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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE V. AUSTIN,

Defendant and Appellant.

D061046

(Super. Ct. No. SCD233495)

APPEAL from a judgment of the Superior Court of San Diego County, Howard H. Shore, Judge. Affirmed as modified.

A jury convicted George V. Austin of possession of a firearm by a felon (count 1; Pen. Code,¹ § 12021,² subd. (a)(1)); carrying a loaded firearm in public (count 2, § 12031, subd. (a)(1)); and possession of ammunition by a prohibited person (count 3, § 12316, subd. (b)(1)). The jury also found true that Austin was an active participant in a

¹ Statutory references are to the Penal Code unless otherwise specified.

² Sections 12021 and 12031 were repealed on January 1, 2012, but their provisions were continued without substantive change in new Title 2 (commencing with § 12001), entitled Sentence Enhancements. We thus refer to these sections by their former numbers in this opinion for clarity and convenience.

criminal street gang, within the meaning of section 12031, subdivision (a)(2)(C), and the firearm possessed was not registered to Austin (§ 12031, subd. (a)(2)(F)). Austin admitted he suffered a prior prison term (§ 667.5, subd. (b)).

The court sentenced Austin to prison for eight months on count 1 and one year on the prison term prior. The court also imposed a two-year concurrent sentence for count 3 and stayed Austin's sentence under count 2.³

Austin appeals, contending he was prejudiced when the court granted the prosecution a 10-day continuance; the trial court erroneously admitted certain gang expert testimony; the warrantless collection of his DNA was unconstitutional; and cumulative error mandates reversal. Austin also contends the true finding on the gang member allegation under section 12031, subdivision (a)(2)(C) was in error and his concurrent sentence under count 2 should be stayed per section 654. We agree that his sentence under count 2 should have been stayed, but we otherwise affirm the judgment.

FACTS

Austin was riding in the passenger seat of a rental car driving on El Cajon Boulevard with its trunk open. A San Diego police officer noticed the car and initiated a traffic stop. The car continued driving for a short distance before coming to a stop in a parking lot. Austin emerged from the car as the officer was getting out of his patrol car. Austin, who was wearing a white dress shirt, looked at the officer and ran away.

³ The court sentenced Austin in conjunction with case number SCD233723 in which Austin was also a defendant. Austin's sentence here runs consecutively to his sentence in case number SCD233723.

Aquantes Russell then opened the rear, driver's side door and ran off in the same direction as Austin. Russell was wearing a dark dress shirt. Lawrence Cochran, the driver, remained seated in the car.

Upon searching the vehicle, officers found a handgun holster and loaded magazine on the floorboard of the car, in front of the driver's seat. The magazine and ammunition were for a Russian style nine-millimeter handgun.

Shortly thereafter, Austin and Russell were located hiding in a dumpster. Both were wearing black t-shirts at the time. Austin attempted to stomp on his cell phone when it fell out of his pocket while he was being taken into custody. He also mouthed something to Russell as they were being apprehended.

An unregistered, loaded Russian nine-millimeter handgun was found under a bush located in between where the car was stopped and where Austin was arrested. A gardener who was working in the area directed the officers to the handgun. One of the gardener's coworkers had seen a person throw a dark hooded sweater as the person was running toward an abandoned property. Another witness saw two African-American males emerge from an apartment complex and run toward the vacant lot. One of the men took off his top and threw it in a bush near the apartment complex. The witness also saw one of the men crouch down by a bush. A third witness saw two men walking nervously in the alley behind his house. One of them threw a jacket in a recycle bin. At a curbside show-up, the witness was able to identify Austin and Russell as the men he had seen walking nervously.

Cochran was a major contributor to the DNA mixtures found on the holster and the handgun. A comparison of Austin's DNA to those mixtures was inconclusive. He was, however, excluded as a possible contributor to one of the swabs tested.

San Diego Police Detective Jon Brown testified as a gang expert. He testified that Skyline is a criminal street gang based in southeast San Diego. Both Cochran and Russell are documented Skyline gang members. It was Brown's opinion that Austin was an active participant of Skyline. He further opined that all gang members riding in a car with a gun would have a right to control the gun. And, in such a situation, removing the gun from the car upon being stopped by the police would benefit the gang.

The parties stipulated that Austin had previously been convicted of a felony.

DISCUSSION

I

TRIAL CONTINUANCE

Austin contends the court committed reversible error when it provided a 10-day trial continuance over his objection. He argues there was not good cause for the continuance and he was prejudiced because the continuance allowed the prosecutor to offer the testimony of Tamara Ballard, a forensic DNA analyst. Because we determine Austin has not shown any prejudice, we conclude this argument lacks merit.

Austin had two cases pending in superior court: one with Keshawn Price as a co-defendant (case no. SCD233723) and this case, with Lawrence Cochran as a codefendant. Both cases, along with a third (Price alone), were assigned to the same courtroom for trial. All three cases were on the same "clock," arraignments having been held on

June 13, 2011. The trial court "trailed" this case behind case number SCD233723. That case was submitted to the jury on September 14, 2011.

On September 15, 2011, the trial court found that the good cause justifying the delay of Austin's trial in this case (i.e., Austin's other trial) was no longer applicable. After hearing from both parties, the court granted the prosecution a 10-day continuance because Ballard was on a preplanned vacation and would not be returning until September 23.

"A defendant's right to a speedy trial is a 'fundamental right' secured by both the United States and California Constitutions." (*Bailon v. Appellate Division* (2002) 98 Cal.App.4th 1331, 1344.) To that end, section 1382 directs a trial court to dismiss a felony prosecution not brought to trial within 60 days of arraignment, "unless good cause to the contrary is shown." A trial court's finding of good cause is reviewed for abuse of discretion. (*People v. Memro* (1995) 11 Cal.4th 786, 852; *Baustert v. Superior Court* (2005) 129 Cal.App.4th 1269, 1275.)

Because the California Constitution prohibits reversal of judgments for non-prejudicial error, a defendant asserting a statutory speedy trial claim on appeal "must show that the delay caused prejudice, even though the defendant would not be required to show prejudice on pretrial appellate review." (*People v. Martinez* (2000) 22 Cal.4th 750, 769.)

Generally, prejudice arising from the trial continuance exists if a defendant can show the delay impaired his ability to defend against the charged violation. Examples of prejudice include the unavailability of a witness, the loss of evidence, or the impairment

of a witness's memory. (See *People v. Lowe* (2007) 40 Cal.4th 937, 946.) Here, Austin claims he was prejudiced because the continuance allowed Ballard to testify for the prosecution about DNA evidence, which linked Cochran to the nine-millimeter gun found by the police when they arrested Austin. In other words, the continuance allowed the prosecutor to present evidence that helped establish Austin's guilt. This does not constitute prejudice. "[T]he mere fact that evidence sufficient to establish the prosecutor's case was introduced against the defendant only after his speedy trial rights were violated could never be considered the requisite prejudice to justify reversal of the judgment." (*In re Chuong D.* (2006) 135 Cal.App.4th 1303, 1312 (*Chuong*); italics omitted.)

In his reply brief, Austin acknowledges *Chuong, supra*, 135 Cal.App.4th 1303, but asserts we should ignore it because "*Chuong D.* cites absolutely no Supreme Court or other authority for the above statement and it is illogical on its face." Although it is true that the court in *Chuong* did not cite to any Supreme Court case to support its conclusion that the appellant did not suffer prejudice from the trial continuance, this fact, in and of itself, is not sufficient to cause us to simply ignore *Chuong*. We are more interested in Austin's assertion that *Chuong* is illogical. Unfortunately, he merely offers this conclusion without providing any reasoning whatsoever.

We agree with *Chuong, supra*, 135 Cal.App.4th 1303. Adopting a different rule would "nullify the requirement of 'prejudice' as a separate element, since in the usual case, *all* the evidence against the defendant would be introduced only after the speedy trial violation had occurred." (*Id.* at p. 1312, original italics.) Like the appellant in

Chuong, Austin does not claim surprise as to the content of Ballard's testimony or suggest that his ability to counter that evidence was somehow diminished because of the continuance. We are satisfied the brief, 10-day continuance did not prejudice Austin.

II

GANG TESTIMONY

Austin next contends reversal is required because the court allowed Brown to testify, as part of his expert opinion, that gang members riding in a car together would be aware of the presence of a gun. We disagree.

Evidence Code section 801, subdivision (a) allows an expert witness to testify regarding subject matter that is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (See also *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931.) In the context of criminal street gangs, our high court made clear that an expert witness may testify about " 'the culture and habits of criminal street gangs.' " (*People v. Vang* (2011) 52 Cal.4th 1038, 1044 (*Vang*), quoting *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Further, an expert witness may give his or her opinion in response to hypothetical questions. (*Vang, supra*, at p. 1049.)

Austin contends *Vang, supra*, 52 Cal.4th 1038 is distinguishable from the instant matter because Brown's testimony concerned the ultimate issue of Austin's guilt. We are not persuaded.

Here, we are satisfied that Brown's testimony falls squarely within the parameters of *Vang, supra*, 52 Cal.4th 1038. The prosecutor asked, "In your opinion, if you had three gang members in a car all from the same gang and there was a gun present, would

all the members in that car have the right to control that gun?" Brown replied in the affirmative. After the court overruled Austin's objection, Brown explained:

"In that hypothetical scenario, that would definitely be a gang-related crime.

"I've spoken to dozens of gang members and almost all of them will tell you if they get in cars with other gang members, they're going to know that there's a gun in that car.

"And there's a wide range of reasons why they want to know: if somebody's on probation or parole and they know that police are going to stop them, they want to know 'do I need to take this gun and run because they're going to find it?' 'If I get in a confrontation with other gang members and I want to shoot somebody, where is the gun?'

"And it's not, 'oh, this is my gun.' It's everybody's gang – I mean, it's everybody's gun. That's part of being a gang member. You're all going to put in work together. It's an equal opportunity set.

"So, therefore, like I said, everybody's going to be able to access that gun, and it's going to elevate their status just to do violent acts like that."

Brown's testimony concerned the customs and habits of criminal street gangs and was sufficiently beyond common experience as to properly be the subject of expert witness testimony. (*Vang, supra*, 52 Cal.4th at p. 1044.) The hypothetical question the prosecutor asked Brown was " 'rooted in facts shown by the evidence.' " (*Id.* at p. 1045, quoting *People v. Gardeley, supra*, 14 Cal.4th at p. 618; see also *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1505, 1513-1514 [prosecutor properly stated hypothetical facts, then asked the expert, " 'do you have an opinion as to whether this particular offense was committed for the benefit of, or in association with the criminal street gang?' "].) In summary, it was not error for the court to admit Brown's testimony.

III

THE CONSTITUTIONALITY OF THE COLLECTION OF AUSTIN'S DNA EVIDENCE

Austin challenges the court's denial of his motion to suppress the buccal swab DNA evidence obtained from him under section 296, subdivision (a)(2)(C) without a warrant while he was under arrest, contending it violated the Fourth Amendment's prohibition against unreasonable searches and seizures. Austin notes that the California Supreme Court has granted review on the issue presented here of whether the compulsory collection of biological samples from all adult felony arrestees for DNA testing under the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (the DNA Act; § 295 et seq.; Stats. 1998, ch. 696, § 2; specifically, §§ 296, subd. (a)(2)(C), 296.1, subd. (a)(1)(A)) violates the Fourth Amendment to the United States Constitution. (*People v. Buza* (2011) 197 Cal.App.4th 1424, review granted Oct. 19, 2011, S196200.) Although we acknowledge our high court will ultimately decide this issue, in the interim, we hold that section 296, subdivision (a)(2) does not violate the Fourth Amendment, and, thus, the court properly denied Austin's suppression motion.

A. Background

Austin, under section 1538.5, subdivision (a), moved to suppress the DNA evidence collected from him upon arrest. The trial court denied the motion. The record does not contain Austin's motion, supplemental motion, or the prosecution's opposition. However, the record includes the transcript from the section 1538.5 hearing where the court heard testimony and the parties argued the motion.

Austin was arrested on suspicion of having committed a felony and during the booking process at the police station, a detective attempted to take a buccal swab of the inside of Austin's cheek. Austin vigorously resisted and had to be restrained. He bit off the end of the swab, and when the detective attempted to take a second swab, Austin bit the officer (there was testimony that Austin did not intend to bite the officer). Ultimately, Austin was subjected to a "forced blood draw" wherein a nurse withdrew blood from Austin's arm while his arms were held behind him.

On appeal, Austin does not challenge any specific conduct on the part of the police, but instead, argues section 296.1 is unconstitutional because it violates the Fourth Amendment. We therefore evaluate the constitutionality of the statute in general without regard to the specific circumstances of the extraction of Austin's DNA, specifically the "forced blood draw."

B. Statutory Scheme

Since 1984, California law enforcement officials have been authorized to collect forensic identification blood, saliva or buccal swab samples from persons convicted of certain serious crimes. (See former § 290.2, added by Stats. 1983, ch. 700, § 1.) In 1998, the Legislature enacted the DNA Act, which required "DNA and forensic identification data bank samples" from all persons convicted of specified offenses. (§ 295, subd. (b)(2).)⁴ The purpose of the program created by this legislation "is to assist federal, state,

⁴ "DNA data base and data bank acts have been enacted in all 50 states as well as by the federal government. (See 42 U.S.C. §§ 14131-14134; and see Annot., Validity,

and local criminal justice and law enforcement agencies within and outside California in the expeditious and accurate detection and prosecution of individuals responsible for sex offenses and other crimes, the exclusion of suspects who are being investigated for these crimes, and the identification of missing and unidentified persons, particularly abducted children." (§ 295, subd. (c).)

At the November 2004 general election, California voters amended and added various provisions to the DNA Act by enacting Proposition 69 (the 2004 Amendment). (Voter Information Guide, Gen. Elec. (Nov. 2, 2004), text of Prop. 69, sec. II, p. 135 & sec. III, pp. 135-144; *Haskell v. Harris* (2012) 669 F.3d 1049, 1051 (*Harris*).) Proposition 69 significantly enlarged the scope of persons subject to warrantless DNA seizures by, among other things, providing that beginning January 1, 2009, warrantless seizure of DNA would be required of any adult arrested for or charged with any felony. (§ 296, subd. (a)(2)(C);⁵ *Harris, supra*, at p. 1051; Voter Information Guide, *supra*, text of Prop. 69, sec. 3 adding § 296, subd. (a)(2)(C), p. 137.)

As amended by the 2004 Amendment, the DNA Act provides that such collection of DNA from felony arrestees must take place "immediately following arrest, or during

Construction, and Operation of State DNA Database Statutes (2000) 76 A.L.R.5th 239, 252.)" (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505.)

⁵ Section 296, subdivision (a)(2)(C) provides: "(a) The following persons shall provide buccal swab samples . . . required pursuant to this chapter for law enforcement identification analysis: [¶] . . . [¶] (2) Any adult person who is arrested for or charged with any of the following felony offenses: [¶] . . . [¶] (C) Commencing on January 1 of the fifth year following enactment of the act that added this subparagraph, as amended, any adult person arrested or charged with any felony offense."

the booking . . . process or as soon as administratively practicable after arrest, but, in any case, prior to release on bail or pending trial or any physical release from confinement or custody." (§ 296.1, subd. (a)(1)(A).)⁶ The taking of a DNA sample is mandatory; law enforcement officials lack discretion to suspend this requirement. (§ 296, subd. (d); *People v. King* (2000) 82 Cal.App.4th 1363, 1373.) Further, collection of DNA samples for analysis is ordinarily "limited to collection of inner cheek cells of the mouth (buccal swab samples)." (§ 295, subd. (e).)

After the DNA sample is taken, it is sent to the DNA laboratory of the California Department of Justice (DOJ), which is responsible for the management and administration of the state's DNA and Forensic Identification Database and Data Bank program and which stores, correlates and compares forensic identification samples for use in criminal investigations. (§§ 295, subs. (f), (g), (i)(1)(C); 295.1, subd. (c); *People v. King, supra*, 82 Cal.App.4th at pp. 1368-1370.) The DOJ is required to perform the DNA analysis "only for identification purposes." (§ 295.1, subd. (a).) A genetic profile is created from the sample based on 13 genetic markers known as "junk DNA," which are

⁶ Section 296.1, subdivision (a)(1)(A) provides: "(a) The . . . samples . . . required by this chapter shall be collected from persons described in subdivision (a) of Section 296 for present and past qualifying offenses of record as follows: [¶] (1) Collection from any adult person following arrest for a felony offense as specified in subparagraph [] . . . (C) of paragraph (2) of subdivision (a) of Section 296: [¶] (A) Each adult person arrested for a felony offense as specified in subparagraph [] . . . (C) of paragraph (2) of subdivision (a) of Section 296 shall provide the buccal swab samples . . . required pursuant to this chapter immediately following arrest, or during the booking or intake or prison reception center process or as soon as administratively practicable after arrest, but, in any case, prior to release on bail or pending trial or any physical release from confinement or custody."

referred to as junk because they are not linked to any known genetic traits. (*Harris, supra*, 669 F.3d at p. 1051.) The resulting genetic profiles are so highly individuated that the chance of two randomly selected individuals sharing the same profile are "infinitesimal." (*United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 819 (*Kincade*).

The laboratory uploads each DNA profile into California's DNA data bank, which is part of the Combined DNA Index System (CODIS), a nationwide collection of federal, state, and local DNA profiles that can be accessed by local, state and federal law enforcement agencies and officials. (*Harris, supra*, 669 F.3d at p. 1052; *Haskell v. Brown* (2009) 677 F.Supp.2d 1187, 1190 (*Haskell*).

When the arrestee's DNA profile is uploaded into CODIS, it is compared to DNA samples collected from crime scenes. (*Harris, supra*, 669 F.3d at p. 1052.) In CODIS, the DNA profile does not include the name of the person from whom the DNA was collected or any case-related information. It includes a specimen identification number, an identifier for the agency that provided the sample, and the name of the personnel associated with the analysis. (*Haskell v. Brown, supra*, 677 F.Supp.2d at p. 1190; *Kincade, supra*, 379 F.3d at p. 819, fn. 8.) If a "hit" is made, matching the DNA profile of the convicted offender or felony arrestee to a crime scene DNA sample, the arrestee's DNA sample is tested again for confirmation and, if the match is confirmed, CODIS notifies the submitting laboratory of the identity of the matching DNA profile, and the laboratory sends that information to the appropriate law enforcement agency. (*Harris, supra*, at p. 1052.)

The 2004 Amendment specifically provides that DNA samples and profiles may be released only to law enforcement personnel and contains penalties for unauthorized use of the arrestee's specimen, sample, or DNA profile or unauthorized disclosure of DNA information. (§ 299.5, subds. (f), (i).)

A person whose DNA profile has been included in the DNA data bank may have his or her DNA sample destroyed and the searchable database profile expunged from the data bank program if he or she "has no past or present offense or pending charge which qualifies that person for inclusion within the . . . Data Bank Program and there otherwise is no legal basis for retaining the specimen or sample or searchable profile." (§ 299, subd. (a).) An arrestee ordinarily must wait until the statute of limitations has run before requesting the expungement, and the court must then wait 180 days before it can grant the request. The court's order is not reviewable by appeal or by writ petition, and the prosecutor can prevent expungement by objecting to the request. (§ 299, subds. (b)(1), (c)(1), (c)(2)(D).) In the alternative, a person may seek expungement after being found factually innocent or not guilty of the underlying offense. (§ 299, subds. (b)(3), (b)(4).)

However, an individual may initiate expedited expungement proceedings by filing a request and supporting documentation with the DOJ DNA Database program. (See DOJ website: <<http://oag.ca.gov/bfs/prop69>> [as of Feb. 6, 2013].) DOJ may grant an expungement request if the individual submits a three-page form and provides "sufficient documentation" of his or her identity, legal status, and criminal history to meet the requirements of section 299. (State of Cal. Form DLE 244, <<http://oag.ca.gov/bfs/prop69>> [as of Feb. 6, 2013].) Depending on the grounds for expungement, the

required documentation may be a letter in support of expungement from a district attorney or prosecutor or a certified or file-stamped copy of a court order, opinion, docket, or minute order. If DOJ denies the request, the individual may initiate a court proceeding. (Expungement Request Instructions: <<http://oag.ca.gov/bfs/prop69>> [as of Feb. 6, 2013].) To do so, the individual must file a petition for expungement with proof of service of the petition on the DOJ's DNA laboratory, as well as the trial court and prosecuting attorney of the county where the petitioner was arrested, the conviction was entered, or the disposition was rendered. (§ 299, subd. (c)(1); Judicial Council Form CR-185: <<http://www.courtinfo.ca.gov/forms/documents/cr185.pdf>> [as of Feb. 6, 2013].)

C. Fourth Amendment Principles

"The Fourth Amendment of the United States Constitution, which is enforceable against the states as a component of the Fourteenth Amendment's guaranty of due process of law[, protects] '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" (U.S. Const., 4th Amend.; *People v. Williams* (1999) 20 Cal.4th 119, 125.)

As the text of the Fourth Amendment indicates, "reasonableness" is the ultimate measure of the constitutionality of a governmental search, and whether a particular search meets the reasonableness standard is judged by examining "the totality of the circumstances" and balancing the intrusion on the individual's Fourth Amendment privacy interests against its "promotion of legitimate governmental interests." (*Samson v. California* (2006) 547 U.S. 843, 848; *People v. Robinson* (2010) 47 Cal.4th 1104, 1120.)

Subject only to a few well-delineated exceptions, warrantless searches are per se unreasonable under the Fourth Amendment, and the state bears the burden of showing the search at issue is reasonable and therefore constitutional. (See *People v. Williams, supra*, 20 Cal.4th at p. 127.)

D. Analysis

Applying the "totality of the circumstances" test, balancing the intrusion of the challenged search on privacy interests against its promotion of legitimate governmental interests (*Samson v. California, supra*, 547 U.S. at p. 848), we conclude the compulsory collection of biological samples from all adult felony arrestees for DNA testing and analysis, as authorized by the 2004 Amendment to the DNA Act, does not violate the Fourth Amendment to the federal Constitution.

1. *Intrusion on Felony Arrestees' Privacy Interests*

Nonconsensual extractions of biological samples that may be used for DNA profiling are "searches" entitled to the protection of the Fourth Amendment. (*Schmerber v. California* (1966) 384 U.S. 757, 767-771 [blood]; *People v. Robinson, supra*, 47 Cal.4th at pp. 1119, 1121 [blood]; *Skinner v. Ry. Labor Executives' Ass'n* (1989) 489 U.S. 602, 616-617 [breathalyzer and urine sample]; *Cupp v. Murphy* (1973) 412 U.S. 291, 295 [finger nail scrapings].) This principle also has been applied to the extraction of saliva. (See, e.g., *Padgett v. Donald* (11th Cir. 2005) 401 F.3d 1273, 1280; *Schlicher v. Peters* (10th Cir. 1996) 103 F.3d 940, 942-943.)

Felony arrestees have a "significantly diminished expectation of privacy." (*Harris, supra*, 669 F.3d at p. 1058.) They are often booked and placed in a jail cell

pending arraignment or bail, and they are typically subjected at that point to various degrading physical and emotional intrusions. For example, they may be subjected to visual body cavity searches (*Bell v. Wolfish* (1979) 441 U.S. 520, 558 & fn. 39 [upholding searches where male inmates "must lift [their] genitals and bend over to spread [their] buttocks for visual inspection" and "[t]he vaginal and anal cavities of female inmates also are visually inspected"]); they may be monitored by guards while they shower and use the toilet (*Johnson v. Phelan* (7th Cir. 1995) 69 F.3d 144, 145); and they may have their telephone access restricted (*Valdez v. Rosenbaum* (9th Cir. 2002) 302 F.3d 1039, 1048-1049).

Here, we evaluate Austin's claim that the 2004 Amendment is unreasonable against the fact that, as discussed, felony arrestees have diminished privacy rights.

a. Physical Intrusiveness

We begin by noting that the typical modern DNA collection procedure, the buccal swab to which Austin was subjected in this matter, is much less invasive than the blood test approved in *Schmerber v. California, supra*, 384 U.S. 757. The collection of a buccal swab DNA sample involves the brief insertion of a cotton swab into the person's mouth, whereas the typical blood extraction involves the insertion of a needle into a blood vessel. (*Harris, supra*, 669 F.3d at p. 1059.) Thus, the buccal swab cannot seriously be viewed as an unacceptable physical intrusion. (See *United States v. Amerson* (2d Cir. 2007) 483 F.3d 73, 84, fn. 11 ["If . . . the DNA were to be collected by cheek swab, there would be a lesser invasion of privacy [than a blood draw] because a cheek swab can be taken in seconds without any discomfort."].)

b. Government Use and Retention of DNA Information

Austin challenges as unconstitutionally intrusive the governmental use and retention of the information contained in the DNA sample that was taken from him without a warrant while he was under arrest, as authorized by the 2004 Amendment. However, as already discussed, a DNA profile derived from a DNA sample taken from a felony arrestee under the amended DNA Act contains only 13 junk DNA markers that are not linked to any genetic or physical trait. They are used only to identify the individual. (See § 295.1, subd. (a), discussed, *ante*; *Kincade*, *supra*, 379 F.3d at p. 837 ["[T]he DNA profile derived from the defendant's [DNA] sample establishes only a record of the defendant's identity--otherwise personal information in which the qualified offender can claim no right of privacy once lawfully convicted of a qualifying offense (indeed, once lawfully arrested and booked into state custody)."]; *United States v. Amerson*, *supra*, 483 F.3d at p. 85 ["[A]t least in the current state of scientific knowledge, the DNA profile derived from the offender's blood sample establishes only a record of the offender's identity."].)

Given the minimal amount of genetic information currently contained in a DNA profile, we are persuaded that DNA collected, used, and retained under the amended DNA Act is substantially indistinguishable from traditional fingerprinting as a means of identifying arrestees and, incidentally, tying them to criminal investigations. We acknowledge that DNA collected from felony arrestees is susceptible to misuse. However, as already noted, the DNA Act, as amended by the 2004 Amendment, carefully and sharply limits the range of permissible uses of the DNA information obtained and

imposes significant criminal penalties upon those who violate those limitations. (See §§ 295.1, subd. (a); 299.5, subds. (f), (i).) Thus, we conclude that the collection, use, and retention of information from junk DNA markers as authorized by the amended DNA Act does not significantly intrude upon a felony arrestee's privacy.

2. *Promotion of Legitimate Governmental Interests*

On the other side of the Fourth Amendment balance, we weigh four legitimate governmental interests: identifying arrestees, solving past crimes, preventing and solving future crimes, and exonerating the innocent.

a. Identification of Arrestees

The primary purpose of the amended DNA Act is to identify arrestees. (See § 295.1, subd. (a) ["The Department of Justice shall perform DNA analysis . . . pursuant to this chapter only for identification purposes."].) This longstanding interest is legitimate. (*Jones v. Murray* (4th Cir. 1992) 962 F.2d 302, 306 ["when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest"]; see also *United States v. Kriesel* (9th Cir. 2007) 508 F.3d 941, 947 ["[T]racking . . . identity is the primary consequence of DNA collection."].)

b. Solving Past Crimes

By accurately identifying felony arrestees, the DNA database helps promote the legitimate and compelling governmental interest in solving past crimes. When California voters passed Proposition 69, enacting the 2004 Amendment to the DNA Act, they expressly recognized the critical importance of expanding the DNA data bank program to include collection and analysis of DNA samples from felony arrestees to promote the

expeditious solving of crimes: "The people of the State of California do hereby find and declare that: [¶] . . . [¶] (b) There is a critical and urgent need to provide law enforcement officers and agencies with the latest scientific technology available for accurately and expeditiously identifying, apprehending, arresting, and convicting criminal offenders. . . ." (Voter Information Guide, *supra*, text of Prop. 69, sec. II, subd. (b), p. 135.)

If a felony arrestee has committed crimes other than the crime he or she is currently suspected of committing, those past crimes must be prosecuted as soon as possible, while victims and witnesses can be located and before memories fade. In this respect the collection and carefully restricted use of identifying DNA information taken from felony arrestees also promotes the legitimate governmental interest in the accurate and expeditious solving of past crimes.

In addition, "by contributing to the solution of past crimes, DNA profiling of qualified federal offenders helps bring closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large." (*Kincade, supra*, 379 F.3d at p. 839.)

c. Preventing and Solving Future Crimes

Implementing the 2004 Amendment provides law enforcement agencies with a catalogue of arrestees' DNA, a tool that potentially will help solve and prevent future crimes. The mere existence of the DNA database creates a strong deterrent effect, and a felony arrestee from whom a DNA sample has been collected pursuant to the 2004 Amendment will be less likely to commit another crime in the future because he or she

knows that the collected DNA is catalogued in the DNA database. (See, e.g., *Kincade*, *supra*, 379 F.3d at pp. 838-839 [mandatory DNA profiles of convicted felons "fosters society's enormous interest in reducing recidivism"]; *Jones v. Murray*, *supra*, 962 F.2d at p. 311 ["[T]he Commonwealth's interest in combating and deterring felony recidivism justifies the involuntary taking of the sample and the creation of the DNA data bank as reasonable in the context of the Fourth Amendment."].)

d. Exonerating the Innocent

Last, by helping identify the actual perpetrators of crimes, the DNA database allows law enforcement officers to eliminate innocent persons from suspect lists. (See *United States v. Sczubelek* (3d Cir. 2005) 402 F.3d 175, 185 ["[T]he DNA samples will help to exculpate individuals who are serving sentences of imprisonment for crimes they did not commit and will help to eliminate individuals from suspect lists when crimes occur."].) The privacy intrusion caused by a buccal swab of a felony arrestee must be viewed as minor compared to society's compelling goal of ensuring that innocent people are exonerated.

3. *Balancing*

In *Harris*, *supra*, 669 F.3d at page 1058, the Ninth Circuit recently explained that "[t]he 2004 Amendment does not provide the Government carte blanche to take buccal swabs from anyone and everyone. It applies only to persons arrested on suspicion of having committed a felony. Before individuals can be required to give a buccal swab DNA sample under the 2004 Amendment, a law enforcement officer must determine that

there is probable cause to suspect that person of having committed a felony." (Italics omitted.)

We conclude that the legitimate governmental interests promoted by the warrantless collection of DNA samples, including buccal swab samples, from felony arrestees who are taken into custody upon probable cause, far outweigh the arrestees' privacy concerns. Our conclusion is based on the following five reasons: The felony arrestee's diminished privacy interests; the de minimis nature of the physical intrusion involved in the collection of a buccal swab DNA sample; the carefully limited scope of the DNA information that is extracted; the strict limits on the range of permissible uses of the DNA information obtained and the significant criminal penalties imposed upon those who violate those limitations; and the strong law enforcement interests in obtaining arrestees' identifying information, solving past and future crimes, deterring future criminal acts, and exonerating the innocent.

Accordingly, we hold that the 2004 Amendment does not violate the Fourth Amendment. Thus, we also conclude the court properly denied Austin's suppression motion.

IV

CUMULATIVE ERROR

Austin contends the cumulative effect of the asserted errors rendered the trial so unfair as to violate his federal and state constitutional rights warranting reversal of the judgment. Because we conclude no other errors exist, this cumulative error argument necessarily fails. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 377 [no cumulative

effect of errors when no error]; *People v. Butler* (2009) 46 Cal.4th 847, 885 [rejecting cumulative effect claim when court found "no substantial error in any respect"].)

V

GANG ALLEGATION

The jury found Austin guilty of carrying a loaded weapon (count 2). In connection with that crime, the jury found that Austin did so while he was an active participant in a criminal street gang. The jury also found the gun Austin possessed was not registered to him. Both of these circumstances elevate count 2, ordinarily a misdemeanor, to a felony. Relying on *In re Jorge P.* (2011) 197 Cal.App.4th 628 (*Jorge P.*), Austin maintains the active gang participant circumstance must be reversed because it is not supported by any conduct beyond that supporting his conviction. The People counter, arguing that *Jorge P.* was wrongly decided.

We agree with the People that *Jorge P.*, *supra*, 197 Cal.App.4th 628 was wrongly decided.⁷

In *People v. Robles* (2000) 23 Cal.4th 1106 (*Robles*), our Supreme Court held proof the defendant violated section 186.22, subdivision (a) is required to elevate a violation of section 12031, subdivision (a)(1) from a misdemeanor to a felony. In *Robles*, the defendant was charged with possession of a loaded firearm in public as a felony under

⁷ We are aware that Division 3 of this court recently determined *Jorge P.*, *supra*, 197 Cal.App.4th 628 was wrongly decided and addressed the very issue currently before us. (See *People v. Infante* (2012) 209 Cal.App.4th 987, 991-992.) Our Supreme Court granted review on *Infante* on January 16, 2013 (S206084) and will ultimately answer this issue. In the interim, we largely adopt the reasoning in *Infante* and disagree with *Jorge P.* as more fully discussed, *ante*.

subdivision (a)(2)(C) of section 12031. As the court noted, "That subdivision elevates from a misdemeanor to a felony the offense of carrying a loaded firearm in public when committed by 'an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22' [Citation.]" (*Robles, supra*, at p. 1109; italics omitted.) The court then sought "to ascertain what the Legislature meant by [an active participant in a criminal street gang, as defined in section 186.22(a)]." (*Robles, supra*, at p. 1109.)

The court construed the language in section 12031, subdivision (a)(2) "as referring to the substantive gang offense defined in section 186.22(a)." (*Robles, supra*, 23 Cal.4th at p. 1115.) As a result, the court determined possession of a loaded firearm in public is punished as a felony under section 12031, subdivision (a)(2)(C) "when a defendant satisfies the elements of the offense described in section 186.22(a). Those elements are [1] 'actively participat[ing] in any criminal street gang [2] with knowledge that its members engage in or have engaged in a pattern of criminal gang activity' and [3] 'willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang.' [Citation.]" (*Robles, supra*, at p. 1115.) In other words, a violation of section 186.22, subdivision (a) is a prerequisite to elevating a violation of section 12031 from a misdemeanor to a felony under subdivision (a)(2)(C) of the latter section.

In *People v. Lamas* (2007) 42 Cal.4th 516 (*Lamas*), the court again confronted the interplay between section 186.22, subdivision (a) and section 12031, subdivision (a)(2)(C). This time the issue was whether possession of a loaded firearm in public--again, normally a misdemeanor--could serve as the felonious criminal conduct necessary

to fulfill the third element of a section 186.22, subdivision (a) violation. (*Lamas, supra*, 42 Cal.4th at pp. 519-520.) In connection with the gang charge, the jury in *Lamas* had been instructed, in pertinent part: " '[f]elonious criminal conduct includes carrying a loaded firearm in a public place by a gang member . . . or . . . carrying a concealed firearm by a gang member.' " (*Id.* at pp. 521-522, italics and fn. omitted.) The problem with this instruction was evident. It used a misdemeanor offense as the felonious criminal conduct necessary to prove the defendant violated the gang statute, a clear example of bootstrapping.

The Supreme Court corrected the situation by holding "all of section 186.22(a)'s elements must be satisfied, including that defendant willfully promoted, furthered, or assisted felonious conduct by his fellow gang members before section 12031(a)(2)(C) applies to elevate defendant's section 12031, subdivision (a)(1) misdemeanor offense to a felony." (*Lamas, supra*, 42 Cal.4th at p. 524; italics omitted.) The court then restated the rule: "[S]ection 12031(a)(2)(C) applies only after section 186.22(a) has been completely satisfied by conduct distinct from the otherwise misdemeanor conduct of carrying a loaded weapon in violation of section 12031, subdivision (a)(1)." (*Lamas, supra*, at p. 524; italics omitted.) Thus, a defendant's misdemeanor possession of a firearm "cannot satisfy section 186.22(a)'s third element, felonious conduct, and then be used to elevate the otherwise misdemeanor offense to a felony." (*Lamas, supra*, at p. 524.) The court held the same logic applies when the underlying firearm offense is possession of a concealed firearm in public by an active participant in a criminal street gang in violation of section 12025, subdivisions (a)(2) and (b)(3). (*Lamas, supra*, at pp. 524-525.)

The interplay between section 186.22, subdivision (a) and the felony elevating provision in section 12031 again arose in *Jorge P.*, *supra*, 197 Cal.App.4th 628. The charges filed in *Jorge P.* presented a new variation on the issues considered in *Robles*, *supra*, 23 Cal.4th 1106 and *Lamas*, *supra*, 42 Cal.4th 516. The minor in *Jorge P.* was charged with possession of a loaded firearm in public as a felony, based on his active participation in a criminal street gang (§ 12031, subds.(a)(1), (a)(2)(C)), like the defendants in *Robles* and *Lamas*. Unlike both those cases, the minor also was charged with a separate offense--minor in possession of a firearm (§ 12101, subd. (a)(1))--which the prosecution argued could serve as the felonious criminal conduct necessary to establish a violation of section 186.22, subdivision (a), and thus permit charging of the violation of section 12031, subdivision (a)(1) as a felony under subdivision (a)(2)(C) of that section. (*Jorge P.*, *supra*, 197 Cal.App.4th at pp. 630, 632.) The juvenile court found both gun charges true. (*Id.* at p. 631.)

The appellate court in *Jorge P.* noted the crime of minor in possession of a firearm is punishable as a misdemeanor or a felony, and remanded that count to the juvenile court to determine whether it found the charge to be a felony or a misdemeanor. (*Jorge P.*, *supra*, 197 Cal.App.4th at p. 632.) Notwithstanding the decision to remand that count to the trial court, the appellate court proceeded to determine whether the evidence supported a felony charge of possession of a loaded firearm in public by an active gang participant, in the event the trial court on remand finds the charge of minor in possession of a firearm was a felony. Therefore, the issue became whether the conduct underlying a felony offense of minor in possession of a firearm (based on possession of the same firearm)

could support a finding the minor violated section 186.22, subdivision (a), thus elevating the misdemeanor offense of possession of a loaded firearm in public to a felony. (*Id.* at pp. 631-632.)

To resolve the issue, the court in *Jorge P.* noted *Lamas, supra*, 42 Cal.4th at page 524, "alluded to" a distinction between conduct and offenses. (*Jorge P., supra*, 197 Cal.App.4th at p. 636.) The court then concluded "conduct" and "offense" are not synonymous. (*Ibid.*) As a result, the court found the minor's arguably felonious conduct of possessing a firearm in violation of section 12101, subdivision (a)(1), was not distinct from his misdemeanor conduct of possessing the same weapon in violation of section 12031, subdivision (a)(1), and could not therefore be used as the felonious criminal conduct necessary to prove a violation of section 186.22, subdivision (a), a prerequisite to elevating the misdemeanor violation of section 12031, subdivision (a)(1) to a felony. (*Jorge P., supra*, at p. 638.)

We respectfully disagree. If a defendant engages in felony conduct that would otherwise subject him to prosecution for a violation of section 186.22, subdivision (a), we see nothing in *Lamas, supra*, 42 Cal.4th 516, to prevent the prosecution simply because that same felonious criminal conduct could, under a different penal statute, be charged as a misdemeanor. We do not think the allusion in *Lamas* to a distinction between a criminal offense and felonious criminal conduct compels the result in *Jorge P., supra*, 197 Cal.App.4th 628.

The court in *Lamas, supra*, 42 Cal.4th 516, sought to prevent the prosecution from bootstrapping a misdemeanor into a felony. There, the court was not presented with the

present situation, where the defendant's possession of the firearm involved felonious criminal conduct independent of any violation of section 186.22, subdivision (a): possession of a firearm by a felon. A misdemeanor firearm charge is not pulled up by its own bootstraps into a felony when a violation of section 186.22, subdivision (a)--a prerequisite to elevation of the offense to a felony--is supported by avowedly felonious criminal conduct (possession of a firearm by a convicted felon). This is true even where possession of the firearm could have been charged as a misdemeanor under a different statute.

Also, the court in *Lamas* stated the prosecution's obligation to prove felonious criminal conduct distinct from a defendant's otherwise misdemeanor conduct of carrying a loaded or concealed weapon in public "applies to the substantive charge that defendant is an active participant of a criminal street gang (§ 186.22(a)) and to the gun offenses that elevate to felonies only upon proof that defendant satisfied *Robles's* requirements under section 186.22(a)." (*Lamas, supra*, 42 Cal.4th at p. 520.) Although *Jorge P.* did not involve a charge of 186.22, subdivision (a) (*Jorge P., supra*, 197 Cal.App.4th at p. 630), the reasoning and conclusion reached therein would appear to prohibit a defendant from being convicted of violating section 186.22, subdivision (a) where the underlying felonious criminal conduct involved a convicted felon's possession of a firearm (§ 12021, subds. (a)(1), (2)) if the firearm was possessed in public and was loaded or concealed on the defendant's person, even if the defendant was not charged with violating sections 12025 or 12031. This would be true because (1) under *Jorge P.*, such felonious conduct would not be considered distinct from the otherwise misdemeanor conduct of possessing

a loaded or concealed firearm in public (*Jorge P.*, *supra*, at p. 638), and (2) under *Lamas*, the rule that the felonious criminal conduct necessary to find a violation under section 186.22, subdivision (a) must be distinct from a defendant's otherwise misdemeanor conduct of possessing a loaded firearm in public applies to the substantive gang charge, as well as to misdemeanor firearm offenses elevated to felony status upon proof the defendant violated section 186.22, subdivision (a) (*Lamas*, *supra*, 42 Cal.4th at p. 524). We do not think the Legislature or our Supreme Court intended such a result.

The fact that possession of a loaded or concealed firearm in public would ordinarily be considered a misdemeanor should not be determinative of whether an inarguable felony possession of a firearm may serve as the felonious criminal conduct necessary to support a charge of violating section 186.22, subdivision (a). This is especially apt given the Legislature expressly provided that a "pattern of criminal gang activity," a prerequisite for finding a group is a criminal street gang (§ 186.22, subd. (a)), may be shown by evidence members of the gang violated section 12021. (§ 186.22, subd. (e)(31).) It would seem then that a violation of section 12021 may serve as the felonious criminal conduct necessary to support a charge of violating section 186.22, subdivision (a). It would thus defy reason to declare a group is a criminal street gang if its members violate section 12021, but hold a violation of section 12021 by a gang member does not qualify as felonious criminal conduct for purposes of finding the gang member is an active participant of the gang. Neither would reason dictate a violation of section 12021 cannot serve as the felonious criminal conduct necessary to find a violation

of section 186.22, subdivision (a) merely because under some other statute the possession of the firearm may be punished as a misdemeanor, rather than a felony.

Accordingly, we conclude the *Lamas* court, in holding the felonious conduct necessary to demonstrate a violation of section 186.22, subdivision (a) must be distinct from the otherwise misdemeanor conduct of possessing a loaded (or concealed) firearm, meant nothing more than the otherwise misdemeanor violation of section 12025 or section 12031 may not serve as the felonious criminal conduct necessary to prove a violation of section 186.22, subdivision (a). (*Lamas, supra*, 42 Cal.4th at p. 524.) In other words, a misdemeanor cannot be considered felonious criminal conduct. The felonious criminal conduct required by section 186.22, subdivision (a) must be conduct that does not depend upon the existence of a violation of that section to itself be elevated from misdemeanor to felony status. Because the prosecution in the present case introduced evidence of Austin's felonious criminal conduct (felon in possession of a firearm), there was sufficient evidence of a violation of section 186.22, subdivision (a). There was no error.

VI

SENTENCE FOR COUNT 3

Austin contends, and the People concede, that his sentence under count 3 must be stayed under section 654. We agree.

In general, section 654⁸ prohibits multiple punishment for an indivisible course of conduct even though it violates more than one statute. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Whether a course of conduct is indivisible depends on the intent and objective of the actor. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) "If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551.)

During closing argument, the prosecutor said: "If you find knowing possession, if you find that the defendant knew that he had that gun or aided and abetted in having possession of that gun, then [he] is guilty of Counts 1, 2, and 3." After the jury found Austin guilty as charged, the court imposed an eight-month sentence for count 1, which was to be served consecutively to his sentence in case number SCD233723. It then imposed a concurrent two-year sentence for count 3. "While there may be instances when multiple punishment is lawful for possession of a firearm and ammunition, the instant case is not one of them." (*People v. Lopez* (2004) 119 Cal.App.4th 132, 138.) Accordingly, Austin's sentence for count 3 should be stayed under section 654.

⁸ Section 654 provides in pertinent part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

DISPOSITION

The judgment is modified to stay Austin's two-year sentence for count 3 (possession of ammunition by a prohibited person) per section 654. The court is directed to amend the abstract of judgment to reflect modification and to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

HALLER, J.