent with her statement to police.

However, at trial she was unable to identify any of the people who had guns. At trial, which took place almost four years later, Rodarte testified that in 2006 she was a daily user of methamphetamine and would go days or weeks without sleeping. Rodarte testified it was difficult to remember the shooting because, among other things, she was under the influence and delusional at the time of the incident.

The prosecution also relied on the pretrial statements of Rashonda Ward, who witnessed the crimes. A surveillance videotape at a casino showed Ward, Rodriguez, Zabalza and Garcia leaving the casino and getting into two vehicles on the evening of March 17. Ward told police they were going to a residence at Cardinal Avenue and Bobolink Street. Ward rode with Rodriguez, whom she identified as "Wicked," and another Mexican man. In a photographic lineup, she identified Zabalza with 60 percent certainty as the second man in the car. Garcia left in his own truck. Ward identified Garcia in another photographic lineup with 70 percent certainty.

Ward's police interview was videotaped and played for the jury. Ward told police the following: She was outside when a white pickup truck arrived at the intersection of Cardinal Avenue and Bobolink Street. Rodriguez told Ward he was going to find out who was in the truck and he wanted to "jack" them. Rodriguez approached the truck first, and Zabalza and Garcia followed him; they each had a gun. Rodriguez told the driver to give him money or get out of the truck; the woman passenger told the driver to leave. As soon as the driver put the truck in reverse, Rodriguez, Zabalza and Garcia drew

their guns. Zabalza and Garcia started firing, but Rodriguez did not shoot because there was a "hina" or woman in the car.<sup>6</sup>

At trial, Ward testified that she was not present at the shooting, did not know Rodriguez, Zabalza and Garcia, and did not remember being interviewed by police about the shooting. Further, Ward testified she was under the influence when she spoke to the police, she used drugs on a daily basis and she would stay up for days in a row. At that time, Ward testified, her primary concern was finding money to buy drugs.

While he was in jail, Zabalza telephoned his aunt, who had raised him, and asked her to destroy evidence against him.

The prosecution's gang expert, Sergeant Christopher Hamilton of the Indio Police Department, testified that the primary activities of the Penn West gang were committing crimes such as vandalism, auto theft, burglary, sale of drugs and assault with a deadly weapon. Hamilton told the jury that Penn West gang members had been convicted of assault with a firearm in 2003, carjacking and participating in a criminal street gang in 2004, and auto theft in 2004.

Hamilton explained that respect is very significant in gang culture and is the main reason people join gangs. Gang members strive to attain a status where they are feared in the community. A gang member can gain the most respect by committing the most serious and violent crimes. The more a gang is feared in the community, the easier it is

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<sup>6</sup> Although Rodarte had told police that she was "pretty sure" that all three appellants had fired their guns, the prosecution's theory at trial was that Rodriguez did not fire his.

for the gang to commit crimes because people in the community are intimidated by the gang and are afraid to cooperate with law enforcement. Hamilton testified that it is typical that if a person does not comply with a gang member's order, the gang member will feel disrespected and react with violence. Hamilton opined that these crimes were committed for the benefit of the Penn West gang because the crimes instilled fear in the community by showing the consequence of not following gang members' orders, and the crimes had the potential to financially benefit the gang if the gang sold the truck or stripped it for parts.

Zabalza presented the expert testimony of a toxicologist on the effects of methamphetamine. The expert testified that chronic methamphetamine users often experience confusion in perceiving events and often cannot focus, process, retain and recall information. None of the other defendants presented evidence.

## DISCUSSION

### I

#### *FAILURE TO DISCHARGE JUROR*

Zabalza and Rodriguez, joined by Garcia, contend the trial court erred when it refused to dismiss a juror who expressed concern over his family's safety. The appellants also contend the court's inquiry into the juror's concern was inadequate. These contentions are without merit.

#### A. Factual Background

During the trial, Juror No. 1 submitted a note to the trial court in which he described an incident involving two Hispanic men who had gone to his house the

previous week. According to the note, the incident "may or may not" be related to the trial, but given the "nature" of the case, Juror No. 1 wanted to "ensure that the court was aware of the incident." At the time of the incident, Juror No. 1 was not home, but his mother-in-law was and she answered the door.

The note related the following: The first Hispanic male asked the mother-in-law, "Who lives here?" The mother-in-law answered, "Who are you looking for?" The first Hispanic male replied, "I am looking for your husband. He is my friend." The mother-in-law said, "My husband has been dead for 15 years." At this point, the two Hispanic men spoke to each other in Spanish. Then, the first Hispanic male told the mother-in-law that he was looking for her son. The mother-in-law said, "I do not have [a] son. Tell me the name of the person you're looking for and maybe I can help." The two Hispanic males again spoke to each other in Spanish before the first Hispanic male asked, "What time will he be home?" The mother-in-law asked, "What time will who be home?" The first Hispanic male replied, "Your husband or son, we know he lives here." The mother-in-law replied, "My husband died 15 years ago and I do not have a son."

The two Hispanic men talked between themselves and then went to a two-door black Honda, which did not have license plates. The first Hispanic male spoke to someone in the back seat; then the Honda, which was lowered like a low-rider, drove up and down the street a few times before leaving the area.

According to the note, the first Hispanic male was in his late 20's, had a shaved head, letter tattoos on the side of his head and neck, and other tattoos on both arms. He had a chunky build, weighed between 200 and 240 pounds, was five feet seven inches to

five feet nine inches tall and wore black Dickie-style long pants with a dark shirt. The second Hispanic male was in his early 20's with very short hair. He had a thinner build, weighed between 150 and 180 pounds, and was five feet 10 inches to six feet tall. He had tattoos on both arms, and wore very baggy shorts with tube socks and a dark shirt.

The note concluded with the following observation, "We have not noticed anyone since. No one has come to [the] house and no unfamiliar cars [have] parked in [the] area."

The trial court conducted a chambers meeting with counsel concerning Juror No. 1's note. The prosecutor said she had her investigating officer read the note and he told her it is common practice among residential burglars to knock on doors to see if someone is home and when someone answers to make up an excuse for their presence. Zabalza's counsel asked the court to inquire whether Juror No. 1's ability to be a fair juror would be affected by the incident.

Juror No. 1 was brought into chambers and the following colloquy took place:

"THE COURT: What do you think happened with your mother-in-law?

"[JUROR NO. 1]: Honestly, I'm not sure. I mean nothing like this happened in the past. I wasn't overly concerned when I heard her say it, because she could [have] embellished some of it as well. My wife was, obviously, concerned. She wanted me to call you on Friday and tell you what happened, and I was like, you know, no, let's just wait to Tuesday or Monday and see what it is. I mean there was no threats made or anything like that, no indications that they were in a gang or, you know, affiliated with anything like that.

"THE COURT: Did you form any opinion as to why they were there at the door?

"[JUROR NO. 1]: No. My first opinion was they came to the wrong house. There is the community I live in is Sonora Wells. There [are] several Hispanic people [who] live there. [¶] . . . [¶]

"THE COURT: Is it in Indio?

"[JUROR NO. 1]: Yes. So that was my first opinion was.

"THE COURT: Wrong house.

"[JUROR NO. 1]: That they came to the wrong house.

"THE COURT: You have no idea as to who they were?

"[JUROR NO.1]: No.

"THE COURT: Or what they were?

"[JUROR NO. 1]: No.

"THE COURT: What's your position as a juror in this case, based on this incident that the mother-in-law told you about?

"[JUROR NO. 1]: It has [had] no effect on the facts of the case or the way I view the facts of the case. It raised concern a little bit, you know, if it is related, you know, is the safety of my family at risk, but other than that, really no effect. [¶] . . . [¶]

"THE COURT: . . . Did anybody call the police over this incident?

"[JUROR NO. 1]: No.

"THE COURT: Okay. Did you have anything else?

"[JUROR NO. 1]: No. Myself, I wasn't overly concerned, but with the nature of this case, I just want to make sure the court was aware of it.

"THE COURT: Thank you. Did you share this information with any of the other jurors?

"[JUROR NO. 1]: No.

"THE COURT: Do not, okay?

"[JUROR NO. 1]: It may have created a potential of something that didn't need to be."

At that point, Juror No. 1 left the chambers. The prosecutor said Juror No. 1 should remain on the jury because he said the incident would not effect his view of the evidence. However, all defense counsel favored removing Juror No. 1 from the jury because the incident caused him to have concern for the safety of his family.

The court asked Juror No. 1 to return to chambers and inquired if his mother-in-law was able to read any of the tattoo letters on the first Hispanic male's head and neck. She had not been able to do so. The court also asked the juror if it would be all right for the police department to contact the residents of his home to investigate.

The court ruled that pending the police follow-up investigation, Juror No. 1 would remain on the jury and the issue would be revisited.

The next day, the investigating officer reported that police had not uncovered any information that the incident involved juror tampering or intimidation.

Over the objections of defense counsel, the court ruled there was not good cause to remove Juror No. 1. The court remarked:

"It appears, when he was talking [with] us, that he was not impacted by it, and my concern was his concern for his family, but when he was talking about it, he didn't seem to have a true concern for his family. My other concern is if it is a gangster or somebody working for gangsters, and now they know that this is the right house and he comes back with a verdict, who knows what might happen. That was my concern, but I don't know that that should cause me to excuse him when it appears to me — believe me, I would like to excuse him, but I need good cause, and his reactions were that he could be objective."

## B. Legal Principles

A defendant charged with a crime has the constitutional right to the unanimous verdict of 12 impartial jurors. (*People v. Harris* (2008) 43 Cal.4th 1269, 1303 (*Harris*)). "An impartial jury is one in which no member has been improperly influenced [citations] and every member is "capable and willing to decide the case solely on the evidence before it" [citations]." (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) ""Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced."" (*Harris*, at p. 1303.)

Section 1089, which governs the discharge of seated jurors in criminal matters, provides: "If at any time . . . a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged . . . ." Furthermore, "[o]nce a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty 'to make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged." (*People v. Espinoza* (1992) 3 Cal.4th 806, 821; accord, *People v. Martinez* (2010) 47 Cal.4th 911, 941-942 (*Martinez*)).

"A trial court's ruling whether to discharge a juror for good cause under section 1089 is reviewed for abuse of discretion." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1158 (*Guerra*)). Moreover, a trial court's discretion to investigate and remove a juror in the midst of trial is broad. (*People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19 (*Boyette*)).

Good cause under section 1089 may exist when a jury receives information about the case that was not part of the evidence presented at trial even if the receipt is involuntary or inadvertent. (*In re Hamilton, supra*, 20 Cal.4th at pp. 294-295.) "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472.)

Before a sitting juror may be properly removed, "[t]he juror's inability to perform the functions of a juror must appear in the record as a 'demonstrable reality' and will not be presumed." (*Guerra, supra*, 37 Cal.4th at p. 1158.) "Demonstrable reality" "is a 'heightened standard' . . . and requires a 'stronger evidentiary showing than mere substantial evidence.'" (*People v. Wilson* (2008) 44 Cal.4th 758, 840, citation omitted.) The decision whether to retain or discharge a juror "rests within the sound discretion of the trial court" and, "[i]f any substantial evidence exists to support the trial court's exercise of its discretion, the court's action will be upheld on appeal." (*People v. Maury* (2003) 30 Cal.4th 342, 434; see also *People v. Earp* (1999) 20 Cal.4th 826, 892 [decision to retain or discharge juror upheld unless it falls outside the bounds of reason].)

### C. Analysis

The unusual incident of two Hispanic males with some gang indicia (e.g., clothing, tattoos, low-rider vehicle without plates) approaching the residence of a juror in an ongoing gang case called for court inquiry because it raised the possibility of jury tampering. "A sitting juror's involuntary exposure to events outside the trial evidence, even if not 'misconduct' in the pejorative sense, may require . . . examination for probable

prejudice. Such situations may include attempts by nonjurors to tamper with the jury, as by bribery or intimidation." (*In re Hamilton, supra*, 20 Cal.4th at pp. 294-295.)

The trial court promptly responded to Juror No. 1's note by convening a chambers conference with counsel. Without ruling out possible jury tampering, the court, along with counsel, discussed other alternative explanations for the encounter between the juror's mother-in-law and the two Hispanic males, such as the two males were casing the house for a burglary or the two males had gone to the wrong house. The court expressed its concern that the two males were Penn West gang members and asked the police department to further investigate whether there was a link between the incident and the gang.

After receiving a verbal report that the police had not uncovered any evidence to show the incident involved jury tampering or intimidation, the court moved on to the issue of whether the incident affected Juror No. 1's ability to serve on the jury and whether good cause under section 1089 existed to remove Juror No.1.

Juror No. 1 told the court the incident "has [had] no effect on the facts of the case or the way I view the facts of the case. It raised concern a little bit, you know, if it is related, you know, is the safety of my family at risk, but other than that, really no effect." Juror No. 1 expressed certainty that he could be fair and impartial. When determining whether a juror can maintain his or her impartiality after an incident raising a suspicion of prejudice, a trial court may rely on a juror's unequivocal statements that his or her ability to deliberate impartially would not be affected. (*Harris, supra*, 43 Cal.4th at p. 1304.) The court found Juror No. 1 credible and concluded that there was not good cause to

excuse him. We defer to the court's evaluation of his credibility. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 646.)

Before we can find that a trial court erred "in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a 'demonstrable reality.' [We] will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence." (*People v. Holt* (1997) 15 Cal.4th 619, 659; accord, *Martinez, supra*, 47 Cal.4th at p. 943.) The record before us does not show as a demonstrable reality that Juror No. 1 was unable to perform a juror's functions as a result of implied bias. Rodriguez's and Zabalza's arguments to the contrary are speculative at best. We conclude substantial evidence supports the trial court's exercise of discretion in deciding that Juror No. 1 should not be discharged for good cause under section 1089. (*Martinez*, at p. 943.)

As to the claim that the trial court's inquiry into Juror No. 1's concern for his family's safety was inadequate, we disagree. "The trial court retains discretion about what procedures to employ, including conducting a hearing or detailed inquiry, when determining whether to discharge a juror." (*Guerra, supra*, 37 Cal.4th at p. 1159.) The decision whether to investigate the possibility of juror bias, incompetence or misconduct, and how to conduct the inquiry, rests within the sound discretion of the trial court. (*People v. Osband* (1996) 13 Cal.4th 622, 675-677 (*Osband*); accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1351.) Any questioning of the jurors should be as limited as possible so as to protect the sanctity of the jury's deliberations. (*People v. Barber* (2002)

102 Cal.App.4th 145, 150.) The trial court's inquiry here was appropriately tailored to the circumstances and did not in any way infringe on the jury's deliberative process. The answers provided by Juror No. 1 during the court's questioning revealed that Juror No. 1 was not overly concerned, he believed his mother-in-law might have embellished some of the facts surrounding the incident, and he was comfortable waiting until after the weekend to inform the court even though his wife was concerned and wanted him to contact the court earlier. Juror No. 1 repeatedly said his reason for bringing up the incident was he believed the court should be made aware of it. Juror No. 1 also told the court his first reaction to hearing about the incident was that the two males came to the wrong house. Juror No. 1 repeated that he was not overly concerned about the incident, but it "raised concern a little bit" if "the safety of my family [is] at risk." The trial court was in the best position to observe Juror No. 1's demeanor and voice. (*Harris, supra*, 43 Cal.4th at p. 1305.) The court impliedly concluded any safety concerns of Juror No. 1 would not affect his ability to perform as an impartial juror, and under the circumstances, there was substantial evidence to support this conclusion. The trial court did not abuse its discretion in the way it conducted its inquiry of Juror No. 1. (*Guerra*, at p. 1159.)

## II

### *DENIAL OF MOTION TO BIFURCATE GANG ALLEGATIONS*

Garcia contends the trial court erred by denying the bifurcation motion because the gang evidence was highly inflammatory and it allowed the prosecution to use guilt by association to fill holes in its case as to him. The contention is without merit.

Here, the prosecution alleged, as to each defendant, that the substantive crimes of murder, attempted murder and assault with a firearm were committed "for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in any criminal conduct by gang members, within the meaning of . . . section 186.22, subdivision (b)."

Before trial, Zabalza's counsel filed a motion to bifurcate the trial of the gang allegations (§ 186.22, subd. (b)) from the trial of the substantive counts. The motion was joined by all codefendants, including Garcia, whose counsel also filed written points and authorities on the issue. The trial court denied the motion, finding the gang allegations "are inextricably intertwined with the offense. And I simply don't see how they can be extricated and separated."<sup>7</sup>

The problem with the admission of gang evidence is the risk the jury "will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Williams* (1997) 16 Cal.4th 153, 193.) When gang evidence is only tangentially relevant, trial courts should disallow its admission if its highly inflammatory nature is more prejudicial than probative. (See, e.g., *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1498.) As our Supreme Court has noted: "In cases *not*

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<sup>7</sup> This ruling was made by Judge Dale R. Wells, who was then assigned the case for trial. Subsequently, however, the prosecutor who was originally assigned to the case became ill, and the case, which was then still in the jury selection phase, was continued. Later, the prosecution assigned another deputy district attorney to try the case. The case was placed on the trial calendar of Judge John J. Ryan, who reconsidered the bifurcation motion and denied it. Judge Ryan presided over the trial.

involving the gang enhancement, . . . evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*)). Nonetheless, gang evidence is often relevant and admissible to prove identity, motive, modus operandi, specific intent and the like. (*Ibid.*)

In cases involving gang allegations, such as this one, a trial court has discretion to bifurcate the trial of a gang enhancement. (*Hernandez, supra*, 33 Cal.4th at pp. 1044, 1049.) In *Hernandez*, our Supreme Court distinguished between a prior conviction allegation, which relates to the defendant's status and may have no connection to the charged offense, and a criminal street gang allegation, which "is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*Id.* at p. 1048.) The Supreme Court also observed that generally there is less need for bifurcation of a gang enhancement than of a prior conviction allegation. (*Ibid.*)

A trial court has wide discretion to deny a motion to bifurcate criminal street gang allegations. "[T]he trial court's discretion to *deny* bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged." (*Hernandez, supra*, 33 Cal.4th at p. 1050, italics added.) As the Supreme Court explained: "To 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.) Moreover, when there is a criminal street gang allegation, a unitary trial is permitted "[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of

the substantive crime itself — for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged . . . ." (*Id.* at p. 1050.)

The burden is on the defendant "to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*Hernandez, supra*, 33 Cal.4th at p. 1051.) That burden has not been met here.

We agree with the trial court that the gang evidence was inextricably intertwined with the murder, attempted murder and assault with a firearm counts. Esqueda drove his truck to the center of the Penn West gang territory — the intersection of Cardinal Avenue and Bobolink Street — where a dozen or so people were congregating. Penn West gang member Rodriguez told Ward he was going to "jack" the truck. Rodriguez approached Esqueda in the truck and "hit him up" — that is, he asked Esqueda where he was from, which is a type of gang challenge. Esqueda's innocuous reply that he was from nowhere — that is, he did not belong to a gang — and that his cousin was a Penn West gang member did not satisfy Rodriguez. Meanwhile, three or four other Penn West members — including Zabalza and Garcia, who were armed — walked up to the truck to back up Rodriguez. Rodriguez told Esqueda to give him money or get out of the truck. All three gang members repeatedly demanded that Esqueda get out of the truck. One of the three gang members opened the driver's door of the truck. The gang members told Esqueda not to start the truck. When Esqueda started the truck and tried to drive away, the gang members started firing their guns. The nexus between the crimes and the Penn West gang could hardly be stronger.

Further, without the gang expert's testimony to explain gang mentality, a lay jury might not have understood the motive for what otherwise appeared to be a senseless shooting by gang members against a person who was not a gang member. Expert testimony about gangs is relevant and admissible to show motive for retaliation against individuals who are not gang members. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 619 (*Gardeley*); see also *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 ["Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related."].) Here, the gang expert explained that when someone disobeys a gang member's order to do something, gang members consider it an act of disrespect. Further, since respect is of utmost importance to gang members, gang members often react with violence when their orders are not followed. By not obeying the gang members' demands that he get out of the car and by attempting to drive away, Esqueda showed disrespect toward the gang members. Typically, gang members do not let acts of disrespect go unanswered.

We are not persuaded by Garcia's claim that these crimes were not gang related because the incident involved only a spur of the moment robbery and/or carjacking. Garcia's argues the shooting was aimed to stop the potential robbery and/or carjacking victims from leaving and thereby foiling the robbery and/or carjacking. However, if that were the case, would not the Penn West gangsters have proceeded, after the shooting, to take whatever money or valuables from Esqueda's person and drive off with his truck? The gangsters did not do this; rather, they themselves fled the scene without any of the spoils of robbery or carjacking.

We conclude much of the same evidence to establish the substantive crimes also was relevant to prove the truth of the criminal street gang allegations. There was no need and no reasonable way to bifurcate the criminal street gang allegations. (*People v. Martin* (1994) 23 Cal.App.4th 76, 81.)

Garcia argues that evidence of his culpability was minimal and the jury convicted him largely on the basis of the inflammatory gang evidence. We disagree. Evidence of Garcia's guilt for committing these crimes might have been less than the evidence of Rodriguez's and Zabalza's guilt, but that does not mean Garcia's culpability was minimal. Ward, an eyewitness, identified Garcia as one of the Penn West gang members who provided backup to Rodriguez by surrounding Esqueda's truck. Ward also said Garcia was one of the gang members who fired his gun. Moreover, Garcia fled the scene after the shooting — an indication of consciousness of guilt — something he shared with Rodriguez and Zabalza. Despite Garcia's attempts to attack Ward's credibility and identification, most of her postincident statements were corroborated.

Garcia's relies on *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*) to argue the gang evidence was so prejudicial that he did not receive a fair trial and his due process rights were violated. The reliance is misplaced.

In *Albarran*, the defendant was charged with multiple offenses based on his participation in a shooting at the victim's home; it was alleged that the crimes were committed for the benefit of a criminal street gang. (*Albarran, supra*, 149 Cal.App.4th at pp. 217-220.) The prosecution did not have any percipient witnesses to prove the crime was gang related or motivated. The trial court permitted the prosecution to introduce

gang evidence to prove defendant's motive and intent. After the jury convicted the defendant of the substantive offenses and found the gang enhancements were true, the trial court granted a motion to dismiss the gang allegations for insufficient evidence, but it denied a new trial motion on the substantive offenses. (*Id.* at pp. 218-220.)

The Court of Appeal held that while the trial court may have found that defendant's gang activities were relevant and probative to his motive and intent, the court abused its discretion when it permitted the prosecution to introduce additional gang evidence that was completely irrelevant to defendant's motive or the substantive criminal charges. (*Albarran, supra*, 149 Cal.App.4th at p. 217.) The irrelevant evidence included other gang members' threats to kill police officers, descriptions of crimes committed by other gang members and references to the Mexican Mafia prison gang. The appellate court characterized the irrelevant gang evidence as "extremely and uniquely inflammatory, such that the prejudice arising from the jury's exposure to it could only have served to cloud their resolution of the issues." (*Id.* at p. 230, fn. omitted.) The appellate court also classified this evidence as "overkill," and said it was "troubled" by the trial court's failure to scrutinize the potential prejudice of the gang offense on the substantive charges. (*Id.* at p. 228.) Finding the irrelevant and prejudicial gang evidence was so inflammatory that it "had no legitimate purpose in this trial," the appellate court concluded admission of that evidence violated defendant's due process rights. (*Id.* at pp. 230-231.)

The case before us is not "one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial

fundamentally unfair." (*Albarran, supra*, 149 Cal.App.4th at p. 232.) Here, unlike *Albarran*, there were percipient witnesses to the crime and substantial evidence to show the crimes were gang related. The gang evidence was not tangential to the murder of Esqueda and the attempted murder of Rodarte; these crimes occurred in the center of the Penn West gang territory and were initiated by a gang challenge. Despite Garcia's efforts to discredit Ward, she put him at the scene, identified him as one of the Penn West gang members who provided backup to Rodriguez by surrounding Esqueda's truck, and said he, along with Zabalza, started shooting when Esqueda tried to leave.

The Court of Appeal in *Albarran* was particularly concerned about the trial court's failure to realize the prejudicial impact of the gang evidence in that case. In contrast, the trial court in this case was clearly aware of the possible prejudice from the gang evidence. For example, the court significantly restricted the amount of evidence allowed from highly inflammatory video clips on Zabalza's cell phone.

The entirety of the record shows the trial court was well aware of the potential prejudice arising from the admission of the gang evidence. The court carefully conducted the requisite balancing process and found the gang evidence that was admitted was more probative than prejudicial; there was no abuse of discretion in admitting the gang evidence. The evidence that was admitted in this trial was not "so extraordinarily prejudicial and of such little relevance" to be comparable to the gang evidence singled out in *Albarran, supra*, 149 Cal.App.4th at page 228. Garcia's due process rights were not violated, because there was a unitary trial for the substantive crimes and the criminal street gang allegations.

### III

#### *INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING GARCIA'S PAROLE STATUS AND PAST IMPRISONMENT*

Garcia contends he received ineffective assistance of counsel because the prosecution was allowed to present evidence of his parole status and his prior prison incarceration. Specifically, Garcia complains that trial counsel either did not object to or elicited testimony referencing Garcia's parole agent, his residence as being subject to a parole search, and 1999 prison records identifying him as part of a "disruptive group" — the prison system's shorthand to indicate he was a gang member. The contention is without merit.

The right to effective assistance of counsel derives from the Sixth Amendment right to assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 685-686 (*Strickland*); see also Cal. Const., art. I, § 15.) To establish constitutionally inadequate assistance of counsel, the defendant must prove (1) deficient performance by counsel as determined by prevailing professional standards, *and* (2) prejudice, or a reasonable probability that, but for the deficient performance, the result would have been more favorable to the defendant. (*Strickland*, at pp. 687-696.) To demonstrate prejudice, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." (*Id.* at p. 693.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694; see also *People v.*

*Weaver* (2001) 26 Cal.4th 876, 961.) Garcia bears the burden of establishing constitutionally inadequate assistance of counsel. (*Strickland*, at p. 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

As a reviewing court, we must "indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) The settled rule is that the decision to object is reserved for the discretion of counsel. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1202.) "Failure to object rarely constitutes constitutionally ineffective legal representation." (*Boyette, supra*, 29 Cal.4th at p. 424.)

Further, "[i]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. . . . Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus." (*People v. Gray* (2005) 37 Cal.4th 168, 207, citations omitted.)

The record does not indicate why counsel failed to object to the references to Garcia's parole status and his prior prison incarceration, counsel was not asked for an explanation as to why he failed to act, and we cannot say on this record that there simply could be no tactical reason not to object. One possible explanation is counsel decided that objecting would place more emphasis on Garcia's parole status and prior imprisonment.

Moreover, apart from whether appellant's trial counsel's performance was deficient, there is the issue of prejudice. To demonstrate prejudice, the accused must show that, but for counsel's deficient representation, it was reasonably probable that the outcome of the proceeding would have been more favorable to the accused. (*Strickland, supra*, 466 U.S. at p. 693.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

It is not reasonably probable that Garcia would have obtained a more favorable outcome had the jury not heard about his parole status, his prior imprisonment and his identification as a gang member while in prison. Garcia was identified by Ward as one of the shooters and during a ride-along after the shooting, she pointed out Garcia's residence as the residence of one of the shooters. Despite Garcia's attempts to attack Ward's credibility, her testimony was largely corroborated. Given the record in this gang murder trial, any negative impact of evidence concerning Garcia's parole status evidence and prior imprisonment was de minimis. We conclude any failing by trial counsel to prevent the parole status and prior imprisonment evidence from being presented to the jury was harmless under any standard of review.

#### IV

#### *GANG EXPERT'S USE OF HEARSAY*

Garcia contends his right to confrontation under the Sixth Amendment as articulated by *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) was violated by the admission of hearsay evidence as a basis for the gang expert's testimony. The contention is without merit.

An expert may generally base his or her opinion on any matter known to the expert, including hearsay not otherwise admissible, which may "reasonably . . . be relied upon" for that purpose. (Evid. Code, § 801, subd. (b); *People v. Montiel* (1993) 5 Cal.4th 877, 918-919 (*Montiel*); *Gardeley, supra*, 14 Cal.4th at pp. 617-618; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426 (*Ramirez*)). As *Gardeley* explained, expert testimony may be "premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." (*Id.* at p. 618.) So long as the material is reliable, "even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony." (*Ibid.*, italics omitted.)

Further, Evidence Code section 802 provides: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter . . . upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." (See also *Montiel, supra*, 5 Cal.4th at pp. 918-919.) "[T]he result is that often the expert may testify to evidence even though it is inadmissible under the hearsay rule." (*Gardeley, supra*, 14 Cal.4th at p. 619.) However, "[t]his basis evidence is inadmissible . . . for its truth." (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1128 (*Hill*); *People v. Cooper* (2007) 148 Cal.App.4th 731, 747 (*Cooper*) [such evidence is not admitted for the truth of the matter asserted but only to assess the weight of the expert's opinion].) An expert's recitation of sources relied upon for his or her opinion "does not transform inadmissible matter into 'independent proof' of any fact." (*Gardeley*, p. 619.)

In *Crawford, supra*, 541 U.S. 36, the United States Supreme Court's landmark decision on the Sixth Amendment right to confrontation and hearsay, the high court held the Sixth Amendment prohibits admission of out-of-court testimonial statements against a criminal defendant unless the declarant is unavailable as a witness and the defendant had a prior opportunity to cross-examine him or her. (*Id.* at pp. 54, 58.)<sup>8</sup> Garcia urges that under *Crawford*, hearsay evidence used as a basis for an expert's opinion should be inadmissible because any distinction between hearsay evidence admitted for its truth and hearsay evidence admitted to shed light on an expert's opinion "is not meaningful." (*Hill, supra*, 191 Cal.App.4th at p. 1130, quoting *People v. Goldstein* (2005) 6 N.Y.3d 119, 128 [843 N.E.2d 727, 733] (*Goldstein*)). We disagree and note the *Crawford* court specifically acknowledged that the confrontation clause of the Sixth Amendment "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Crawford*, at p. 59, fn. 9.)

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<sup>8</sup> The court in *Crawford* did not set forth "a comprehensive definition" of testimonial evidence, but held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford, supra*, 541 U.S. at p. 68 & fn. 10.) However, the Supreme Court subsequently clarified the meaning of testimonial by distinguishing statements made to police where there is no ongoing emergency and "the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution" and statements made under emergency situations; the former are testimonial and the latter are not. (*Davis v. Washington* (2006) 547 U.S. 813, 822.) In *People v. Cage* (2007) 40 Cal.4th 965, the California Supreme Court weighed in on the definition of testimonial by noting that although a testimonial statement need not be made under oath, it must have some "formality and solemnity characteristic of testimony" and "must have been given and taken primarily . . . to establish or prove some past fact for possible use in a criminal trial." (*Id.* at p. 984, italics omitted.)

As has every California appellate court but one, we reject the notion that *Crawford* has made hearsay evidence relied upon by an expert inadmissible if such hearsay evidence is not offered for its truth. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210 (*Thomas*); *Cooper, supra*, 148 Cal.App.4th at p. 747; *Ramirez, supra*, 153 Cal.App.4th at p. 1427; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154; see also *People v. Fulcher* (2006) 136 Cal.App.4th 41, 57; *People v. Archuleta* (2011) 202 Cal.App.4th 493, 508-510.)<sup>9</sup>

In *Thomas, supra*, 130 Cal.App.4th 1202, the defendant was convicted of receiving stolen property and being an active participant in a criminal street gang in violation of section 186.22, subdivision (a). (*Thomas*, at p. 1207.) A gang expert opined the defendant was a gang member and that the underlying crime was committed for the purpose of aiding the gang on the basis of, among other things, what other gang members told him. (*Id.* at pp. 1205-1206.) On appeal, the defendant argued the introduction of hearsay statements made by other gang members to the expert violated his Sixth Amendment rights and *Crawford*. (*Thomas*, at p. 1208.) The Court of Appeal rejected that contention stating: "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the

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<sup>9</sup> The sole appellate court decision that has disagreed with the reasoning in these cases is *Hill, supra*, 191 Cal.App.4th 1104, which nonetheless affirmed the lower court because to do otherwise would violate principles of stare decisis. (*Id.* at pp. 1127, 1131.)

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. *Crawford* itself states that the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" (*Id.* at p. 1210, quoting *Crawford, supra*, 541 U.S. at p. 59, fn. 9.)

In *Hill, supra*, 191 Cal.App.4th at pages 1129-1131, the Court of Appeal analyzed the distinction made in *Thomas, supra*, 130 Cal.App.4th at pages 1209-1210, between out-of-court statements offered for their truth and out-of-court statements relied upon by an expert as the basis for his or her opinion. The *Hill* court noted "where basis evidence constitutes an out-of-court statement, the jury will often be required to determine or assume the truth of the statement in order to utilize it to evaluate the expert's opinion." (*Id.* at p. 1131.) "The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context." (*Id.* at p. 1130, quoting *Goldstein, supra*, 843 N.E.2d 727, 732-733.) The *Hill* court concluded, nonetheless, that the distinction between basis evidence and substantive evidence under California law was dictated by *Gardeley, supra*, 14 Cal.4th 605, and other California Supreme Court precedents. (*Hill*, at p. 1127, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The Court of Appeal therefore rejected the defendant's claim that the gang expert should not have been permitted to describe the out-of-court statements supporting his opinion during his testimony the jury. (*Hill*, at pp. 1127-1128.) We also follow *Gardeley* and apply its distinction between basis evidence and hearsay evidence offered for its truth.

In sum, *Crawford* did not change the fundamental rule that experts can relate to the jury the basis for their opinions. After all, if an out-of-court statement is admitted for a purpose other than the truth of the matter asserted, the credibility of the hearsay declarant is not at issue and therefore cross-examination of the declarant is less important. (*Cooper, supra*, 148 Cal.App.4th at p. 747.) "The hearsay relied upon by an expert in forming his or her opinion is 'examined to assess the weight of the expert's opinion,' not the validity of [its] contents." (*Ibid.*, quoting *Thomas, supra*, 130 Cal.App.4th at p. 1210.)

Garcia alternatively argues the trial court committed instructional error by not sua sponte giving CALCRIM No. 360, which reads as follows:

"[Witness Name] testified that in reaching (his/her) conclusions as an expert witness, (he/she) considered [a] statement[s] made by [the defendant]. I am referring only to the statement[s] [insert or describe statements admitted for this limited purpose]. You may consider [that/those] statement[s] only to evaluate the expert's opinion. Do not consider (that/those) statements as proof that the information contained in the statement[s] is true."

However, there is no sua sponte duty to give instructions limiting the purpose for which a jury can consider evidence. (Evid. Code, § 355.) "When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly." (*Ibid.*, italics added; see also *Hernandez, supra*, 33 Cal.4th at p. 1051; *People v. Cowan* (2010) 50 Cal.4th 401, 479; *People v. Murtishaw* (2011) 51 Cal.4th 574, 590.)

Garcia's claim that his trial counsel was ineffective for not requesting CALCRIM No. 360 is also unavailing. Prejudice is one of two prerequisites to establish ineffective

assistance of counsel. (*Strickland, supra*, 466 U.S. at pp. 687-696.) Because an ineffective assistance of counsel claim fails on an insufficient showing of either element, we need not consider whether counsel's performance was deficient before determining whether the defendant suffered prejudice as a result of the alleged deficiencies of counsel. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

Garcia claims his rights under *Crawford* to confront witnesses against him were violated five times during the testimony of gang expert Hamilton by the use of out-of-court statements as the basis of Hamilton's opinion.

In the first instance, Hamilton, testifying about the significance of tattoos in gang culture, related that he watched a video in which a Los Angeles gang member with a large gang tattoo on the back of his head said: "Well, I was so tired of people over the years . . . asking me what gang I was associating with, I decided to put it there so no one would have to ask me again." Garcia had a tattoo, "Indio," on the back of his head. In the second instance, Hamilton opined that Richard De La Fuente, who was convicted in one of the predicate acts, was a Penn West gang member based on the victim of the crime saying De La Fuente was a Penn West gang member. In the third instance, Hamilton opined that a crime committed by Noel Acevedo was a predicate crime based on Acevedo's plea that he committed the crime for the benefit of a criminal street gang. In the fourth instance, Hamilton opined that Garcia was an active member of the Penn West gang based on an investigative report of an assault with a deadly weapon. The detective who wrote the report recognized Garcia from previous contacts as a member of the Penn

West gang. In the fifth instance, Hamilton testified that prison records indicated that in 1999 Garcia was part of a "disruptive group" known as Penn West.

Whether these five instances are considered individually or collectively, Garcia cannot show he suffered prejudice by the absence of CALCRIM No. 360.

Moreover, the trial court, at various points during Hamilton's testimony when defense counsel raised hearsay objections, at least implicitly informed the jury that out-of-court statements used by the expert were not admissible for the truth of the matter asserted. When Hamilton described "same gang writing" in Rodriguez's yearbook, the court told the jury: "The witness has given a lot of opinions, and his opinions are based on information he had reviewed. That's the purpose for this information. It is a limited purpose." When Hamilton testified that Rodriguez's relatives told him that a cell phone belonged to Rodriguez, the court granted his counsel's hearsay objection and ordered the testimony stricken. When Zabalza's counsel lodged a hearsay objection to Hamilton's testimony that his client had self-admitted his gang membership, the court said: "It is not offered for the truth of the matter asserted; am I correct?" The trial court also sustained other hearsay objections to Hamilton's testimony.

As our Supreme Court noted in *Montiel, supra*, 5 Cal.4th at pages 918-919: "[P]rejudice may arise if, "under the guise of reasons," the expert's detailed explanation "[brings] before the jury incompetent hearsay evidence." [Citations.] ¶ Because an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding

substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment."<sup>10</sup>

V

*INSTRUCTIONS ON FIRST DEGREE ATTEMPTED MURDER COURT*

Rodriguez, joined by Garcia, contends the jury's findings of deliberation and premeditation on his attempted murder conviction should be reversed because the jury instructions did not specifically connect deliberation and premeditation to the natural and probable consequences theory of aiding and abetting liability.

We begin by noting the general principles of aiding and abetting liability. "Aider-abettor liability exists when a person who does not directly commit a crime assists the direct perpetrator by aid or encouragement, with knowledge of the perpetrator's criminal intent and with the intent to help him carry out the offense." (*People v. Miranda* (2011) 192 Cal.App.4th 398, 407 (*Miranda*)). In considering whether one is an aider and

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<sup>10</sup> We also reject Garcia's argument that the court erred in instructing the jury pursuant to CALCRIM No. 332 because of the underlined language in the instruction: "Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education; the reasons the expert gave for any opinion; and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." (Underline added.) The instruction is a correct statement of the law. (*People v. Felix* (2008) 160 Cal.App.4th 849, 859.) Further, as explained in *People v. Ramirez, supra*, 153 Cal.App.4th at page 1427, "any expert's opinion is only as good as the truthfulness of the information on which it is based."

abettor, relevant factors include presence at the scene of the crime, companionship and conduct before and after the offense. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

Aider and abettor liability can also be found under the natural and probable consequences doctrine, which provides "an aider and abettor is guilty of not only the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the actual perpetrator. The defendant's knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. [Citation.] The elements of aider and abettor liability under this theory are: the defendant acted with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) the defendant by act or advice aided, promoted, encouraged or instigated the commission of the target crime; (4) the defendant's confederate committed an offense other than the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Miranda, supra*, 192 Cal.App.4th at pp. 407-408.)

The jury was instructed on general aiding and abetting theory and on the natural and probable consequences doctrine with the following standard jury instructions: CALCRIM Nos. 400, 401 and 403. CALCRIM No. 400 presents the general principles of aiding and abetting liability. CALCRIM No. 401 sets forth the elements of direct

aiding and abetting when the defendant knows the perpetrator's intent to commit a crime, intends to aid and abet the perpetrator and does so. CALCRIM No. 403 is given when the prosecution is asserting aiding and abetting liability under the natural and probable consequences doctrine and only the nontarget offense is charged.<sup>11</sup>

With respect to his conviction of first degree attempted murder, Rodriguez claims the jury instruction on the natural and probable consequences theory (CALCRIM No. 403) was deficient because it referred to attempted murder, not "deliberate and premeditated" attempted murder.<sup>12</sup> In other words, CALCRIM No. 403 referred to

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<sup>11</sup> CALCRIM No. 403, as given by the trial court, read: "Before you decide whether a defendant is guilty of murder, attempt[ed] murder, and assault with a firearm under the natural and probable consequences theory, you must decide whether he is guilty of attempt[ed] robbery. ¶ To prove that a defendant is guilty of murder, attempt[ed] murder, and assault with a firearm under the natural and probable consequences theory, the People must prove that ¶ 1. The defendant is guilty of attempt[ed] robbery; ¶ 2. During the commission of attempt[ed] robbery a coparticipant in that attempt[ed] robbery committed the crime of murder, attempt[ed] murder, and assault with a firearm; and ¶ 3. Under all the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder, attempt[ed] murder, and assault with a firearm was a natural and probable consequence of the commission of the attempt[ed] robbery. ¶ A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander. ¶ 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 of the circumstances established by the evidence. If the murder, attempt[ed] murder, and assault with a firearm was committed for a reason independent of the common plan to commit the attempt[ed] robbery, then the commission of murder, attempt[ed] murder, and assault with a firearm was not a natural and probable consequence of attempt[ed] robbery. ¶ To decide whether the crime of murder, attempt[ed] murder, and assault with a firearm was committed, please refer to the separate instructions that I will give you on that crime."

<sup>12</sup> CALCRIM No. 403 also does not specifically reference "deliberate and premeditated" murder, but Rodriguez does not raise a similar assignment of error with

attempted murder without noting that in order to convict Rodriguez of first degree attempted murder under the natural and probable consequences doctrine, the jury would have to find that deliberate and premeditated attempted murder was a natural and probable consequence of attempted robbery. Rodriguez argues because of the instructional error, the jury findings of premeditation and deliberation with respect to his attempted murder conviction cannot stand and the conviction should be reduced to the lesser included offense of attempted murder.

There is a split of authority on the issue in the Courts of Appeal, and the question is currently before the California Supreme Court. (See *People v. Favor*, review granted Mar. 16, 2011, S189317; *People v. Hart* (2009) 176 Cal.App.4th 662 [reference to degree required]; *People v. Cummins* (2005) 127 Cal.App.4th 667 [reference not required].)

Assuming, without deciding, that the instruction properly should have related deliberate and premeditated attempted murder to the natural and probable consequences theory, we find such an error would be harmless. It is not reasonably likely that had CALCRIM No. 403 specifically referenced deliberate and premeditated attempted murder — rather than attempted murder generally — a more favorable result for Rodriguez would have ensued. (*People v. Prince* (2007) 40 Cal.4th 1179, 1267; *People v. Breverman* (1998) 19 Cal.4th 142, 165 [failure to instruct on lesser included offense in

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respect to his first degree murder conviction, because the jury sustained the felony-murder special circumstance and the felony-murder rule does not apply to attempted murder.

a noncapital case is subject to the *People v. Watson* (1956) 46 Cal.2d 818, 836, standard of harmless error].)

Rodriguez started the sequence of events leading to the shooting at close range of Esqueda in his truck while Rodarte sat next to him. Rodriguez, who was hanging out with his fellow gang members in the center of Penn West territory, decided he wanted to carjack Esqueda's truck and/or rob him. Rodriguez approached the truck first, and other Penn West gang members, including Zabalza and Garcia, followed. There was at least a tacit agreement that his fellow gang members would back up Rodriguez. Rodriguez took the lead in trying to persuade by intimidation and then demanding that Esqueda get out of his truck, but the other Penn West gang members surrounding the truck, including Zabalza and Garcia, also participated in the attempted robbery. Rodriguez, who was armed, knew, at least inferentially, that Zabalza and Garcia were armed as well.<sup>13</sup> They had spent the evening together, first at the casino and later at the intersection of Cardinal Avenue and Bobolink Street, where a large number of people were congregating.

As Esqueda continued to resist the gang members' orders to get out of his truck, a reasonable person in Rodriguez's place would have or should have foreseen the confrontation would escalate into some type of physical violence. Having had their

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<sup>13</sup> Although Rodriguez told police he did not know Zabalza and Garcia were armed, it was up to the jury to decide whether this statement was true. In any event, a murder — or attempted murder — conviction based on aiding and abetting liability is not dependent on "prior knowledge that a fellow gang member is armed." (*People v. Medina* (2009) 46 Cal.4th 913, 921 (*Medina*)). "Given the great potential for escalating violence during gang confrontations, it is immaterial whether [defendant] specifically knew [a fellow gang member] had a gun." (*People v. Montes* (1999) 74 Cal.App.4th 1050, 1056.)

orders ignored in the center of their territory, the gang members would have to save face and regain any lost respect by making some violent showing. Since the gang members surrounding Esqueda's truck were armed with guns, shooting was a reasonably foreseeable consequence of the stalemate. When Esqueda tried to drive away, Zabalza and Garcia started shooting. The number of shots fired into Esqueda's truck was indicative of premeditation and deliberation — that is, "the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life." (*People v. Anderson* (1968) 70 Cal.2d 15, 27, italics omitted.) Although Rodriguez did not fire his gun, he was intimately involved in the shooting of Esqueda; he was a full and active participant in all the steps that led to the murder of Esqueda and the attempted murder of Rodarte.

Under these circumstances, the evidence supports a finding by the jury that a reasonable person in Rodriguez's position would have or should have foreseen that a deliberate and premeditated attempted murder could result from the attempted robbery that he initiated and his fellow gang members joined. Although murder or attempted murder may not always be a natural and probable consequence of an armed attempted robbery, under certain factual circumstances, particularly in the gang context, a jury is entitled to find that it was. (*Medina, supra*, 46 Cal.4th at pp. 927-928.) Such was the case here. Regardless of whether the "deliberate and premeditated" attempted murder was referenced in the CALCRIM No. 403 instruction, we conclude the jury was likely to find the attempted murder by Rodriguez was deliberate and premeditated — that is, first

degree attempted murder — under the natural and probable consequence of aiding and abetting liability.

## VI

### *SUFFICIENCY OF EVIDENCE FOR GANG SPECIAL CIRCUMSTANCE*

Rodriguez contends the gang special circumstance finding attached to his first degree murder conviction should be reversed because there was insufficient evidence he acted with the requisite intent to kill. The contention is without merit.

The gang special circumstance is set forth in section 190.2, subdivision (a)(22), which provides: "The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: [¶] . . . [¶] (22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang."

The prosecution proceeded at trial under the theory that Rodriguez was not the actual killer on the basis of evidence that when Esqueda turned on the truck to drive away, Rodriguez drew his gun but did not fire it. Either Zabalza or Garcia, who fired their guns, was the actual killer.

A special circumstance may apply to an aider and abettor who is not the actual killer if the aider and abettor had the intent to kill or acted with reckless indifference to

human life while acting as a major participant in an enumerated felony. (§ 190.2, subds. (c), (d).)<sup>14</sup>

We review the sufficiency of the evidence to support special circumstances under the same standard we apply to a conviction. (*Osband, supra*, 13 Cal.4th at p. 690.) We review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence, that is, evidence that is reasonable, credible and of solid value, from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We ask whether, after viewing the evidence in the light most favorable to the judgment, any rational trier of fact could have found the allegations to be true beyond a reasonable doubt. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Unless it is clearly demonstrated that "upon no

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<sup>14</sup> Section 190.2 provides in part:

"(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.

"(d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4."

hypothesis whatever is there sufficient substantial evidence to support [the verdict of the jury,]" we will not reverse. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

The jury reasonably could have found beyond a reasonable doubt that even though Rodriguez did not fire his gun, he acted with the intent to kill (§ 190.2, subd. (c)) or acted with a reckless indifference to human life and as a major participant (§ 190.2, subd. (d)).

Rodriguez initiated the series of events that led to Esqueda's murder when he decided to rob Esqueda and/or carjack his truck. Rodriguez, who was armed, knew that he would have backup support from his fellow Penn West gang members in this endeavor. Rodriguez issued a gang challenge to Esqueda by asking "Where are you from?" The intimidation continued as Rodriguez, as well as Zabalza and Garcia, repeatedly demanded that Esqueda turn over money and get out of his truck. The incident escalated when one of the three gang members opened the driver's door to Esqueda's truck and insisted that he and Rodarte get out of the truck. Further escalation occurred when Esqueda disobeyed the order. Gangs often react with violence when they are shown disrespect, according to Hamilton, the gang expert, and here Esqueda — in the middle of the Penn West gang's turf in front of a group of people — was repeatedly defying three Penn West gang members. Esqueda also was ordered not to turn on the truck. When Esqueda disobeyed this order by starting the engine, Rodriguez immediately drew his gun; he was the first to do so. Rodriguez did not shoot because a woman (Rodarte) was in the cab of the truck. The repeated demands by Rodriguez and the others that Esqueda get out of the truck tended to corroborate evidence that Rodriguez did not shoot because Rodarte was in the truck cab. In any event, Rodarte's presence did not stop

Zabalza and Garcia from shooting. Although Rodriguez told police he did not know that Zabalza and Garcia were armed and did not know that anyone would be shot, it was up to the jury to decide whether these self-serving statements were true.

Under these circumstances, particularly, Esqueda's repeated instances of disrespect to the gang and the presence of Rodarte in the killing zone of the truck's cab, a reasonable jury could have concluded that although Rodriguez did not pull the trigger, he knew his fellow gang members would shoot, and he intended that result. (§ 190.2, subd. (c).) Moreover, the evidence is overwhelming that Rodriguez acted with reckless indifference to human life while acting as a major participant in the attempted robbery and/or attempted carjacking. (§ 190.2, subd. (d).) Substantial evidence supported the gang special circumstance finding.

To the extent Garcia joins in this argument, he cannot prevail. His firing of a gun at close range showed his intent to kill.

## VII

### *ERRONEOUS INSTRUCTION ON DEFINITION OF CRIMINAL STREET GANG*

Rodriguez, joined by Zabalza and Garcia, contends the trial court committed prejudicial instructional error with its definition of a criminal street gang. Further, Rodriguez contends, the jury's findings on the gang allegations (§ 186.22, subd. (b)), the gang special circumstance (§ 190.2, subd. (a)(22)) and the murder and attempted murder firearm allegations (§ 12022.53, subd. (e)) — all of which are related to the statutory meaning of a criminal street gang — should be reversed because to prevail on each of

these allegations, the prosecution had to establish that Penn West was a criminal street gang as statutorily defined.

Rodriguez is correct that there was instructional error, but the error was harmless.

Section 186.22, subdivision (f) defines "criminal street gang" 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."<sup>15</sup> In addition to the gang allegation, this definition of criminal street gang applied to the gang special circumstance. (§ 190.2, subd. (a)(22).) As for the murder and attempted murder firearm allegations, they required a finding that the defendant committed the crime for the benefit of a criminal street gang. (§ 12022.53, subd. (e).)

In instructing the jury, the trial court defined "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] 1. That has a common name or common identifying sign or symbol; [¶] 2. That has, as one or more of its primary activities, the commission of auto theft (Vehicle Code Section 10851), assault with a firearm (Penal Code Section 245(a)(2)),

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<sup>15</sup> Section 186.22, subdivision (e) reads in relevant part: "As used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, . . . two or more of the following offenses . . . ."

carjacking (Penal Code Section 215(a)), *or participating in a criminal street gang (Penal Code Section 186.22(a))*; and [¶] 3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity. [¶] In order to qualify as a *primary* activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group. [¶] A pattern of criminal gang activity, as used here, means: [¶] 1. The commission of or conviction of: [¶] any combination of two or more of the following crimes: auto theft (Vehicle Code Section 10851), assault with a firearm (Penal Code Section 245(a)(2)), carjacking (Penal Code Section 215(a)), *or participating in a criminal street gang (Penal Code Section 186.22(a))*; [¶] 2. At least one of those crimes was committed after September 26, 1988; and [¶] The most recent crime occurred within three years of one of the earlier crimes; and [¶] 4. The crimes were committed on separate occasions, or by two or more persons." (First and last italics added.)<sup>16</sup>

The italicized parts of the instruction are incorrect. The separate crime of active participation in a criminal street gang (§ 186.22, subd. (a)) is not one of the enumerated crimes in section 186.22, subdivision (e), and, therefore, its inclusion as a part of the crimes that could constitute a primary activity in the jury instruction defining primary activities of a criminal street gang was error. (See § 186.22, subd. (f); *People v.*

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<sup>16</sup> This definition was given as part of CALCRIM No. 736, the instruction on the gang special circumstance and was incorporated by reference in CALCRIM No. 1401, the instruction on the gang allegation.

*Sengpadychith* (2001) 26 Cal.4th 316, 324 (*Sengpadychith*).<sup>17</sup> The crime of active participation in a criminal street gang also was erroneously included as a qualifying crime to establish a pattern of criminal activity in the instruction. (§ 186.22, subd. (e).)

The Attorney General concedes the instruction was faulty, which leaves us with the issue of prejudice.

In *Sengpadychith, supra*, 26 Cal.4th at page 326, the California Supreme Court held error in instructing on an element of a sentencing enhancement allegation should be evaluated under the *Chapman v. California* (1967) 386 U.S. 18 standard if the enhancement increases the penalty for the underlying crime beyond the prescribed statutory maximum. Such error is reversible unless it can be shown beyond a reasonable doubt that it did not contribute to the verdict. (*Id.* at p. 24.) The trial court stayed the gang allegations, but imposed the section 12022.53 enhancement on the first degree murder and first degree attempted murder counts. Thus, we review the instructional error under the *Chapman* standard.

To satisfy the definition of a criminal street gang, it must be established that *one* of the gang's primary activities is a crime enumerated in section 186.22, subdivision (e). (§ 186.22, subd. (f).) A police officer's gang expert testimony can be sufficient evidence establishing section 186.22's required elements. (*Gardeley, supra*, 14 Cal.4th at pp. 617-620.) The primary activities of a gang may be proved by expert testimony.

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<sup>17</sup> None of the defendants in this case was charged with the crime of active participation in a criminal street gang.

(*Sengpadychith, supra*, 26 Cal.4th at p. 324.) Past offenses, as well as the circumstances of the charged crime, have some tendency in reason to prove the group's primary activities, and thus both may be considered by the jury on the issue of the group's primary activities. (*Id.* at pp. 320, 323.) As to the primary activities of the Penn West gang, Hamilton, the prosecution's gang expert, testified they included vandalism, auto theft, burglary, drug sales and assault with a deadly weapon. Furthermore, the jury could consider the circumstances of the current charged offenses of murder, attempted murder and assault with a firearm, which were the result of an attempted robbery and/or carjacking. The prosecution presented overwhelming evidence that the Penn West gang members attempted to rob Esqueda and/or carjack his truck when they approached the vehicle. Thus, there was undisputed and overwhelming evidence that (1) one of the Penn West gang's primary activities was stealing vehicles or carjacking and (2) another primary activity was assault with a firearm. These crimes, which were set forth in the instruction, are listed in section 186.22, subdivision (e) as required by section 186.22, subdivision (f). Therefore, the jury had ample reason to find that either of these crimes satisfied the primary activity requirement to find a criminal street gang. We conclude the instructional error of including the crime of active participation as a possible primary activity of the Penn West gang was harmless beyond a reasonable doubt. "[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." (*Neder v. United States* (1999) 527 U.S. 1, 17 (*Neder*).

Similarly, the erroneous inclusion of the crime of active participation in a criminal street gang as one of at least two requisite crimes to establish a pattern of criminal activity for the Penn West gang was harmless beyond a reasonable doubt. To satisfy the definition of a "criminal street gang," it must "include[] members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period." (*Gardeley, supra*, 14 Cal.4th at p. 617, italics omitted; § 186.22, subs. (e), (f).)<sup>18</sup> Hamilton, the gang expert, testified that Penn West gang members committed the following offenses on the following dates: assault with a firearm (Oct. 9, 2003); carjacking (Jan. 31, 2004); and vehicle theft (May 8, 2004). Along with Hamilton's testimony, the prosecutor presented documentary proof of these predicate offenses. Given the undisputed and overwhelming evidence of these offenses, all of which are enumerated in and meet the time requirements of section 186.22, subdivision (e), we are convinced beyond a reasonable doubt that the instructional error of including the crime of active participation in a criminal street gang with establishing at the necessary pattern of criminal activity was harmless beyond a reasonable doubt. (*Neder, supra*, 527 U.S. at p. 17.)

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<sup>18</sup> The definition of "'pattern of criminal gang activity'" provides that "at least one" of the two or more enumerated offenses must have "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." (§ 186.22, subd. (e).)

## VIII

### *SENTENCING ON ASSAULT WITH A FIREARM COUNT AND ABSTRACT OF JUDGMENT*

The trial court sentenced Rodriguez, Zabalza and Garcia to a stayed sentence of 17 years on the assault with a firearm count (count 3). The sentence consisted of the midterm of three years, plus a four-year enhancement for the personal use of a firearm (§ 12022.5, subd. (a)) and a 10-year enhancement for committing the offense to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)).

Rodriguez, joined by Zabalza and Garcia, contends the case should be remanded for resentencing on the assault with a firearm count because the trial court erroneously imposed a 10-year enhancement under section 186.22, subdivision (b)(1)(C). The contention is without merit.

However, the trial court erred by imposing enhancements under both section 12022.5, subdivision (a) and section 186.22, subdivision (b)(1)(C).

In *People v. Rodriguez* (2009) 47 Cal.4th 501, 509 (*Rodriguez*), our Supreme Court held that a section 186.22, subdivision (b)(1)(C) gang enhancement constitutes a firearm enhancement. Section 1170.1, subdivision (f) provides in pertinent part: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." Thus, the trial court was only authorized to impose the greater (§ 186.22, subd. (b)(1)(C)) enhancement.

In *Rodriguez*, the trial court imposed three sentences stemming from three separate assaults and imposed two firearm enhancements on each sentence. (*Rodriguez, supra*, 47 Cal.4th at p. 504.) Under those circumstances, remand was appropriate to allow the trial court to restructure its sentencing choices. (*Id.* at p. 509.) Remand is unnecessary here. There is no action to be taken by the trial court, other than the clear mandate of section 1170.1, subdivision (f) that the greater enhancement be imposed. Accordingly, we order the personal use of a firearm (§ 12022.5, subd. (a)) enhancement stricken and order the trial court to amend the abstract of judgment accordingly to show a 13-year stayed sentence for count 3.

Rodriguez, joined by Zabalza and Garcia, also contends the following amendments should be made to the abstracts of judgment and the minute orders for April 29, 2010:

Count 1: The minute order should be amended to show the court imposed one 25-year-to-life enhancement under section 12022.53, subdivisions (d) and (e). The abstract of judgment should be amended to show that the gun-use enhancement was imposed under section 12022.53, subdivisions (d) and (e), and the gang enhancement was imposed under section 186.22, subdivision (b).

Count 2: The minute order should be amended to delete a stayed 25-year-to-life enhancement. The abstract of judgment should be amended to show the gun use enhancement was imposed under section 12022.53, subdivisions (b) and (e).

Victim Restitution Award: The abstract of judgment should be amended to show that (1) victim restitution of \$41,851.56 is to be paid to the Victim Compensation Claims Board and (2) liability for victim restitution is joint and several.

The Attorney General acknowledges these proposed amendments are appropriate. Our review of the record also shows the proposed amendments accurately reflect the trial court's sentencing orders. Therefore, we order the trial court to make these amendments to the court minutes and abstracts of judgment and forward a copy of the amended abstracts of judgment to the Department of Corrections and Rehabilitation.

#### DISPOSITION

The clerk of the superior court is ordered to amend Zabalza's abstract of judgment as follows: (1) to reflect the gun use enhancement on count 1 was imposed under section 12022.53, subdivisions (d) and (e); (2) to reflect the gang enhancement on count 1 was imposed under section 186.22, subdivision (b); (3) to reflect the gun use enhancement on count 2 was imposed under section 12022.53, subdivisions (b) and (e); (4) to strike the section 12022.5, subdivision (a) enhancement on count 3 and show a 13-year stayed sentence on count 3; (5) to show victim restitution of \$41,851.56 is to be paid to the Victim Compensation Claims Board; and (6) to indicate Zabalza's liability for restitution payments to the board is joint and several. The clerk is further ordered to send a copy of Zabalza's abstract of judgment to the Department of Corrections and Rehabilitation. The clerk also is ordered to amend the minute order for April 29, 2010, to (1) show the court imposed one 25-year-to-life enhancement under section 12022.53, subdivisions (d) and (e) on count 1; and (2) delete a stayed 25-year-to-life enhancement on count 2.

In all other respects, the judgment against Zabalza is affirmed.

The clerk of the superior court is ordered to amend Garcia's abstract of judgment as follows: (1) to reflect the gun use enhancement on count 1 was imposed under section 12022.53, subdivisions (d) and (e); (2) to reflect the gang enhancement on count 1 was imposed under section 186.22, subdivision (b); (3) to reflect the gun use enhancement on count 2 was imposed under section 12022.53, subdivisions (b) and (e); (4) to strike the section 12022.5, subdivision (a) enhancement on count 3 and show a 13-year stayed sentence on count 3; (5) to show victim restitution of \$41,851.56 is to be paid to the Victim Compensation Claims Board; and (6) to indicate Garcia's liability for restitution payments to the board is joint and several. The clerk is further ordered to send a copy of Garcia's abstract of judgment to the Department of Corrections and Rehabilitation. The clerk also is ordered to amend the minute order for April 29, 2010, to (1) show the court imposed one 25-year-to-life enhancement under section 12022.53, subdivisions (d) and (e) on count 1; and (2) delete a stayed 25-year-to-life enhancement on count 2.

In all other respects, the judgment against Garcia is affirmed.

The clerk of the superior court is ordered to amend Rodriguez's abstract of judgment as follows: (1) to reflect the gun use enhancement on count 1 was imposed under section 12022.53, subdivisions (d) and (e); (2) to reflect the gang enhancement on count 1 was imposed under section 186.22, subdivision (b); (3) to reflect the gun use enhancement on count 2 was imposed under section 12022.53, subdivisions (b) and (e); (4) to strike the section 12022.5, subdivision (a) enhancement on count 3 and show a 13-year stayed sentence on count 3; (5) to show victim restitution of \$41,851.56 is to be

paid to the Victim Compensation Claims Board; and (6) to indicate Rodriguez's liability for restitution payments to the board is joint and several. The clerk is further ordered to send a copy of Rodriguez's amended abstract of judgment to the Department of Corrections and Rehabilitation. The clerk also is ordered to amend the minute order for April 29, 2010, to (1) show the court imposed one 25-year-to-life enhancement under section 12022.53, subdivisions (d) and (e) on count 1; and (2) delete a stayed 25-year-to-life enhancement on count 2.

In all other respects, the judgment against Rodriguez is affirmed.

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HUFFMAN, Acting P. J.

WE CONCUR:

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HALLER, J.

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IRION, J.