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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. GERALD ALBERT TAJA et al., Defendant and Appellant.	D058911 (Super. Ct. No. RIF146203)

APPEAL from a judgment of the Superior Court of Riverside County, Patrick F. Magers, Judge. Affirmed as modified.

After the jury in the first trial deadlocked and a mistrial was declared, a jury in the second trial convicted defendants Gerald Taja (Gerald) and Samuel Taja (Samuel) of one count each of attempted murder (Pen. Code, § 664/187, subd. (a),[1] count 1), one count each of assault with a firearm (§ 245, subd. (a), count 2), and one count each of active participation in a criminal street gang (§ 186.22, subd. (a), counts 3 and 4). The jury

1 All further statutory references are to the Penal Code unless otherwise specified.

found the attempted murder was willful, deliberate and premeditated (§ 664, subd. (a)), and found true the enhancements, alleged in connection with counts 1 and 2, that Gerald and Samuel committed the offenses in furtherance of a street gang within the meaning of section 186.22, subdivision (b)(1). The jury also found true a variety of enhancing allegations as to each of the defendants[2] and, in a bifurcated proceeding, the court found true Samuel had served a prior prison term and Gerald had a prior strike conviction and a prior serious felony conviction. The court sentenced each defendant to an aggregate term of 41 years to life.

On appeal, Gerald and Samuel argue that retrial on all counts was barred by double jeopardy principles, there was evidentiary error, and the court was required by section 654 to stay the concurrent term for the section 186.22, subdivision (a), convictions. Gerald separately asserts the evidence was insufficient to show he aided and abetted Samuel in committing attempted premeditated murder, and there was instructional error on aiding and abetting liability. Gerald also asserts he was denied effective assistance of counsel because counsel did not take preemptive measures to prevent the jury from hearing evidence of his prior criminal record, and section 12022.53,

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[2] As to Samuel, the jury found that (1) in committing the attempted murder, he personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)); (2) as to count 2, he personally used a firearm (§ 12022.5, subd. (a)); and (3) as to counts 1 and 2, he personally inflicted great bodily injury (§ 12022.7, subd. (a)). As to Gerald, the jury found that (1) in committing the attempted murder, a principal personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subds. (d) & (e)); and (2) as to counts 1 and 2, he was vicariously armed with a firearm (§ 12022, subd. (a)(1)) and committed the crimes while on bail (§ 12022.1).

as applied to aiders and abettors, violates equal protection. Gerald and Samuel also assert the court erred as to the sentences imposed on them on count 1.

I

FACTS

A. Prosecution Evidence

The Victim

In August 2006, the victim, Wally Giles, witnessed a shooting in the Casa Blanca area of Riverside. Giles told police the shooter was Mr. Hernandez, a member of the Casa Blanca Fern Street Vagabundos gang of Riverside. In September 2007, Giles testified at a preliminary hearing and indentified Hernandez as the shooter.

The Perpetrators: Samuel, Gerald and Daniel Frias

Samuel and Gerald are brothers, and are cousins to Daniel Frias. All three are distantly related to Giles but, in 2008, Giles had not seen them in years. Gerald is a member of the Westside Riva gang in Riverside. Samuel and Frias are members of the Sur Riva Locotes gang in Riverside.

After Giles identified him as one of the shooters, police arrested Hernandez. In October 2006, when Hernandez was in custody, he shared a cell with Frias (also then in custody) for one day. Although Hernandez was assigned to another cell the next day, Hernandez and Frias were assigned to adjoining day rooms between which they could communicate.

The Shooting

On September 30, 2008, Giles visited a cousin at an apartment complex and unexpectedly encountered Samuel near the pool area. Samuel appeared happy to see Giles and invited him to a party in an apartment at the back of the complex. Shortly thereafter, Giles saw Frias by a parking structure near the pool. It had been years since Giles had seen Frias.

Later that evening, Giles went to the apartment at the back of the complex to "hang out" with Samuel. Although Samuel was not there, Gerald was, and Giles went in to wait for Samuel. Samuel and Frias later arrived at the apartment. Samuel told Giles that the group was going to Frias's house so that Frias could shower, and invited Giles to accompany them. Giles accepted the invitation. He trusted the three men and did not fear for his safety because, although he knew Samuel belonged to the Sur Riva Locotes gang, Giles had never had any problems with the Taja brothers, Frias, their parents or their families.

After arriving at Frias's house, Gerald and Giles stayed outside while Frias showered. Samuel kept going in and out of the house. Nicole Rodriguez, Frias's girlfriend, was also at the house. At one point, as she was standing outside, she overheard Gerald and Samuel discussing Giles and heard them say Giles was "no good" (meaning he was a snitch) and that they were going to "fuck him up."

Later, the group drove together in an SUV to a hospital where Rodriguez's daughter was being treated. On the drive to the hospital, Samuel (seated in the back seat behind Rodriguez) leaned forward and whispered to her, "Is [Frias] mad? This guy is no

good." On arriving at the hospital, Samuel, Frias and Rodriguez visited her daughter while Gerald waited with Giles in the lobby. After the visit, the men said goodbye to Rodriguez and drove away in the SUV, leaving her at the hospital.

Giles thought the group was returning to the apartment complex or going to another house. Instead, Frias drove them to some orange groves near the hospital and parked in a dark and deserted place. Samuel and Gerald got out of the SUV and Giles, seeing Samuel get out, also got out of the SUV. As they were getting out, Samuel told Frias not to forget them and to come back. Frias drove around the corner and stopped.

Samuel, without saying a word and with Gerald at his side, immediately shot Giles three times. Giles was struck in the left earlobe, the left shoulder, and in the lower back. Samuel and Gerald then walked back to the waiting SUV and drove away. Giles remained lying at the side of the road until a passerby found him and called police.

The Investigation

The first officer on the scene was Officer Stennett. Giles, who was gravely injured, nevertheless told Stennett several times that he needed to talk to Detective Simons, a lead investigator in the Hernandez matter. While paramedics were treating Giles, he told Stennett the perpetrators were "Sammy," "Danny" and "Jeff." Giles also said he was related to the perpetrators and that they were his nephew's cousins. For information on the perpetrators, Giles told Stennett to contact his brother or someone in the Taja family, and named the parents of Samuel and Gerald. Later that night, while in the hospital emergency room, Giles told detectives the perpetrators were three Hispanic males in their early 20's, their names were "Sam," "Danny" and "Jeff," and they were

cousins of Giles' nephew.[3] Giles also gave police the phone number for the parents of the Taja brothers. That night, police identified Samuel and Gerald as the suspects.

Around 3:00 a.m. the next morning, police put Gerald's home under surveillance. The house was dark, without movement, except at one point a bathroom light quickly went on and off. Shortly thereafter, at 4:06 a.m., two adults carrying children wrapped in blankets left the house, got into a truck, and drove off. Police pulled the truck over and arrested Gerald.

Around 3:00 a.m. that same morning, Samuel appeared at the home of Christina Negrete (his cousin), and said he needed a place to stay because there had been a fight. Samuel later also stated there had been a shooting in Riverside, someone had been paralyzed,[4] and that he needed a place to hide. Police arrested Samuel at the Negretes' house four days after the shooting.

In 2009, while in county jail, Hernandez asked deputies on several occasions to have Gerald moved into Hernandez's cell. On April 25, 2009, Hernandez called Gerald Taja, Sr., and asked to speak with "Gerry's dad." Gerald Taja, Sr., did not know Hernandez and had never spoken to him before that date. At Hernandez's trial the following month concerning the shooting Giles had witnessed, Giles testified he could not recall portions of the shooting he had witnessed and could not identify the shooter.

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[3] At trial, Giles testified he could not recall giving the name "Jeff" to the police. Giles testified there was no "Jeff" involved, and that the Taja brothers (his nephew's cousins) were the ones involved in the shooting.

[4] Giles was hospitalized for a month, and spent a couple of weeks in a rehabilitation center. The gunshot wound left him paralyzed from the waist down.

The Gang Evidence

The prosecution theory was that Samuel, Gerald and Frias, acting in accordance with gang mores, shot Giles because he cooperated with police in the prosecution of Hernandez. Detective Miera, a gang expert, testified that a "rat" or a "snitch" is someone who reports crimes to police. In Hispanic gang culture, a reference to a person as "no good" means they are a "rat." Gangs will subject that "rat" to threats, intimidation or violence, which causes people to not cooperate with police or report crimes. When people do report crimes, they are concerned for their personal safety.

The Mexican Mafia has rules for its gangs about how to treat a "rat," which rules require gang members to harm the "rat" when the opportunity presents itself, and a gang member who does not adhere to that code of conduct is himself subject to retaliation. Persons with closer ties to the Mexican Mafia, including persons with Aztec or Maya tattoos that represent affiliation with the Mexican Mafia,[5] have a higher level of expectation that they will "handle the rat." Almost all of the Southern California Hispanic gangs are under the control of the Mexican Mafia, including the gangs (Westside Riva and Sur Riva Locotes) to which Samuel, Gerald, and Frias belonged.

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[5] The expert testified that among the symbols proclaiming association with the Mexican Mafia is a "G Shield," and Gerald had a tattoo with that symbol, something that has to be earned by conduct benefitting the Mexican Mafia. The expert also noted documents seized from Frias had the name and prison identification number for a Mr. Estrada, a leader of the Mexican Mafia in the Inland Empire, suggesting Frias was a pipeline to carry out orders for the Mexican Mafia.

When given a hypothetical based on the facts of this case, Miera testified the shooting was committed in association with and for the benefit of a criminal street gang and would benefit both the individuals involved and the gangs to which they belonged.

II

ANALYSIS OF CHALLENGES TO CONVICTIONS

A. The Double Jeopardy Claim

Gerald and Samuel contend the trial court's erroneous handling of the jury deadlock in their first trial resulted in a judgment of acquittal that barred retrial of the charges under double jeopardy principles.

Background-The First Trial

After a trial lasting several days, the jury in the first trial commenced deliberations on January 26, 2010, at 10:00 a.m., although a good portion of the first day was devoted to listening to a read-back of the testimony. The following day, after approximately one hour of additional deliberations, the court received two notes from the jury, one that said, "All twelve jurors cannot come to an agreement," and the second that stated two jurors were asking to be excused, apparently also as a result of the jury's inability to reach agreement.[6]

With the agreement of counsel, the court told the jury it had not deliberated long enough and instructed the jurors to continue deliberations, reminding them to adhere to

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6 The latter note stated, "Juror #3 would like to be excused. Feeling nauseated. The mood of deliberation too stressful to withstand" and "Juror #9, needs out. Cannot handle the people or stress of the situation!! People are [idiots]."

the instructions on deliberating and to treat each other courteously. After approximately two additional hours of deliberations, interrupted only by the lunch recess, the jury again sent a note reporting its inability to reach agreement, stating, "Nothing has changed. We are still hung." The court called in the jury and again asked if there was any possibility that further deliberations would permit it to reach a verdict. When the jury indicated it was irrevocably deadlocked, and after the parties declined the opportunity to poll the jury, the court asked the attorneys whether they had any other questions for the jury. Counsel suggested conferring with the court at a sidebar conference and, after an unreported sidebar conference, the court asked whether (during the last two hours the jury had deliberated) there had been any change in either the tone of the deliberations or the voting count, or whether the vote had remained "pretty much the same." The court stated that, given the numerous counts and allegations, it was not sure the jury had devoted enough time to examining them all, but asked the jury whether they believed it would be fruitless to resume deliberations. When juror number 6 said changing his or her mind was possible, the court directed the jury to resume deliberating, but assured the jury that if it decided it was " 'stuck' " and would " 'never decide,' " the court would not "keep you forever."

After approximately one more hour of deliberations, the jury sent another note to the court saying "[n]othing has changed, we are still hung." The court again reconvened the jury and, after the jury indicated the vote would not change even if it continued to deliberate, the court declared a mistrial. The court then asked what the vote had been,

and learned it was 9 to 3 in favor of conviction, and had stayed that way the entire time. The following colloquy ensued:

> "The Court: . . . You said [that vote] pretty much stayed [the] same?
> "TJ04: Yeah.
> "The Court: Throughout the entire discussion. So there was no change at the end. There was no change at any point.
> "TJ04: Okay.
> "The Court: All right. And is that as to the first count, as to all counts?
> "TJ04: We couldn't even get to the first count. We couldn't even place--we didn't feel we had enough evidence to place--
> "The Court: You couldn't get the first one. You couldn't agree on the first count?
> "TJ04: Basically the first count was as far as we got.
> "The Court: And [the] others were related to that.
> "TJ04: Uh-huh."

Analysis of Double Jeopardy Claim

Gerald and Samuel, relying principally on *People v. Ham* (1970) 7 Cal.App.3d 768 (disapproved on other grounds by *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3), assert dismissal of the jury before it began deliberations on counts 2, 3 and 4 precluded retrial of those counts because there was no "manifest necessity" to declare a mistrial as to those counts. From that predicate, they contend retrial of count 1 is also barred because the jury, having been discharged before deliberating on counts 2, 3, and 4, was discharged "contrary to law [which must be deemed] equivalent to a verdict of acquittal" (*Paulson v. Superior Court* (1962) 58 Cal.2d 1, 5), thereby barring retrial on count 1 under double jeopardy principles. Even assuming the absence of an objection to the

mistrial cannot be properly deemed an implied consent to the mistrial order,[7] we reject this claim.

"The Fifth Amendment to the United States Constitution provides that '[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . .' This guarantee is applicable to the states through the Fourteenth Amendment. [Citations.] Similarly, article I, section 15, of the California Constitution provides: 'Persons may not twice be put in jeopardy for the same offense . . . .' " (*People v. Saunders* (1993) 5 Cal.4th 580, 592-593.) Jeopardy attaches once the jury and the alternates are sworn. (*People v. Huff* (1967) 255 Cal.App.2d 443, 447.)

Granting an unnecessary mistrial after jeopardy has attached precludes retrial. (*People v. Hernandez* (2003) 30 Cal.4th 1, 8.) However, a retrial is not barred if the

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[7] Neither Gerald nor Samuel objected to the court's decision to declare a mistrial and, were we free to do so, we would hold that their failure to raise the issue at the time would be deemed a consent to the mistrial order. There is a split in the law, among various states and federal circuits, as to whether a defendant's silence may constitute consent to a declaration of mistrial. (Annot., What Constitutes Accused's Consent to Court's Discharge of Jury or to Grant of State's Motion for Mistrial Which Will Constitute Waiver of Former Jeopardy Plea (1959) 63 A.L.R.2d 782, § 5[a], § 5[b].) The federal courts appear to require the defendant to object to preserve the former jeopardy claim (see, e.g., *U.S. v. Lara-Ramirez* (1st Cir. 2008) 519 F.3d 76, 83 ["Consent may sometimes 'be implied from a defendant's acts or failures to act, such as where the defendant sits silently by and does not object to the declaration of a mistrial even though he has a fair opportunity to do so.' "]; *U.S. v. El-Mezain* (5th Cir. 2011) 664 F.3d 467, 559 [" 'If a defendant does not timely and explicitly object to a trial court's *sua sponte* declaration of mistrial, that defendant will be held to have impliedly consented to the mistrial and may be retried in a later proceeding.' "]), although language in a number of California cases (largely derived from *Curry v. Superior Court* (1970) 2 Cal.3d 707) seem to hold that silence does not constitute consent. (See, e.g., *People v. Chaney* (1988) 202 Cal.App.3d 1109, 1116.) Although a recent decision in a different factual scenario concluded *Curry* was not controlling (see, e.g., *Stanley v. Superior Court* (2012) 206 Cal.App.4th 265), we adhere to *Curry* until our Supreme Court rules to the contrary.

defendant consented to, or legal necessity required, the mistrial. (*Curry v. Superior Court*, *supra*, 2 Cal.3d at p. 712.) A deadlocked jury is one ground for legal necessity that does not bar retrial:

> "When a jury indicates it is unable to reach a verdict, double jeopardy rules bar retrial unless the defendant consents to the discharge of the jury [citation], or the trial court determines further deliberations are not reasonably likely to result in a verdict (§ 1140), in which case legal necessity exists for a declaration of mistrial [citation]." (*People v. Marshall* (1996) 13 Cal.4th 799, 825.)

A defendant may be retried for offenses as to which the jury is deadlocked. (§§ 1140, 1141; *People v. Rojas* (1975) 15 Cal.3d 540, 545-546.) A court properly declares a mistrial based on jury deadlock when "at the conclusion of such time as the court deems proper, it satisfactorily appears to the court that there is no reasonable probability that the jury can resolve its differences and render a verdict. Under these circumstances the court may properly discharge the jury and reset for trial." (*Rojas*, *supra*.) "The determination of the jurors' state of mind, and whether further deliberations will result in a unanimous verdict, lies within the sound discretion of the trial judge in view of all the circumstances" (*People v. Wash* (1993) 6 Cal.4th 215, 248), because the trial judge has heard the evidence and arguments and has been able to personally observe the progress of the jurors' deliberations. (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 522.)

We conclude the trial court in this case did not abuse its discretion by determining that, based on all the circumstances, there was no reasonable probability that further deliberations would have enabled the jury to resolve its differences and render a verdict

in the first trial, and therefore the order declaring a mistrial as to all counts was proper. The record is clear, and Gerald and Samuel do not dispute, that ample grounds existed for the trial court's finding that the jury was hopelessly deadlocked on count 1, the attempted murder count. Moreover, we conclude the trial court did not abuse its discretion by finding the jury was equally deadlocked on *all* counts. First, all of the charges and enhancements alleged against Samuel and Gerald arose out of the same operative conduct: the alleged shooting of Giles by Samuel and Gerald that occurred on or about October 1, 2008.[8] Second, the defense proffered as to all of the offenses was identical: both claimed they were not the perpetrators of the shooting. Third, when the jury asked whether the deadlock was "as to the first count, as to all counts," the foreman explained "we couldn't even get to the first count. We couldn't even place--*we didn't feel we had enough evidence to place*. . . ." (Italics added.) A trial court could reasonably construe the foreman's response as explaining the deadlock was over whether there was enough evidence to prove Gerald and Samuel were involved in the shooting at all. That construction is reinforced by the colloquy immediately following that explanation when the foreman stated "[b]asically the first count was as far as we got," and the foreman

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[8] Count 1 of the information (and the firearm enhancement appended to count 1) alleged that, on or about October 1, 2008, Gerald and Samuel attempted to murder Giles and used a firearm in doing so. Count 2 of the information alleged that, on or about October 1, 2008, Gerald and Samuel committed assault with a firearm on Giles, and the parties recognized this count was based on the same core conduct as count 1 within the meaning of section 654. Counts 3 and 4 of the information alleged that, on or about October 1, 2008, Gerald and Samuel willfully violated section 186.22, subdivision (a), by actively participating in a street gang and by willfully promoting, furthering, or assisting in felonious criminal conduct by members of the gang. There was no evidence as to the latter element except as to the October 1, 2008, crimes.

answered affirmatively when the trial court stated "[a]nd [the] others were related to that." On this record, we cannot conclude the trial court abused its discretion when it concluded the jury *had* deliberated on *all* the charges but were deadlocked, because the record supports the implied conclusion that the jury deliberated on the predicate question applicable to all of the charges--the identity of the perpetrators--but were deadlocked on that predicate issue as to all charges.

Gerald and Samuel rely on *People v. Ham*, *supra*, 7 Cal.App.3d 768, for their double jeopardy claim, but we conclude *Ham* provides no assistance to them here. In *Ham*, a multiple count indictment charged armed robbery, assault with a deadly weapon, and attempted murder. The jury announced it was deadlocked, and the court declared a mistrial, but then learned the jury considered only the armed robbery charge and had not considered the other two offenses. (*Id*. at pp. 775-776.) The *Ham* court concluded retrial of the assault with a deadly weapon and the attempted murder charges was barred by double jeopardy principles because there was no legal necessity for a mistrial on the unconsidered counts. (*Id*. at pp. 776-777.) However, the discussion in *Ham* does not reveal whether the charges in that case were interdependent, or whether there were separate factual bases for the unconsidered charges. More importantly, *Ham's* analysis turned on the statement that the judge declared a mistrial after learning "the jury had deliberated only as to [the armed robbery charge] and that *it had not deliberated at all* on [the other charges]." (*Id*. at p. 776.) In contrast, the trial court here could have reasonably concluded the jury in effect *did* deliberate and reach a deadlock on *all* charges because, although the jury did not reach or examine the technical elements of all counts,

it did examine and deadlock on the factual predicate for all counts: the identity of the perpetrators. We conclude double jeopardy principles did not bar retrial of Gerald and Samuel as to all counts because the trial court did not abuse its discretion in concluding there was a legal necessity for a mistrial on all counts.

B. The Evidentiary Claims

Gerald and Samuel assert the trial court abused its discretion when it admitted into evidence two statements by Hernandez.

Background

The prosecution's theory was that Gerald and Samuel shot Giles because he cooperated with police in connection with the prosecution of another gang member, Hernandez, for a 2006 shooting. The prosecution introduced two statements by Hernandez at trial. First, a sheriff's employee at the detention facility where Hernandez and Gerald were housed testified that in 2009 Hernandez asked to be housed with Gerald on two or three occasions. The court overruled objections by the defense contending that evidence was irrelevant and prejudicial. Second, the prosecution introduced evidence that Hernandez called Gerald Taja, Sr., and asked to speak with "Gerry's dad," but that Gerald Taja, Sr., did not know Hernandez and had never spoken to him before that date. The court overruled objections by the defense that contended the evidence was prejudicial.[9]

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9 As to both statements, Gerald and Samuel also interposed a hearsay objection. However, they do not resurrect that claim on appeal.

Analysis

We conclude the court acted within its discretion in concluding the evidence was relevant. " 'The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.] The trial court retains broad discretion in determining the relevance of evidence.' " (*People v. Cunningham* (2001) 25 Cal.4th 926, 995.) The fact that Hernandez asked to be housed with Gerald was relevant to whether Hernandez knew and got along with Gerald, even though they belonged to different gangs. Similarly, the fact that Hernandez telephoned someone he did not know (Gerald Taja, Sr.) and asked to speak with "Gerry's dad" similarly showed Hernandez knew Gerald so well that Hernandez knew the phone number of Gerald's father. A trier of fact could logically and naturally infer, from this affiliation, Gerald and Hernandez were sufficiently close that Gerald had a motive for attacking a person (Giles) potentially harmful to Hernandez. Although Gerald and Samuel contend on appeal that Hernandez's requests and phone call were irrelevant because they occurred many months *after* the attack, "[t]he remoteness of the evidence usually goes to its weight, not to its admissibility." (*People v. Archerd* (1970) 3 Cal.3d 615, 639, disapproved on other grounds by *People v. Nelson* (2008) 43 Cal.4th 1242, 1255.) The court's determination that the evidence was relevant was not an abuse of discretion.

Gerald and Samuel also claim the evidence should have been excluded under Evidence Code section 352. A court's ruling under Evidence Code section 352 is reviewed for abuse of discretion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118.)

When examining whether the probative value of evidence outweighs its potential for undue prejudice, we weigh whether the evidence " ' "uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." ' " (*People v. Padilla* (1995) 11 Cal.4th 891, 925, disapproved on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Evidence pertaining to motive ordinarily has relevance to disputed issues (*People v. Barnett, supra,* 17 Cal.4th at p. 1118), and there is nothing inflammatory about a phone call or a request for housing that tends to evoke any emotional bias. The trial court did not abuse its discretion in overruling the Evidence Code section 352 objection.

C. The Sufficiency of the Evidence Claim

Gerald argues the evidence was insufficient to support the conviction for the premeditated attempted murder of Giles. He notes that, because the evidence showed he was not the shooter, his liability necessarily rests on aider and abettor principles, and the evidence was insufficient to support a finding he aided and abetted Samuel in the premeditated attempted murder of Giles.

Applicable Principles

"[T]o be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing--which means that the person guilty of attempted murder as an aider and abettor must intend to kill." (*People v. Lee* (2003) 31 Cal.4th 613, 624.) If the aider and abettor possesses the requisite mental state of intending to facilitate the direct perpetrator's

accomplishment of the intended killing, he can be vicariously liable for the premeditated and deliberate component of the mens rea of an accomplice and be liable for an attempted murder that is willful, deliberate, and premeditated.[10] (*People v. Concha* (2009) 47 Cal.4th 653, 665.)

Because there is rarely direct evidence of a defendant's knowledge (*People v. Buckley* (1986) 183 Cal.App.3d 489, 494-495) or intent (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690), these matters generally must be established by circumstantial evidence and the reasonable inferences to which it gives rise. (*People v. Smith* (2005) 37 Cal.4th 733, 741.) Although mere "presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission . . . [citations] . . . '[a]mong the factors which may be considered in making the determination of aiding and abetting are: 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.) " 'Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment.' " (*Ibid*.)

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10 Gerald does not contend the evidence was insufficient to show the direct perpetrator--Samuel--committed a willful, deliberate, and premeditated attempted murder. Accordingly, we do not outline the evidence supporting that conviction, but instead examine only whether the evidence was sufficient to show Gerald gave aid or encouragement to Samuel, knowing of Samuel's intent to kill and with the purpose of facilitating the accomplishment of the intended killing.

Analysis

We conclude there is substantial evidence from which a trier of fact could reasonably infer Gerald aided or encouraged Samuel, knowing Samuel's intent and with the purpose of facilitating Samuel's accomplishment of the intended killing. Gerald does not claim the evidence was insufficient to show Samuel intended to kill Giles or that Samuel was motivated by gang mores requiring retaliation against persons who cooperate with police. Instead, Gerald claims there was no evidence from which a trier of fact could have inferred he shared Samuel's intent to kill, or provided any aid or encouragement to Samuel knowing of his intent.

There was substantial evidence from which a trier of fact could have inferred the requisite knowledge and intent. Gerald was a member of the same gang culture that required retaliation against "rats,"[11] and had tattoos showing he had earned an even closer alignment with the Mexican Mafia by engaging in conduct benefitting the Mexican Mafia. Moreover, shortly before the trio of gang members took Giles to an isolated location and shot him, Gerald and Samuel were overheard discussing the fact that Giles was "no good" and was someone they needed to "fuck up." Additionally, when the group arrived at the orange grove, which was dark and isolated, Gerald expressed no surprise or confusion about why Frias had driven to this destination, but instead got out of the vehicle with Samuel and Giles and then watched without comment as Frias drove off. Finally, when Samuel immediately proceeded to shoot Giles three times, Gerald

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[11] There was also some evidence from which a jury could have inferred Gerald had a personal relationship with the person (e.g. Hernandez) against whom Giles had informed.

expressed neither shock nor consternation at Samuel's action, but instead calmly walked back with his brother to the waiting vehicle. A jury could infer, from Gerald's presence at the scene, his discussion with Samuel at Frias's house, and his failure to react in surprise either to the car drive to the orange grove or to Samuel's conduct on arriving at the orange grove, that Gerald knew of Samuel's intended course of action and shared Samuel's intent to kill Giles.

Gerald asserts that, even if the evidence would permit a jury to infer he knew Samuel intended to shoot Giles, there was no evidence he did anything to aid or encourage Samuel in accomplishing that goal. However, a jury could infer this argument ignores the evidence that, on the night of the shooting, Gerald helped Samuel by lulling Giles into a false sense of security.[12] Moreover, over the course of the evening, Gerald stayed with Giles when Samuel was elsewhere (both at Frias's house and at the hospital), and also sat in the back seat with Giles on the drive to the orange grove, from which a jury could infer Gerald was ensuring Giles would not depart before Samuel meted out the punishment. Finally, Gerald did not stay seated in the car on arriving at the orange grove, but instead accompanied Samuel when he got out, from which a jury could have inferred Gerald was there to act as lookout and/or to back up his brother in the impending shooting. (See *People v. Miranda* (2011) 192 Cal.App.4th 398, 409 [fact that gang member accompanied fellow gang member during direct perpetrator's crime permitted

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12 When Giles arrived at the apartment to meet Samuel that night, Samuel was not there but Gerald was, and Gerald invited Giles in and waited with him until Samuel and Frias arrived at the apartment.

jury to infer defendant aided and abetted crime either as a backup or lookout]; cf. *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376 [stating in dicta that a gang member who did nothing but stand by and watch could be an aider and abettor if jury was convinced "he was there to back up his homeboys and thereby encouraged [underlying crime]"].) There was evidence and inferences that would permit a jury to infer Gerald aided or encouraged Samuel knowing his intent and with the purpose of facilitating his accomplishment of the intended killing.

D. The Instructional Claim

Gerald asserts the instructions on aider and abettor liability were prejudicially flawed because the trial court did not sua sponte modify the then-current version of CALCRIM No. 400 to delete the word "equally" from a sentence in that instruction.

The Instructions

The court instructed with CALCRIM No. 400, as follows:

> "A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator who directly committed the crime. A person is *equally* guilty of the crime whether he committed it personally or aided and abetted the perpetrator who committed it." (Italics added.)

Next, the court instructed the jury with CALCRIM No. 401:

> "To prove that a defendant is guilty of a crime based upon aiding and abetting that crime, the People must prove, number one, the perpetrator committed the crime; two, the [d]efendant knew that the perpetrator intended to commit the crime; three, before or during the commission of the crime, the [d]efendant intended to aid and abet the perpetrator in committing the crime; and four, the [d]efendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime."

Argument

On appeal, Gerald contends the trial court prejudicially erred when it instructed on aiding and abetting under CALCRIM No. 400 without sua sponte deleting the word "equally" from that instruction. Relying on *People v. McCoy* (2001) 25 Ca1.4th 1111, and *McCoy's* progeny (*People v. Samaniego* (2009) 172 Cal.App.4th 1148 (*Samaniego*) and *People v. Nero* (2010) 181 Cal.App.4th 504), Gerald essentially argues the court had a sua sponte duty to instruct the jury regarding applicable legal principles because the use of the term "equally" could have inadequately clarified for the jury that it could find him guilty of a lesser offense than attempted murder if it found he had a less culpable state of mind than the actual perpetrator. Because the court did not do so, Gerald asserts the court committed federal constitutional error.

Analysis

McCoy and its progeny stand for the proposition that, under limited circumstances, the use of the term "equally" could potentially be misleading. As a preliminary matter, Gerald neither objected to nor complained about the wording of CALCRIM No. 400 as given and there was no discussion at all regarding the "equally guilty" language of CALCRIM No. 400 below. Gerald (like the defendant in *Samaniego*) has forfeited this claim on appeal. (*Samaniego, supra*, 172 Cal.App.4th at p. 1163.) Generally, " '[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' " (*People v. Hart* (1999) 20 Cal.4th 546, 622.) As

Samaniego explained, CALCRIM No. 400 is generally an accurate statement of law regarding an aider and abettor's liability, but should be modified in those "most exceptional circumstances" (*Samaniego,* at p. 1165) in which the jury could be misled because various codefendants may have acted with different mental states in committing the charged crimes. (*Id.* at pp. 1163-1165.) In *Samaniego*, in which two victims were killed in a gang-related shooting and there was no evidence as to who fired the fatal shots, the court held it could potentially be misleading under those particular facts to give the jury CALCRIM No. 400 without modification or clarification of the words "equally guilty" to properly assess each defendant's individual mental state. (*Samaniego,* at pp. 1164-1165.) In so holding, the *Samaniego* court reviewed *People v. McCoy, supra*, 25 Cal.4th 1111, which made clear that in cases involving accomplices charged with specific intent offenses, the jury must separately determine each codefendant's mental state and may convict an accomplice of a *greater* offense than the actual perpetrator under an aiding and abetting liability. (*McCoy,* at pp. 1116-1117.) By parity of reasoning, the court in *Samaniego* determined an accomplice may be convicted of a *lesser* offense than the perpetrator as well, "if the aider and abettor has a less culpable mental state." (*Samaniego,* at p. 1164.)

We agree with the reasoning in *Samaniego* and conclude the "equally guilty" language of CALCRIM No. 400 is essentially a correct statement of law. Even assuming this case involved unique circumstances that might have made use of the term "equally" potentially misleading, Gerald was required to object to, or request a modification of, the

standard instruction at trial to preserve the issue for appeal. (*Samaniego, supra,* 172 Cal.App.4th at p. 1163.) Gerald has forfeited this claim.

Moreover, even if Gerald had properly preserved the issue for review or may interpose the claim under the rubric of ineffective assistance of counsel, we are unpersuaded he was prejudiced because the instructions as a whole show the jury was properly instructed. Even assuming CALCRIM No. 400 as given in this case may have misdescribed "the prosecution's burden in proving the aider and abettor's guilt of [the charged offenses] by eliminating its need to prove the aider and abettor's . . . intent," the error was harmless beyond a reasonable doubt "because the jury necessarily resolved these issues against [Gerald] under other instructions." (*Samaniego, supra,* 172 Cal.App.4th at p. 1165.) In *Samaniego,* as here, the court gave CALCRIM No. 401, which stated that to prove Gerald guilty based on the aiding and abetting theory, the prosecution must prove, among other things, that (1) "[t]he defendant *knew* that the perpetrator intended to commit *the* crime," and (2) "the defendant *intended* to aid and abet the perpetrator in committing *the* crime." (*Samaniego,* at p. 1166, italics added.) As *Samaniego* recognized, when aider and abettor liability is *not* based on a " 'natural-and-probable-consequences doctrine' " (*id.* at p. 1166), but instead required the jury to determine the defendant *knew* of the perpetrator's intent to commit the charged offense and *intended* to aid and abet the perpetrator in committing that crime, the equally guilty language used in the former version of CALCRIM No. 400 is not prejudicially misleading. (*Samaniego,* at pp. 1165-1166.) We conclude, consistent with *Samaniego,* any alleged ambiguity in the instruction was harmless because the jury necessarily was

compelled to correctly resolve Gerald's intent as an aider and abettor under other instructions.

E. The Ineffective Assistance of Counsel Claims

Gerald asserts his counsel was ineffective by not taking action to preempt the jury from learning of his previous history with law enforcement or to "sanitize" the evidence. He complains of three items of evidence: an expert testified he was aware Gerald and Frias had allegedly committed a robbery together in 1998; Gerald admitted he was a gang member when he was booked into a jail facility; and Gerald was out on bail for an offense at the time of the attempted murder and had later been convicted of the offense for which he had been out on bail.

Applicable Principles

To establish ineffective assistance of counsel, a defendant bears the burden of showing both that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and that it is reasonably probable the verdict would have been more favorable to the defendant absent counsel's error. (See, e.g., *People v. Hernandez* (2004) 33 Cal.4th 1040, 1052-1053.) "We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703.) We will reverse on the ground of ineffective assistance of counsel " 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' " (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) Furthermore, in an appropriate case, we may dispose of an ineffectiveness claim on the ground of lack of

prejudice without determining whether counsel's performance was deficient. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *In re Fields* (1990) 51 Cal.3d 1063, 1079.)

Analysis

Gerald first asserts the jury should not have been permitted to hear about a 1998 robbery allegedly involving Gerald and Frias. During cross-examination of the gang expert by Samuel's attorney, he asked the expert whether Gerald and Farias had committed a robbery together in 1998, and the court overruled Gerald's Evidence Code section 352 objection. The expert then testified he was aware Frias and Gerald had allegedly committed a robbery together, Frias had cooperated with police and admitted he and Gerald committed the robbery, and Gerald had not retaliated against Frias.

Although these statements were admitted, Gerald's counsel successfully objected and prevented the prosecutor from asking any follow-up questions about the 1998 robbery. Additionally, Gerald's counsel subsequently moved for a mistrial because Samuel's counsel "talked about the 1998 conviction of Gerald . . . that was highly prejudicial . . . ." The court denied the mistrial, but agreed to give Gerald's counsel an opportunity to propose a jury instruction to disregard the evidence as to Gerald. Over Samuel's objection, the court instructed the jury (in language proposed by Gerald) that the evidence concerning the 1998 robbery was stricken and the jury was to disregard the testimony for all purposes.

Gerald asserts his counsel was ineffective by not preventing in advance the presentation of this evidence. Even assuming Gerald's counsel should have anticipated

and tried to prevent this evidence from being heard,[13] we are convinced it is not reasonably probable the verdict would have been more favorable to him. The evidence was stricken, the jury was directed to disregard it, and we presume the jury adhered to that admonition.[14] (*People v. Mendoza* (2007) 42 Cal.4th 686, 699.)

Gerald next contends his counsel was ineffective because counsel (1) did not move to bifurcate the "on-bail" enhancement appended to counts 1 and 2, and (2) agreed to the trial court's modification of a stipulation concerning his "on-bail" status. Examining the first aspect of Gerald's claim, we note that although a trial court has the *discretion* to bifurcate the determination of the truth of enhancements (*People v. Hernandez, supra,* 33 Cal.4th at p. 1049), it also has the discretion to deny bifurcation, and Gerald cites nothing on appeal to suggest an "on-bail" enhancement must be severed on motion by the defendant. Contrary to Gerald's implied suggestion, the right to a bifurcated trial on the

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13 Gerald asserts his counsel should have anticipated his codefendant's counsel would ask this question because that same inquiry had been made during the first trial, and Gerald had objected at the first trial to some aspects of this evidence. However, at the first trial, it appears the court agreed Samuel's counsel could ask whether the expert was aware of an alleged robbery involving Frias and Gerald and that Frias had informed on Gerald in connection with that alleged crime, to impeach the expert's testimony that gang members do not inform on other gang members, and it appears Gerald's counsel was satisfied with limiting the expert to testimony that the expert was " 'aware of--' *whatever the report is* . . . and that Mr. Frias implicated himself and implicated [Gerald]." (Italics added.) It does not appear, in the second trial, the question exceeded these boundaries.

14 Even if the jury ignored the instruction, the brief allusion to a 1998 crime was unaccompanied by any suggestion Gerald was *convicted* of that crime. Moreover, the questions may have collaterally benefitted Gerald to the extent it undermined the main thrust of the prosecutor's theory of motive for the attack on Giles, because it showed Gerald did *not* retaliate against (but instead remained friends with) Frias despite an even *more* personal reason for engaging in retaliatory conduct.

issue of prior convictions (*People v. Calderon* (1994) 9 Cal.4th 69, 75-76) does not give rise to a correlative right to bifurcate the trial of any and all other enhancements. A request to bifurcate a charged enhancement is akin to a motion to sever the charges, but a denial of severance is not error unless a defendant clearly establishes there is a substantial danger of prejudice requiring the charges be separately tried (*People v. Arias* (1996) 13 Cal.4th 92, 127), and joinder is otherwise proper when evidence of the offenses would be cross-admissible in separate trials. (*People v. Davis* (1995) 10 Cal.4th 463, 509.)

Here, counsel may have had legitimate reasons for not seeking to sever the on-bail enhancement. First, he may have concluded the motion would have been fruitless because the evidence of the on-bail enhancement charge might have been cross-admissible in separate trials if, for example, the other pending case was relevant and admissible to explain the manner in which the police discovered Gerald's whereabouts with such rapidity,[15] or if the other pending case was relevant and admissible to explain the circumstances under which Gerald identified himself to authorities as a member of the Westside Riva gang. "If 'counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed.' [Citation.] When, however, the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons. To engage in such speculations would involve the reviewing court ' "in the perilous process of second-guessing." ' [Citation.] Because the appellate record

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15 It appears police were able to locate Gerald's home and place surveillance on that home within a few hours after Giles was discovered at the site of the shooting.

ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, rather than on appeal." (*People v. Diaz* (1992) 3 Cal.4th 495, 557-558.) When the record on appeal does not show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268.)

Gerald's second claim--that his counsel was ineffective because counsel approved the court's modification of Gerald's proposed stipulation to add that Gerald was ultimately convicted of the offense for which he was on bail--suffers from a similar defect: the record is silent on why counsel agreed to that modification. Ordinarily, evidentiary stipulations are tactical decisions left to the discretion of counsel (*People v. Adams* (1993) 6 Cal.4th 570, 578), and counsel may have decided to agree to the stipulation for tactical reasons on which the record is silent.[16]

Gerald finally argues counsel was ineffective for not seeking to "sanitize" certain evidence relevant to Gerald's gang membership. A correctional officer testified that in early 2007 he had a conversation with Gerald in which Gerald admitted to gang

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16 For example, counsel may have been concerned the jury, having learned Gerald had been on bail but not knowing whether he had escaped justice in that case, might subconsciously decide to punish Gerald by finding him guilty in the present case, and therefore it was better for the jury to know that Gerald had "ultimately been convicted of a felony" for the on-bail offense to remove that concern. Alternatively, counsel may have wanted to portray Gerald as one who forthrightly admits culpability for crimes he *has* committed, to sub silencio reinforce his claim that denied any involvement or culpability in *this* case.

membership, and the officer saw a tattoo on Gerald's back that said "Westside Riva." Gerald asserts his counsel was ineffective for not seeking the evidence be "sanitized" to avoid having the jury learn of his arrest in 2007, either by seeking to preclude the officer from testifying this evidence was gathered during a booking, or by offering to stipulate that he admitted to gang membership to a police officer without disclosing where the admission occurred. We reject Gerald's argument, because counsel did move in limine to exclude the evidence, and that motion was overruled. Because the evidence was ruled admissible, the context in which the evidence was gathered was germane, because a jury could rightly question how an officer would have been able to see a tattoo on a person's back and why Gerald would have made a damning admission. Moreover, the jury was already aware (based on the on-bail allegation) of Gerald's prior legal troubles, and therefore any prejudicial implication was already present. A counsel need not pursue futile motions to provide effective assistance (*People v. Thompson* (2010) 49 Cal.4th 79, 122), and we conclude Gerald's counsel was not ineffective for not seeking sanitization of this evidence.

II

ANALYSIS OF CHALLENGES TO SENTENCES

A. The Equal Protection Claim

Gerald asserts section 12022.53 is unconstitutional because it violates equal protection. He contends section 12022.53, subdivisions (d) and (e), authorizing imposition of a 25-year-to-life term on him as an aider and abettor when a principal in the commission of the offense personally fired a gun and the commission of the offense was

for the benefit of the gang, violates equal protection. He argues section 12022.53, subdivision (e), singles out aiders and abettors of murder caused by the discharge of a firearm who act for the benefit of a criminal street gang, and treat them differently from aiders and abettors who act for the benefit of a group or organization that is not a criminal street gang.

Gerald recognizes *People v. Hernandez* (2005) 134 Cal.App.4th 474 rejected this contention, explaining:

> "It is beyond dispute the state has a legitimate interest in suppressing criminal street gangs. [Defendant] concedes this. He also acknowledges the state has a legitimate interest in punishing criminal gun use more severely than the use of other weapons. . . . [¶] Courts have long recognized . . . a Legislature 'acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach.' It may direct its attention ' "to those classes of cases where the need is deemed to be clearest." ' In enacting the street gang legislation in 1988 the Legislature found, among other things, 'in Los Angeles County alone there were 328 gang-related murders in 1986, and that gang homicides in 1987 have increased 80 percent over 1986.' When the Legislature enacted section 12022.53 10 years later and made aiders and abettors of gang crimes involving gun use equally liable with the actual perpetrator it did so 'in recognition of the serious threats posed to the citizens of California by gang members using firearms.' As our Supreme Court has stated, the Legislature 'is not prohibited by the equal protection clause from striking the evil where it is felt the most.' [¶] . . . [¶] . . . Where as here the question is not whether to deprive [defendant] of his liberty but for how long, we believe rational basis review, not strict scrutiny, is the appropriate test to resolve an equal protection challenge. [¶] Clearly the Legislature had a rational basis for imposing a 25-[year]-to-life enhancement on one who aids and abets a gang-related murder in which the perpetrator uses a gun . . . . As we previously observed, the purpose of this enhancement is to reduce through punishment and deterrence 'the serious threats posed to the citizens of California by gang members using firearms.' One way to accomplish this purpose is to punish equally with the perpetrator a person who, acting with knowledge of the perpetrator's

> criminal purpose, promotes, encourages or assists the perpetrator to commit the murder." (*Hernandez,* at pp. 481-483, fns. omitted.)

We agree with the *Hernandez* court that a rational basis exists for the distinction drawn by the Legislature. Gerald argues, however, that we should not follow *Hernandez* because that court erroneously applied the "rational basis" test rather than the "strict scrutiny" test, which Gerald contends is the proper test under *People v. Olivas* (1976) 17 Cal.3d 236. However, we reject Gerald's claim that *Olivas* mandates application of the strict scrutiny test here. As the court in *People v. Wilkinson* (2004) 33 Cal.4th 821 explained at pages 837 to 838:

> "The language in *Olivas* could be interpreted to require application of the strict scrutiny standard whenever one challenges upon equal protection grounds a penal statute or statutes that authorize different sentences for comparable crimes, because such statutes always implicate the right to 'personal liberty' of the affected individuals. Nevertheless, *Olivas* properly has not been read so broadly. As the court observed in *People v. Davis* (1979) 92 Cal.App.3d 250 . . . : 'It appears . . . that the *Olivas* court did not want to increase substantially the degree of judicial supervision of the Legislature's criminal justice policies. Such a highly intrusive judicial reexamination of legislative classifications is not merited by a close reading of *Olivas.* There is language in the *Olivas* opinion that emphasizes the narrowness of the holding. For instance, the court noted that [the statute in question] was constitutionally infirm because persons committed under the statute had been "prosecuted *as adults,* adjudged by the same standards which apply to *any competent adult,* and convicted *as adults in adult courts.*" ([*People v. Olivas, supra*,] 17 Cal.3d at pp. 242-243.) This language requires only that the boundaries between the adult and juvenile criminal justice systems be rigorously maintained. We do not read *Olivas* as requiring the courts to subject all criminal classifications to strict scrutiny requiring the showing of a compelling state interest therefor.' [Citation.] Other courts similarly have concluded that a broad reading of *Olivas,* as advocated by defendant here, would 'intrude[] too heavily on the police power and the Legislature's prerogative to set criminal justice policy.' (*People v. Bell* (1996) 45

> Cal.App.4th 1030, 1049 . . . ; see *People v. Owens* (1997) 59 Cal.App.4th 798, 802 . . . ['California courts have never accepted the general proposition that "all criminal laws, because they may result in a defendant's incarceration, are perforce subject to strict judicial scrutiny" ' [citations].)"

Therefore, contrary to Gerald's assertion, the rational basis test applied in *Hernandez* is the proper one, and *Olivas* does not mandate application of the strict scrutiny test. We follow *Hernandez* and reject Gerald's equal protection claim.

B. <u>The Correct Sentence on Count 1</u>

Samuel argues the trial court erred when it sentenced him on count 1 to 15 years to life for attempted premeditated, deliberate murder, rather than to life with a 15-year minimum parole eligibility term. The People concede the sentence imposed on Samuel should have been life with a 15-year minimum parole eligibility term. The People similarly concede the sentence imposed on Gerald for count 1 should have been life with a 14-year minimum parole eligibility, rather than a 14-year-to-life term. We agree and therefore order that, on remand, the court shall correct the minute order and the abstract of judgment to show, as to count 1, Samuel should be sentenced to life with a 15-year minimum parole eligibility term, and Gerald should be sentenced to life with a 14-year minimum parole eligibility term.

C. <u>The Section 654 Claim</u>

Gerald and Samuel assert the court should have stayed execution of the sentences imposed on count 3 (as to Samuel) and count 4 (as to Gerald) under section 654. There was a split of authority over whether section 654 applied to a defendant convicted of both the substantive offense under section 186.22, subdivision (a), and the underlying felony

used to establish the gang crime when, as here, both convictions are based on the same act. Our Supreme Court has recently resolved this split of authority in *People v. Mesa* (2012) 54 Cal.4th 191, holding that section 654 precludes multiple punishment for both the gang crime and the underlying felony used to establish the gang crime, when both convictions are based on the same act. (*Mesa*, at pp. 197-198.)

We are bound by *Mesa*, and therefore conclude that because the gang crime is based on the same acts as counts 1 and 2, defendants may be punished only for one, but not both, offenses. Accordingly, pursuant to section 654, Samuel's sentence on count 3 and Gerald's sentence on count 4 must be stayed.

The Prior Serious Felony Conviction

The People assert the trial court erred when it stayed the five-year enhancement for Gerald's prior serious felony conviction under section 667, subdivision (a)(1), and argue this term should have been added to the indeterminate term imposed for the current convictions. It appears the trial court's rationale for staying this five-year enhancement was that the five-year enhancement had already been imposed in a prior case for which Gerald was serving an determinate term, and because the indeterminate term imposed in this case was to run consecutively to the sentence in the prior case, it was improper to impose the five-year enhancement twice. The People contend that, as this court stated in *People v. Misa* (2006) 140 Cal.App.4th 837, a defendant is "subject to a prior conviction enhancement under section 667, subdivision (a) on [a count requiring imposition of an indeterminate term] even though he also received a similar enhancement relating to [a count on which a determinate term was imposed]." (*Id*. at p. 847.) Gerald has raised no

argument suggesting *Misa* was either incorrect or that it is distinguishable, and we therefore follow *Misa*.

Moreover, this type of sentencing error may be corrected on appeal. "It has been held that '[w]hen the truth of the allegation of conviction of a crime qualifying for a five-year enhancement has been established, it is mandatory that the enhancement be imposed.' [Citation.] Thus, '[c]ourts lack discretion to strike or stay allegations of prior serious felony conviction[s] under section 667, subdivision (a)(1).' " (*People v. Jordan* (2006) 141 Cal.App.4th 309, 319; see also § 1385, subd. (b) ["[t]his section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [§] 667"].) "The failure to impose a five-year section 667, subdivision (a) prior serious felony conviction enhancement is a jurisdictional error which may be corrected for the first time on appeal." (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1562.)

DISPOSITION

The convictions are affirmed. The sentence as to Gerald shall be modified to (1) impose the previously stayed five-year term on the prior serious felony enhancement, (2) stay under section 654 the sentence on count 4 pursuant to *People v. Mesa, supra,* 54 Cal.4th 191, and (3) to reflect that Gerald's term for the conviction on count 1 is life with a minimum 14-year parole eligibility period. As so modified, the sentence as to Gerald is affirmed. The sentence as to Samuel shall be modified to (1) stay under section 654 the sentence on count 3 pursuant to *People v. Mesa, supra,* 54 Cal.4th 191, and (2) to reflect

that Samuel's term for the conviction on count 1 is life with a minimum 15-year parole eligibility period. As so modified, the sentence as to Samuel is affirmed.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.