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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CLAUDIO ROLANDO JIMENEZ et al.,

Defendants and Appellants.

D066212

(Super. Ct. No. FBA1100613)

APPEALS from judgments of the Superior Court of San Bernardino County,
Rodney A. Cortez, Judge. Judgments affirmed as modified.

John Patrick Dwyer, under appointment by the Court of Appeal, for Defendant and
Appellant, Claudio Rolando Jimenez.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and
Appellant, Rolando Guadalupe Gamez.

Kamala D. Harris, Attorney General, Dane R. Gillette and Julie L. Garland,
Assistant Attorneys General, William M. Wood and Marilyn Lindsay George, Deputy
Attorneys General, for Plaintiff and Respondent.

A jury convicted codefendants Claudio Rolando Jimenez and Rolando Guadalupe Gamez of first degree murder (Pen. Code,¹ § 187, subd. (a); count 1), conspiracy to commit murder (§ 182, subd. (a); count 2) and active participation in a criminal street gang (§ 186.22, subd. (a); count 3). It found true allegations that as to count 1, a principal personally used and discharged a firearm, causing another's death (§ 12022.53, subds. (d) & (e)(1)), and that the defendants committed the offenses in counts 1 and 2 for the benefit of a criminal street gang. (§ 186.22, subd. (b)(5).) The defendants both received an indeterminate term of 25 years to life for the count 1 murder, a consecutive term of 25 years to life for the firearm allegation, a consecutive three-year determinate upper term for the count 3 offense, and a stayed term of 25 years to life for the count 2 conspiracy.

Jimenez and Gamez separately appeal. Jimenez contends the prosecutor committed prejudicial misconduct during her rebuttal closing argument by shifting the burden of proof to the defense, or alternatively his defense counsel was prejudicially ineffective by failing to object to the prosecutor's rebuttal argument. He further contends there is insufficient evidence to prove the predicate offenses for the count 3 gang crime conviction and true findings for the gang allegations on counts 1 and 2. Finally, Jimenez contends his three-year sentence for active participation in a criminal street gang must be stayed because that conviction was based on the count 1 murder. Gamez contends there is no independent nonaccomplice corroborating evidence connecting him to any of the

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

crimes, and thus there is insufficient evidence he aided and abetted the murder, conspired to commit murder, or actively participated in the gang killing. He joins Jimenez's arguments to the extent they benefit him. The People concede that the defendants' three-year sentences for actively participating in a criminal street gang should be stayed under section 654. We agree with the People's concession and order the defendants' sentences modified to stay the three-year terms on count 3. We otherwise affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND²

Prosecution Evidence

In May 2009, Tara and Octavio Cortez threw a birthday party for Tara's brother, whose birthday was on May 15. The party was held at their house at 27740 Crestview, located in the Heights area of Barstow. At some point that night, Gilbert Chavez, Gamez, Jimenez and Tomas Quintana arrived in the same car, a Nissan Altima. Chavez, also known as "Do Wrong," was a member of the Los Gents criminal street gang, as were Jimenez, also known as "Monstro" or "Mon," Gamez, who was also known as "Rolo," and Quintana, who was also known as "Sapo" or "TJ." The men stood together drinking from a large bottle of tequila, and it appeared to one of the partygoers, Theresa Ramos, that the men were trying to get Chavez drunk. Ramos heard Jimenez tell Chavez to sit down and be quiet, and there would be no problems in the house. According to Ramos, the men left together in two separate cars.

² Much of the factual background is taken from witness interviews conducted by Barstow Police Detective Leo Griego. Many of the witnesses changed their stories at trial.

On the morning of May 16, 2009, Chavez's body was found on a dirt road in a desert area of Barstow Heights, less than a mile away from the Cortezes' house.³ He had been shot by a revolver in the left wrist and in the back of his head. Just below his body were tire impressions, which a criminalist later determined could have been consistent with one of the tires on Sanchez's Nissan Altima. Crime scene evidence examiners found a spent bullet projectile at the scene, but no bullet casings. The existence of the projectile and blood evidence indicated that Chavez died at the scene; he was not brought and dumped there.

After Chavez's murder, Jimenez showed up at Ramos's apartment, told her he knew her brother, and asked her if he could hide out there because he was "on the run."

Detective Griego interviewed several witnesses to events of the night before Chavez's murder, including some attendees from the Cortezes' party. Regina Chavira reported to him that she drove Chavez to her grandfather's house on Leona Street, where Chavez received a telephone call and then was picked up by someone.⁴ Jeremiah Baca told Detective Griego that he met Chavez at the Leona Street house, then accompanied Chavez to a trailer home behind a bar. While there, Baca saw Chavez leave in Sanchez's Nissan Altima with Gamez, Jimenez, and Quintana, who were armed with a shotgun and

³ The crime scene evidence technician testified the body was .8 miles from the Cortezes' residence.

⁴ At trial, Regina Chavira testified that on May 15, 2009, she picked up Chavez and brought him to her father's house.

a .38-caliber revolver.⁵ During Baca's interview with Griego, Baca's eyes began to tear up and he told Griego he was "scared as fuck." Baca later told Detective Griego that at trial he was going to deny remembering anything. Adam Chavez also reported that Chavez left the Leona Street house with Jimenez and Gamez in a car similar to the Nissan Altima. Detective Griego confirmed that a 2004 Nissan Altima registered to Sanchez and her husband was the vehicle shown to witnesses in pictures during the trial. He testified that a surveillance video caught a car having a military sticker on the lower driver's side of the windshield slowly drive down a dirt road that was near the location of Chavez's body and out of the camera's view, then depart at a high rate of speed.

Detective Griego pointed out that just after Chavez's murder, Jimenez obtained a tattoo on his right cheek of the letters "VSSG" and a picture of a revolver below. He testified that these tattoos signified Jimenez broadcasting his membership of the Varrio South Side Gents and his pride in the fact he was a shooter; that he had used a revolver in a killing. Based on the crime scene evidence, Detective Griego believed a revolver fired the two bullets that hit Chavez.

⁵ Baca did not tell Detective Griego which person had what weapon. Detective Griego's testimony was that Baca reported seeing "people that were armed with a shotgun and a .38[-caliber] revolver and that [Chavez] entered a vehicle with those people." Baca then identified the people as Jimenez, Gamez and Quintana. Baca testified at trial that he saw Chavez at his cousin's house and saw Chavez leave, but did not recall much of anything else or what he told Detective Griego.

Quintana's Statements to Police

Detective Griego interviewed Quintana in September 2010. Quintana told the detective that the only reason he agreed to be interviewed was to protect his family. According to Quintana, Chavez had gotten involved in something in Victorville; Chavez had "pulled something off" and when he returned he told Quintana he was "in a situation" and needed help. Quintana told the detective that he did not turn Chavez away, and Chavez told Quintana he had some family in Los Angeles he wanted to contact. Chavez eventually came to Quintana's house with two men and a female, and they discussed an uncle in Los Angeles who was talking to some people. At some point, Chavez and the others left.

Quintana told Detective Griego that about that time he received a phone call from Jimenez, who asked him if he had talked to Chavez and that there was a situation. Jimenez told Quintana they needed to find Chavez and talk to him, so Quintana got in Jimenez's car to look for Chavez but they could not find him. Quintana returned home, and then heard that Chavez was "behind Leona," so he went there. When he arrived, Chavez was "tripping" and pulled a long shotgun on Quintana, saying, "Ok mother fucker, you either with me or against me," and that his uncle from Los Angeles was "taking care of this." Chavez then received a phone call from some men and cussed at them. Quintana asked Chavez what was going on and what they were going to do about the situation, saying, "Are they coming for you? Are they coming for the hood? Are we

going to be put on green light[?]"⁶ Chavez responded that he would take care of it, and they should go drinking. The two men who had previously been at Quintana's house showed up in a grey Mustang with a bottle of vodka and they and Chavez began drinking. Quintana drank a beer with them.

At some point, Chavez spoke to family members who told him to go get his cousin, or they would not be there for him. Chavez declined, and Quintana saw he was "talking shit" to his family. Quintana explained to Detective Griego that there were phone calls and conversations "in the hood" about what to do with Chavez, and "[w]hether we were going to have his back or if we were just going to turn our back on him." Quintana told Detective Griego: "So after the party they, the phone call came, who's, who's gonna do it.? It is either you guys or us. Ah, me and [Gamez] both said, "Nah, I ain't doing this." [¶] . . . [¶] . . . I'm not doing this. They said alright then, you fuckers, you guys go too. [¶] . . . [¶] . . . So then we're like what do you mean you guys go too. And then you mother fuckers are going to get smoked too. You think we're playing? Na, we ain't playing. So then [Jimenez] says, "Check this out. I'll take care of

⁶ Detective Griego testified that a "green light" is a term commonly used in criminal street gangs for a target put on a person or gang when the person or gang has disrespected another gang or violated the gang's beliefs. He stated, "That means they are subject to be [*sic*] killed on sight, and it could be for a variety of reasons, but it's someone that's marked with an order for that person to be killed." Detective Griego explained that when a gang has been told to discipline its own gang member, the person that performs the discipline takes pride or believes he obtains status in doing that; the gang members "don't want to have a green light put on them and be subject to the same type of . . . outcome that the other gang member suffered, in this case, . . . Chavez."

everything, let's say we all did it you know what I'm saying and you guys go on about your business. I'll do the favor for you guys."⁷

Quintana told Detective Griego that he, Jimenez, Gamez and Chavez got in the car, and Jimenez drove out to the desert. Quintana told Chavez to run, and when he opened the back door and tried to jump out, Jimenez jumped out of the car and shot him with a .38-caliber revolver. Chavez tried to run, but Jimenez chased him down and shot him again. When asked about who called Jimenez, Quintana explained, "It's a political beef, that's the whole reason this shit started in the first place."

Defense Evidence

Quintana testified that he told Detective Griego the story about being present when Chavez was murdered only as a "way to get out." Though it was true that he and Gamez were at the Cortezes' party, Quintana testified he lied when he told the detective that he left in the vehicle with Chavez and the other men, and lied when he claimed he told Chavez to run and saw Jimenez shoot him. According to Quintana, he actually knew no specific facts about Chavez's murder. He testified he was not aware of anything Gamez or Jimenez did to conspire to kill Chavez.

⁷ Quintana initially denied getting in the car with the other men to Detective Griego during the interview. He related to the detective that others at the party were talking about what they were going to do about the situation, and "that's when the phone call came. You guys take care of it or we will." Quintana said, "I'm not gonna pull the trigger, you know what I'm saying, on my brother? I refuse to be a part of it., you know what I'm saying? [Gamez] knew I was scared because [Gamez] was scared too. So I know he didn't want to do that. So we left I did not get in the car to go shoot this dude." After Detective Griego accused Quintana of lying and pressed him to tell the truth, Quintana eventually admitted to getting in the car and driving to the desert with Chavez and the others.

DISCUSSION

I. *Jimenez's Appeal*

A. *Claim of Prosecutorial Misconduct*

During her rebuttal argument, the prosecutor made the following comments concerning the count 1 murder charge: "Count 1. I told you we talked about that lesser. Count 1 does have a lesser of second degree murder. What you have to believe to choose second degree murder, you have to believe that the defendants murdered Gilbert Chavez but did not act willfully, deliberately and without premeditation but they did. So there are no lessers. It's just Count 1, first degree murder and then Counts 2 and 3 but those counts have lessers. ¶¶ What do you have to believe to chose not guilty? You have to believe that the defendants did not take the parties to the Heights. You have to believe that they did not drink with Gilbert Chavez until he was three times the legal limit. You have to believe that the defendants did not take Gilbert Chavez out of [*sic*] the desert. You have to believe that the defendants did not shoot him in the head, and you have to believe that the defendants did not leave the scene of the murder."

Jimenez contends these comments impermissibly shifted the burden of proof to the defense and consequently violated his state and federal due process rights. He argues that jurors need not find or believe certain facts to reject the prosecution's theory, and maintains "there is a reasonable likelihood the jury understood the prosecutor to be saying that, to have a reasonable doubt, the jurors had to *believe* certain facts—not simply have a reasonable doubt about the prosecution's evidence." According to Jimenez, "[g]iven the contradictory accounts in Quintana's police statement and trial testimony,

some jurors might not know what to believe about who was involved in the murder" and they "would have a reasonable doubt and be required to acquit, even though they did not meet the prosecutor's 'have-to-believe' criterion for acquittal." Jimenez asks us to reject the holding in *People v. King* (2010) 183 Cal.App.4th 1281, in which the court rejected a similar argument in connection with a prosecutor's opening statement that jurors had to believe the victim and eyewitness were lying to find the defendant not guilty of a sexual assault.

" 'Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct infects the trial with such " 'unfairness as to make the resulting conviction a denial of due process.' " [Citation.] By contrast, our state law requires reversal when a prosecutor uses "deceptive or reprehensible methods to persuade either the court or the jury" [citation] and " 'it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct' " [citation]. To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm.' [Citation.] A claim will not be deemed forfeited due to the failure to object and to request an admonition only when 'an objection would have been futile or an admonition ineffective.' " (*People v. Thomas* (2012) 54 Cal.4th 908, 937.)

As a threshold matter, defense counsel forfeited any claim of prosecutorial misconduct in connection with these remarks by failing to assign misconduct to the prosecutor's statement at trial and object that the prosecutor had shifted the burden of

proof to the defense. (Accord, *People v. Thomas*, *supra*, 54 Cal.4th at pp. 938-939.) Counsel has an obligation to state the "*specific ground* for an objection in order to preserve the issue for appeal." (*Id.* at p. 938, citing *People v. Stanley* (2006) 39 Cal.4th 913, 952.) Jimenez maintains an objection was not required under the circumstances because a curative instruction would not have ameliorated the harm.⁸ However, Jimenez provides no record basis, and we perceive no reason, to conclude that would be the case. Under the circumstances, we reject the contention. (*People v. Panah* (2005) 35 Cal.4th 395, 462 [defendant seeking to rely on an exception to the forfeiture doctrine that an admonition would have been insufficient to cure prosecutorial misconduct "must find support for his or her claim in the record"].)

Anticipating our conclusion as to forfeiture, Jimenez also contends his counsel was prejudicially ineffective by failing to object to the prosecutor's remarks. However, we conclude the contention has no merit because as we explain, it is not ineffective assistance to withhold an objection to proper rebuttal argument. (See *People v. Osband* (1996) 13 Cal.4th 622, 696 [addressing merits of prosecutorial misconduct argument to resolve ineffective assistance claim].) "A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. [Citation.] Comments on the state of the

⁸ Jimenez acknowledges that this court will presume jurors follow the trial court's instructions, but then cites authorities, including *People v. Fritz* (2007) 153 Cal.App.4th 949, for the proposition that an appellate court must take into account the jurors' inability to disregard a prosecutor's improper argument despite admonitions. *Fritz* did not involve a prosecutor's closing argument, but the trial court's attempt to provide a limiting instruction on the jury's consideration of what the appellate court held was inadmissible, highly prejudicial, prior crimes evidence in an otherwise "painfully thin" case. (*Id.* at pp. 952-953, 962-963.) The circumstances of these cases are not comparable.

evidence or on the defense's failure to call logical witnesses, introduce material evidence, or rebut the People's case are generally permissible." (*People v. Woods* (2006) 146 Cal.App.4th 106, 112.) And "even otherwise prejudicial prosecutorial argument, when made within proper limits in rebuttal to arguments of defense counsel, do[es] not constitute misconduct." (*People v. McDaniel* (1976) 16 Cal.3d 156, 177.) "However, a prosecutor may not suggest that 'a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.'" (*Woods*, at p. 112.)

Here, the prosecutor did not improperly attempt to shift the burden of proof on any issues to defendant, and there was no misconduct. The context of the prosecutor's rebuttal argument was that Quintana was telling the truth to Detective Griego during his recorded interview, that his story was corroborated by other witnesses, and the only reasonable inferences from or interpretation of the evidence pointed to the defendants' guilt. We understand the prosecutor's challenged comments to mean that in order to acquit the defendants of murder, the jury would have to disbelieve Quintana and the other evidence putting the men together in the same vehicle and at the Cortezes' party with Chavez. The prosecutor was suggesting that the most logical interpretation of the evidence was that the defendants committed the crimes, and it was a legitimate and " 'fair comment on the state of the evidence.' " (*People v. Thomas, supra*, 54 Cal.4th at p. 939, quoting *People v. Cook* (2006) 39 Cal.4th 566, 608.) We do not perceive, and conclude there is no reasonable likelihood the jury would interpret, the prosecutor's statements to suggest the defendants bore a burden to establish their lack of guilt or that some other standard of proof applied. Indeed, the prosecutor made clear at the outset of her

argument that she bore the burden of proof beyond a reasonable doubt, in accordance with the court's instruction. And, as in *Thomas*, 54 Cal.4th 908, no reversible misconduct appears under either the federal or California standard because "the trial court properly instructed the jury that the arguments of counsel did not constitute evidence, and that the prosecution bore the burden of convincing each juror of defendant's guilt of each charge beyond a reasonable doubt, instructions we presume the jury followed." (*Id.* at p. 940, citing *People v. Harris* (1994) 9 Cal.4th 407, 426 [recognizing, as a "sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given"].) In sum, Jimenez's trial counsel did not provide constitutionally ineffective assistance by failing to object to the prosecutor's argument.

B. *Sufficiency of Evidence to Prove Predicate Offenses*

1. *Background*

At trial, Detective Griego testified that the primary activity of the Los Gents gang was the commission of crimes to its benefit, including murders; assaults with a deadly weapon; kidnappings, possession, distribution and manufacturing of controlled substances; witness intimidation; drive-by shootings; arsons; burglaries; possession of a variety of illegal firearms and other serious felony crimes. According to the detective, Alexander Gamez, a member of the Los Gents gang, had been convicted of crimes that the detective considered primary activities of the gang, namely, possession of firearms, possession of body armor and possibly other crimes. He testified that another Los Gents gang member, Jesus Romero, was convicted in 2007 or 2008 of assault with a deadly weapon.

During a discussion concerning exhibits, the prosecutor explained that her records as to Alexander Gamez having pleaded to being a felon in possession of a firearm (§ 12021, subd. (a)(2)) were inaccurate, and she had obtained proof of another conviction of Romero's. The prosecutor nevertheless wanted to admit Alexander Gamez's plea to a gang enhancement. On Rolando Gamez's counsel's objection that Alexander Gamez's evidence showed a propensity due to family relations, the court excluded the evidence (Ex. No. 113) of Alexander Gamez's prior plea. However, it admitted without objection from either defense counsel evidence of Romero's December 2007 conviction for assault with a deadly weapon (a knife) under section 245, subdivision (a)(1) (Ex. No. 114), and his October 2006 conviction for being a felon with a concealed firearm in a vehicle in violation of former section 12025, subdivision (a)(1) (Ex. No. 115).⁹

During the jury instruction conference, the prosecutor asked the court to correct CALCRIM No. 1400, pertaining to the count 3 charge of active participation in a criminal street gang, to reflect Romero's plea to the section 12025, subdivision (a)(1) charge. Both defense counsel stipulated to the correction. Accordingly, the court changed the statutory reference in CALCRIM No. 1400 from section 12021 to section 12025, subdivision (a)(1), but it did not correct the corresponding nature of the offenses, so that the instruction read in part: "A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] 1. That

⁹ Section 12025 was repealed effective January 1, 2012. (Stats. 2010, ch. 711, § 4, No. 10 West's Cal. Legis. Service, p. 4138.) The crime of carrying a weapon concealed within a vehicle is now prohibited by section 25400, subdivision (a)(1).

has a common name or common identifying sign or symbol; [¶] 2. That has, as one or more of its primary activities, the commission of assault with a firearm . . . [section 245, subdivision (a)(2)] or felon in possession of a firearm[, section 12025, subdivision (a)(1)] [*sic*]; [¶] and [¶] 3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity." (Some italics and capitalization omitted.)

The trial court read the modified but factually flawed CALCRIM No. 1400 to the jury accordingly, without objection from defense counsel, and also told the jury that the instruction applied to the additional allegations that the defendants committed the crime for the benefit of, at the direction of, or in association with a criminal street gang. It told the jurors they would receive a printed copy of the instructions. During closing argument, the prosecutor told the jurors that Romero's convictions were proof of the Los Gents gang's primary activities, which helped to define Los Gents as a gang, and because they predated Chavez's murder, they were "predicate" offenses.

2. *Contentions*

Jimenez contends the gang crime conviction of count 3 and the true findings for the gang allegations in counts 1 and 2 must be reversed because the People did not present substantial evidence of the commission of the two predicate offenses—assault with a firearm and felon in possession of a firearm—on which the court instructed the jury. He argues: "Here, the court instructed the jury that the predicate offenses to be proven were assault with a firearm and felon in possession of a firearm. . . . There is, however, no evidence in the record that Romero was convicted of these offenses. On the

contrary, the record shows he was convicted of different offenses proscribed by different provisions in the Penal Code—namely, assault with a deadly weapon (a knife) and carrying a concealed firearm in a vehicle."

The People respond that the court's instructional error was invited by counsel, and in any event, Romero's offenses qualified as predicate offenses, which do not need to be the same as the gang's primary activities.

3. *Legal Principles*

Section 186.22, subdivision (a) makes street terrorism, i.e., the active participation in any criminal street gang, a separate criminal offense.¹⁰ (See *People v. Albillar* (2010) 51 Cal.4th 47, 55-56; *In re Jose P.* (2003) 106 Cal.App.4th 458, 466.) "[T]he elements of the gang offense are (1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.] All three elements can be satisfied without proof the felonious criminal conduct promoted, furthered, or assisted was gang related." (*Albillar*, at p. 56.)

¹⁰ Section 186.22, subdivision (a) provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

Section 186.22, subdivision (b)(1) provides for a sentence enhancement when the defendant "is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." There are three main aspects of this gang enhancement, namely, that the crime was (1) "committed for the benefit of, at the direction of, or in association with" (2) "any criminal street gang," as defined by the statute, and (3) the defendant committed the crime "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1); see also *People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.)

The substantive offense of active participation in a criminal street gang (§ 186.22, subd. (a)) and the gang enhancement (§ 186.22, subd. (b)(1)) both require proof of a criminal street gang: "The existence of a criminal street gang is unquestionably an element of both the enhancement and the substantive offense." (*Jose P.*, *supra*, 106 Cal.App.4th at p. 466.) Subdivision (f) of section 186.22 defines a "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its *primary activities* the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (Italics added.) The prosecution must show that the "[criminal street] gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary

activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period." (*People v. Gardeley, supra*, 14 Cal.4th at p. 617.) "Under the statute, the pattern of criminal gang activity can be established by proof of 'two or more' predicate offenses committed 'on separate occasions, *or* by two or more persons.' " (*People v. Loeun* (1997) 17 Cal.4th 1, 9.)

4. *Analysis*

"In determining whether the evidence is sufficient to support a conviction or an enhancement, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] Under this standard, 'an appellate court in a criminal case . . . does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Rather, the reviewing court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] This standard applies to a claim of insufficiency of the evidence to support a gang enhancement." (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

Though Jimenez couches his argument as one challenging the sufficiency of the evidence of the predicate offenses for purposes of the substantive offense under section 186.22, subdivision (a), and the section 186.22, subdivision (b) gang enhancement, his claim is in fact not a question of substantial evidence. Indeed, Jimenez does not argue that Romero's convictions fail to qualify as a subdivision (e) enumerated crime as to fall within the "primary activities" element for the substantive gang offense, and he does not challenge the sufficiency of the record evidence (Ex. Nos. 114 & 115) of those convictions. He concedes as much in his reply brief. Nor does he challenge the substance or foundation of Detective Griego's testimony concerning the Los Gents gang's primary activities. It is settled that the primary activities element may be proven by expert testimony that the criminal street gang "was primarily engaged in . . . statutorily enumerated felonies." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) On this record, Detective Griego's testimony summarized above constitutes substantial evidence of the fact that "the commission of one or more of the statutorily enumerated crimes [was] one of [Los Gent's] 'chief' or 'principal' occupations." (*Id.* at p. 323.)

Rather, Jimenez's argument is that the jury instructions as to the Los Gents gang's primary activities did not comport with the evidence presented concerning Romero's offenses, and therefore the prosecutor did not present evidence of (and the jury could not have reached findings as to) the predicate offenses assertedly *identified in the court's instruction*. As we have summarized above, this situation arose with defense counsel's acquiescence in the prosecutor's proffer of Romero's section 245, subdivision (a)(1) and section 12025, subdivision (a)(1) convictions as predicate offenses, the court's decision to

restrict the proof to those two convictions at defense counsel's objection, and the court's ensuing factually flawed, but otherwise correct, instruction on the issue, to which neither defendant objected. We see the circumstances as a misstatement or misinstruction to the jury, which defendants either invited by tactically agreeing to the prosecutor's proffer of predicate crimes so as to avoid an association with Alexander Gamez (e.g., *People v. Cooper* (1991) 53 Cal.3d 771, 831) or forfeited for their failure to seek modification or clarification at the time the court read the factually flawed, but otherwise legally correct, instruction to the jury. (See *People v. Lucas* (2014) 60 Cal.4th 153, 290-291 & fn. 51 [failure to object to otherwise legally correct instructions forfeits the error] *People v. Capistrano* (2014) 59 Cal.4th 830, 875, fn. 11; *People v. Whalen* (2013) 56 Cal.4th 1, 81-82 ["'failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal'"].)

Assuming, arguendo, defendants either did not invite the error and/or forfeit it, we nevertheless would conclude the trial court's instructional error was harmless under either the federal or California standard of prejudice. Under the California standard of prejudice (*People v. Watson* (1956) 46 Cal.2d 818, 836) we conclude it is not reasonably probable the defendants would have obtained a more favorable result had the court not so erred. The jury received copies of Romero's criminal convictions, and Jimenez concedes those crimes constituted predicate crimes. Therefore, had the court's instruction with CALCRIM No. 1400 correctly listed those predicate crimes (e.g., assault with a knife and possession of concealed firearm in a vehicle), we have no doubt the jury would have made the same true findings under section 186.22, subdivisions (a) and (b)(1). It is not

reasonably probable defendants would have obtained a more favorable result had the court not erred by omitting those specific predicate crimes from its instruction. (*Watson*, at p. 836; *People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 327.)

Alternatively, applying the federal standard of prejudice (*Chapman v. California* (1967) 386 U.S. 18, 24), we conclude that instructional error was harmless beyond a reasonable doubt. That is, because there is no reasonable possibility of any jury finding other than that Romero's predicate crimes were of the type listed in section 186.22, subdivision (e), for purposes of determining whether the Los Gents gang was a criminal street gang within the meaning of section 186.22, subdivisions (a) and (b)(1), the trial court's error in omitting the specific predicate crimes for the criminal street gang definition was harmless beyond a reasonable doubt. (*Chapman*, at p. 24.)

C. *Request to Stay Three-Year Sentence On the Count 3 Offense*

Pointing to the court's instructions to the jury as well as the prosecutor's closing arguments, Jimenez contends the count 1 murder was the basis of the crime charged in count 3, and thus under section 654 and *People v. Mesa* (2012) 54 Cal.4th 191, this court must stay his three-year sentence on count 3 and amend the abstract of judgment accordingly. The People concede that the conspiracy to commit murder and murder were committed for the purpose of promoting the criminal street gang within the meaning of section 186.22, and agree that the defendants' sentences for active gang participation should have been stayed.

We conclude that here, section 654 precludes additional punishment for a

violation of section 186.22, subdivision (a), the substantive offense of actively participating in a street gang, because both Jimenez and Gamez were punished for murder, which was the " 'act[] that transformed mere gang membership . . . into the crime of gang participation.' " (*People v. Mesa, supra*, 54 Cal.4th at p. 197.) As the People concede, section 654 requires that for both defendants, the terms imposed for the section 186.22, subdivision (a) gang participation offense be stayed.

II. *Gamez's Appeal*

A. *Sufficiency of Evidence of Nonaccomplice Corroboration*

1. *Legal Principles*

Section 1111 provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

Corroborating evidence " 'may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime.' " (*People v. Abilez* (2007) 41 Cal.4th 472, 505.)

The corroborating evidence need not corroborate the accomplice as to every fact on which the accomplice testifies (*People v. Davis* (2005) 36 Cal.4th 510, 543), and it " 'need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime.' " (*People v. Abilez*, at p. 505; see also *People v. McDermott* (2002) 28 Cal.4th 946, 986; *People v. Pedroza* (2014) 231 Cal.App.4th 635, 659.) And, evidence establishing motive and

opportunity may be sufficient to corroborate an accomplice's testimony. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1022.) "The evidence is 'sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.'" (*People v. Gonzales* (2011) 52 Cal.4th 254, 303; see also *People v. Valdez* (2012) 55 Cal.4th 82, 148.)

" 'Unless a reviewing court determines that the corroborating evidence should not have been admitted or that it could not reasonably *tend* to connect a defendant with the commission of a crime, the finding of the trier of fact on the issue of corroboration may not be disturbed on appeal.'" (*People v. Szeto* (1981) 29 Cal.3d 20, 25.)

2. *The Trial Court Correctly Ruled the Independent Evidence was Sufficient to Corroborate Quintana's Statements Tending to Connect Gamez with Chavez's Murder*

At the close of the prosecution's case, defendants moved for a judgment of acquittal under section 1118.1¹¹ based on insufficient evidence to convict them of the offenses. The trial court denied the motion.

Gamez contends the trial court should have entered a judgment of acquittal on grounds the prosecutor failed to present independent evidence corroborating Quintana's statements to police connecting him to the crimes. He maintains that absent Quintana's

¹¹ Section 1118.1 provides in part: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

statement, the evidence shows only that he was present with Chavez, Jimenez and Quintana before the killing, and nothing more. Gamez argues his mere presence at the scene with Chavez is not enough to connect him to the crime. And, he argues it is not sufficient to prove that Gamez, Chavez, Jimenez and Quintana were members of the same gang.

In making these arguments, Gamez raises numerous asserted deficiencies or weaknesses in the nonaccomplice evidence. He points out that Baca's testimony was unspecific as to which of the men were armed or whether the guns were used in a threatening manner, and that Baca did not claim to have witnessed any conflict or conversation that Chavez was in trouble with his gang generally, or Jimenez and Gamez specifically. He argues Baca's testimony does not corroborate any part of Quintana's statement that incriminated him with respect to Chavez's murder. Gamez likewise argues that Ramos's testimony—that the men were drinking tequila at the Cortezes' party and trying to get Chavez drunk—was unspecific, and did not identify Gamez as the person engaging in that behavior; he maintains that evidence was "meaningless" in any event because "there was no evidence connecting the alcohol consumption with the murder." Gamez contends Ramos's story did not corroborate anything Quintana told Detective Griego since Quintana had stated the telephone call regarding Chavez's murder came after the party had concluded. He points to Ramos's claim that Jimenez told Chavez to be quiet and there would be no problems, arguing the statement is ambiguous and did not implicate him since Jimenez said it, and any statement made during the party does not corroborate Quintana's story to the detective, in which he claimed the order to kill Chavez

came after the party ended.¹² Gamez argues, citing *People v. Falconer* (1988) 201 Cal.App.3d 1540, that the statement constitutes only noncorroborative "suspicious circumstances." Finally, though Gamez concedes the tire track evidence might permit jurors to infer the Nissan Altima took Chavez to his death, he maintains the inference is insufficient because there was no evidence he owned the car, had any control over it, or actually left the party in that vehicle. He argues any evidence he was in the vehicle before it was used in the crime is inadequate, and because the evidence showed the murder occurred 90 minutes after the party ended, it is speculation to conclude that Gamez was still in the Nissan at that time.

We agree that the independent corroborative evidence must "do more than raise a conjecture or suspicion of guilt" (*People v. Szeto, supra*, 29 Cal.3d at p. 27) and it is "not sufficient if it requires interpretation and direction to be furnished by the accomplice's testimony to give it value" (*People v. Falconer, supra*, 201 Cal.App.3d at p. 1543.) And, the law is clear that merely connecting the defendant with a gang, or his association with the accomplice and other perpetrators, is not sufficient by itself. (*People v. Pedroza, supra*, 231 Cal.App.4th at p. 651; *People v. Robinson* (1964) 61 Cal.2d 373, 400.) But the nonaccomplice evidence in this case raises more than just

¹² Gamez represents that in her trial testimony Ramos characterized the men's behavior as "men having a good time." But this is a mischaracterization. Ramos responded to the defense counsel's cross-examination about the party as follows: "[Jimenez's counsel]: I believe you testified that you didn't see the individuals we've been talking about. You didn't see them arrive? [¶] [Ramos:] No. [¶] [Jimenez's counsel:] And you didn't see them leave? [¶] [Ramos:] No. [¶] [Jimenez's counsel:] You just saw them in the backyard from a distance hanging out? [Ramos:] Correct. [¶] [Jimenez's counsel:] Having a good time? [Ramos:] Seemed like."

conjecture or suspicion connecting Gamez to Chavez's murder, and more than Gamez's mere presence at the crime scene. Gamez's challenges to it neglect reasonable inferences that may be drawn from the testimony of Baca and Ramos.

Disregarding Quintana's testimony, the evidence shows that the night before Chavez's death, Gamez, Jimenez and Quintana, all Los Gents gang members, were armed with the type of weapon that killed Chavez, a .38-caliber revolver, as well as a shotgun, and took Chavez away in Sanchez's Nissan Altima, which was later tied to the crime scene by surveillance video and tire track evidence. The jury could reasonably infer from Baca's testimony that Gamez was either in possession of one or more of the weapons or, at a minimum, aware of them at the time. Gamez's presence with weapons similar to those used in Chavez's murder, does more than merely connect Gamez with the accomplice or the others involved in the murder. Baca, who knew the men by their gang monikers, expressed not only extreme fear at the situation, but also made clear he would deny knowing anything about it, from which the jury could conclude that Chavez's departure was made under unusually adverse circumstances. Gamez was among the group of gang members attempting to get Chavez, their fellow gang member, drunk just hours before his death and the jury could infer Gamez heard Jimenez tell Chavez to be quiet and there would be no problems at the house. The men left the party together, and Chavez's body was found a short distance away. After the murder, Jimenez asked to hide at Ramos's house, claiming he was on the run, and later he obtained a tattoo of a revolver on his face, signifying pride in using such a weapon in a killing. While the evidence does not prove Gamez's direct hand in Chavez's killing, there is enough circumstantial

evidence reasonably *tending* to connect Gamez with Chavez's murder to satisfy the corroboration requirement. All of this evidence corroborates Quintana's testimony " 'in such a way as to satisfy the jury that [Quintana was] telling the truth.' " (*People v. Gonzales, supra*, 52 Cal.4th at p. 303.)

B. Sufficiency of Evidence of Aiding and Abetting

Gamez contends that even considering Quintana's statement to Detective Griego, there is insufficient evidence of the requisite intent, aid and encouragement to support Gamez's conviction as an aider and abettor to Chavez's murder. "[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) " '[A] person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts.' " (*People v. Maciel* (2013) 57 Cal.4th 482, 518.) And "when the crime is murder, the 'aider and abettor must know and share the murderous intent of the actual perpetrator.' " (*Ibid.*)

Here, sufficient evidence and reasonable inferences drawn from the evidence establish that Gamez knew the full extent of Jimenez's purpose and, by his inaction and out of self-preservation, intended to facilitate Chavez's murder as a "green light" ordered by the unidentified person over the telephone. According to Baca, Gamez was present with the men at the Leona house, during which Chavez pulled a shotgun, asking whether the men were "with me or against me," in response to which Quintana asked whether he

or the "hood" was going to be put on a green light, which was gang terminology for a targeted killing. Gamez was present when Jimenez offered to comply with the order to kill Chavez and permit the others to take credit. As Quintana explained to Detective Griego's sergeant toward the end of his interview: "We went there, and like I told [Detective] Griego, they didn't force us but they pretty much gave us an option, you know what I'm saying, either you guys go and do this or you guys go with them. I got kids, [Gamez's] got kids, you know what I'm saying, so we're not gonna sit there and be like, you know, fucking, you know, then Monster says hey, don't trip, I know you guys got yourself in this situation. [¶] I'll take care of everything. You guys just go along with it, fuck that, he's my brother, I can't do that. You're going too. You're going to get in the fucking car, so I'm already under the assumption that I'm in some shit you know what I mean? [¶] . . . [¶] So I'm like fuck, here we go, the homie's in the back seat, and I told Gilbert to run, run Gilbert, run mother fucker. So he did. He says where we going? He jumps out of the car, he fucking hops out. And . . . [¶] . . . [¶] Monstro shot him." The jury could reasonably infer that Gamez, learning of the potential green light and Jimenez's plan at some point either before or during the party, went with the men to help lower Chavez's guard and fool him into thinking he was merely leaving the party, unbeknownst that they were preparing to execute the green light. The evidence permits an inference of Gamez's knowledge of the plan and his assistance in its accomplishment. We conclude substantial evidence supports Gamez's conviction for Chavez's murder on a theory of aiding and abetting.

C. *Sufficiency of Evidence of Conspiracy and Coconspirator Liability*

Gamez contends the evidence is insufficient to prove he was part of a conspiracy to commit murder. Specifically, he argues there was no evidence he agreed to Chavez's killing or harbored the specific intent to agree, or intent, to kill him. According to Gamez, at most, the evidence shows Jimenez made an offer to kill Chavez and to let Gamez and Quintana share credit, but he argues there was no evidence he accepted Jimenez's offer or even capitalized on the offer by claiming credit; and he maintains there can be no agreement absent such acceptance. Further, Gamez argues that even assuming a jury could infer acceptance, it was necessarily the product of duress, because Quintana told Detective Griego that neither he nor Gamez were in favor of Chavez's killing and only got into the car after being told they would be murdered if they did not go along.

" 'Evidence is sufficient to prove a conspiracy to commit a crime "if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy." ' " (*People v. Maciel, supra*, 57 Cal.4th at pp. 515-516.)

For the same reasons stated above as to aiding and abetting, we conclude the evidence collectively supports an inference that the parties, including Gamez, " ' "positively or tacitly came to a mutual understanding" ' " to murder Chavez. (Accord, *People v. Maciel, supra*, 57 Cal.4th at p. 518, quoting *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135.) Direct evidence that Gamez and Quintana expressly discussed killing Chavez was not necessary. (*Maciel*, at p. 516, citing *People v. Jurado* (2006) 38

Cal.4th 72, 121 ["[a]lthough there is no direct evidence that defendant and [an accomplice] discussed in advance the killing of [the victim], there was evidence that they were alone together . . . shortly before the killing, during which a discussion and agreement could have taken place"].) And, as the object of the conspiracy was to kill Chavez, his murder satisfied the element of an overt act committed in furtherance of the conspiracy. (Accord, *Maciel*, at p. 518.) We conclude that given evidence of Gamez's acquiescence in the plan and his participation in the car with the other men, as well as Quintana's statements to Detective Griego's sergeant that the men were not forced into Chavez's killing, the jury could have discredited Quintana's statements indicating Gamez did not wish to "turn his back on" or kill Chavez.

D. Sufficiency of Evidence of Active Gang Participation

Gamez contends that because the evidence shows Jimenez "acted alone" in killing Chavez, and the record is absent evidence that Gamez or Quintana were part of a conspiracy to kill Chavez, there is insufficient evidence to support his count 3 conviction for active participation in a criminal street gang. Because this contention is premised entirely on the claimed absence of evidence of a conspiracy, it fails for the reasons we have upheld Gamez's murder and conspiracy convictions.

DISPOSITION

We modify the judgments of Claudio Rolando Jimenez and Rolando Guadalupe Gamez to stay the three-year sentences for the count 3 Penal Code section 186.22, subdivision (a) substantive gang offense and as modified, we affirm the judgments. The clerk of the superior court is directed to prepare amended abstracts of judgment reflecting the modifications and to forward certified copies of the amended abstracts of judgment to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.