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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO RAMIREZ,

Defendant and Appellant.

D067088

(Super. Ct. No. SCN315351)

APPEAL from a judgment of the Superior Court of San Diego County, Blaine K. Bowman, Judge. Affirmed as modified.

Nancy Olsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Sergio Ramirez guilty of attempted first degree premeditated murder (Pen. Code, §§ 187, subd. (a), 189 & 664;¹ count 1) and assault with a firearm (§ 245, subd. (a)(2); count 3). As to both counts, the jury found true defendant committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1).)

Further as to count 1, the jury found true that defendant personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)); that in the commission and attempted commission of this offense, defendant "intentionally and personally discharged a firearm" (i.e., a handgun) (§ 12022.53, subd. (c)); that defendant was a principal in this offense and, in connection with this offense, at least one principal personally discharged a firearm (§ 12022.53, subds. (c) & (e)(1)); that defendant "intentionally and personally discharged a firearm," causing great bodily injury to the victim (§ 12022.53, subd. (d)); and that defendant was a principal in this offense and, in connection with this offense, at least one principal personally used a firearm (§ 12022.53, subds. (d) & (e)(1)).

Finally, as to count 3, the jury also found true defendant personally inflicted great bodily injury upon the victim, who was not an accomplice (§ 12022.7, subd. (a)), and personally used a firearm (i.e., a handgun) (§ 12022.5, subd. (a)). The court sentenced defendant under count 1 to life with the possibility of parole, plus 25 years to life for the

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

firearm enhancement and stayed under section 654, subdivision (a) punishment under count 3 and the remaining enhancements.

Defendant on appeal contends there is insufficient evidence in the record to support the jury's true findings on the section 186.22 gang enhancements. He further contends the court prejudicially erred when it sustained a prosecution witness's claim of privilege under Evidence Code section 1040; when it admitted certain items of evidence under Evidence Code section 352; and when it imposed, but stayed, on count 1 a five-year sentence for the criminal street gang enhancement. Finally, defendant contends he was denied due process based on the cumulative error doctrine.

As we explain, we agree the court in connection with count 1 erred when it imposed, and stayed pursuant to section 654, subdivision (a), the five-year enhancement under subdivision (b)(1)(B) of section 186.22. Instead, the court should have imposed the 15-year minimum parole period under subdivision (b)(5) of this statute, inasmuch as defendant was sentenced to a life term on count 1. We conclude the court also erred when it imposed and stayed in connection with count 3 the five-year enhancement under subdivision (b)(1)(B) of section 186.22. Instead, the court should have imposed (and stayed) the 10-year enhancement under subdivision (b)(1)(C) of section 186.22 because the felony in count 3 was violent as defined by section 667.5, subdivision (c). In all other respects, we affirm the judgment of conviction.

FACTUAL OVERVIEW

Victim Louis Cervantes testified defendant shot him at close range on January 3, 2013. At the time of the shooting, Cervantes and defendant had known each other for

more than 10 years, and, up until the shooting, Cervantes believed their relationship had been "good." Shortly before the shooting, defendant introduced Cervantes to a companion defendant called "Big Homie." Cervantes did not know this individual.

Cervantes came to know defendant through defendant's older brother, who went by the monikers "Chuy," "Toro" and "Torito." Cervantes, defendant, and defendant's brothers were all members of the criminal street gang Varrio Fallbrook Locos (VFL). Cervantes joined the gang when he was about 13 years old. At the time of the shooting, he went by the moniker "Toker" and defendant went by the moniker "Hunger."

Cervantes testified that on the day of the shooting, he and a friend, Fernando Anguiano, traveled in Cervantes's white Chevy pickup truck to another's friend's house in De Luz, where they intended to build a greenhouse to grow marijuana to smoke and sell. About 30 or 40 minutes after they started building the greenhouse, a woman named Guadalupe yelled to Cervantes from the house below that "people" were looking for him. Cervantes in response took a bicycle from the back of his truck and rode down a hill to the house. When he arrived, Cervantes saw defendant and the man he came to know as the Big Homie.

Cervantes testified defendant first asked to borrow his pickup. When Cervantes refused because defendant did not have a driver's license, defendant next asked for a ride "back to town." At the time, Cervantes was not worried about being contacted by defendant and Big Homie because Cervantes believed he and defendant were friends. Cervantes agreed to give them a ride but arranged to meet them at another location on the property so that the men would not see the greenhouse. Although Anguiano warned

Cervantes the two men appeared "up to something" when Cervantes returned for his pickup, Cervantes testified he was not worried because of his friendship with defendant.

Defendant sat in the front seat and Big Homie in the backseat as they rode into town in Cervantes's pickup. Cervantes told defendant he had smoked "weed" earlier that day, and defendant, in response, told Cervantes he too wanted to smoke marijuana. Big Homie also mentioned he had "just gotten out" (of prison). As they drove, defendant changed his mind and asked Cervantes to drop them off at a friend's house instead of in town. However, when they were close to defendant's friend's house, defendant again changed his mind and asked to be driven into town.

At some point during the drive, defendant asked Cervantes to stop the pickup because defendant had to urinate. Cervantes agreed and stopped his pickup at a location where he and defendant had smoked "weed" in the past. Defendant next got out of the truck, and Cervantes saw Big Homie open the passenger door but stay seated in the truck. Cervantes lit a cigarette and, while waiting for defendant, he "heard the cocking of a gun." Cervantes saw defendant standing a few feet away, pointing a gun at him. Cervantes testified that the gun was a semiautomatic .38 or .40 Glock; that immediately before defendant fired, defendant said " '[d]ispensa,' " which Cervantes testified meant "[m]y bad," "[s]orry"; and that defendant then pulled the trigger.

Cervantes testified that he "hunched over" in the driver's seat of his car after being struck by the first bullet. After he was struck by a second bullet, Cervantes tried "throwing [his] truck into drive" but could not do so before he was hit by a third bullet. Cervantes then sped off in his pickup. However, he began to lose feeling in his arms and

legs shortly thereafter. Cervantes lost control of the pickup and struck a wall that bounced him to the opposite side of the road.

Fortunately for Cervantes, a passing motorcyclist stopped and provided assistance. Because Cervantes could not ride on the motorcycle, they waited for a passing car. The driver of the car took Cervantes to a Fallbrook hospital. Cervantes was later taken by helicopter to another hospital, where he remained for about a week.

While in the hospital, Cervantes was interviewed by sheriff's deputies. Cervantes informed the deputies he had been shot by defendant. Although deputies showed Cervantes several photographs, he was unable to identify Big Homie. Nonetheless, Cervantes noted in gang culture a person known as "Big Homie" typically meant that person has "done work for the neighborhood . . . and he basically has to be respected." When asked what he meant by putting in "work," Cervantes testified it meant this individual has done things for the gang, like selling drugs, making money for the "rest of the Big Homies," and putting in work against rival gangs.

When asked why Big Homie was with defendant on the day of the shooting, Cervantes testified it was to make sure defendant "carried out what he was supposed to do," namely shoot Cervantes. Cervantes also testified that, in gang culture, there was a general understanding among gang members that there must be a witness when a gang member is "putting in work" for the gang.

Cervantes admitted that when first interviewed by deputies, he told them he and defendant met up at a different friend's house. Cervantes testified he changed his story to

deputies because he wanted to protect his other friend, where he had planned to build a greenhouse to grow marijuana, "because obviously illegal stuff was going on there."

Cervantes testified that he was no longer a member of VFL; that he decided to leave VFL while in prison, after he was arrested in 2009 for evading a police officer and for residential burglary; and that he made a decision to leave the gang while in prison because he just got in more trouble for being a part of the gang, none of his "so-called friends were really there for [him]," and he wanted to be there for his own son.

With about five or six months of his prison term remaining, Cervantes told a prison guard he wanted to go to "S.N.Y.," which Cervantes testified stood for "[s]pecial needs yard" and which was the same as protective custody. Inmates in protective custody are kept separate from the general jail population because, according to Cervantes, people in the general population would attempt to harm inmates in protective custody because such inmates are perceived to be cooperating with law enforcement.

Cervantes testified a criminal street gang who believed one of its members was cooperating with law enforcement would "try to do whatever [it] can to take [that member] out." While in protective custody awaiting his release, Cervantes told law enforcement/correctional officers what he knew about VFL. Cervantes was released from prison in late April 2012.

Cervantes testified that, after the January 2013 shooting, the district attorney's office provided him financial assistance and helped him move out of Fallbrook, where he had lived his entire life. Cervantes was relocated in order to keep him "out of harm's way." In May 2013, however, Cervantes moved back to Fallbrook after he broke up with

his girlfriend. The district attorney's office in response told Cervantes he no longer was eligible to participate in the witness protection program or receive any financial support because a condition of being in the program was he remain out of Fallbrook.

Cervantes testified he was the victim of a second shooting in May 2013 while he was moving some of his "stuff" into his grandmother's Fallbrook house. About 7:00 or 8:00 p.m. that day, Cervantes saw two young individuals at the corner of his grandmother's house. Cervantes recognized both individuals as the younger brothers of two veteran VFL members: Armando and Chucky. Chucky's little brother was called "Little Chucky," and the other individual with Little Chucky was Christopher Flores, the younger brother of Armando. Cervantes testified Little Chucky was then trying to join VFL.

Cervantes went outside and asked Little Chucky and Flores why they were "scoping out" his grandmother's house. (Italics omitted.) In response, they told Cervantes he had "fucked up" by testifying against defendant and demanded Cervantes go with them to an area where VFL gang members typically hung out. (Italics omitted.) Cervantes refused. As they continued to argue, Cervantes noticed Flores had his hands in the waistband of his pants. The two individuals left after Cervantes's mother intervened.

Later that evening, Cervantes returned to his grandmother's house. Sometime after 10:00 p.m., while outside moving suitcases and clothes into his mother's car, Cervantes saw Flores approach from across the street. Angered, Cervantes went around the car and asked him, "What's up"? Flores in response said, "This is what's up" as he reached into his waistband and pulled out what Cervantes described was a "big 'ol revolver." (Italics

omitted.) Cervantes testified he dove over a brick wall just as Flores began to fire the revolver. Cervantes next ran toward the back of his grandmother's house, hopped the fence, and alerted a neighbor who allowed Cervantes to hide inside.

When asked why Flores targeted him, Cervantes testified that once he "gave up" defendant to law enforcement, the gang's mission was to "take [him] out before [he] testified." Cervantes noted when a gang punishes one of its members it is called "checking." According to Cervantes, a gang member needs permission from the gang's "older homies" before that member can "check[]" another member who has "messed up."

Cervantes noted that he was in fact "checked" by VFL and that sometimes the order to "check[]" someone comes from gang members in prison. When asked why VFL gang members wanted to "check[]" him, Cervantes stated it was likely because he dropped out of the gang and went into protective custody while in prison.

Cervantes testified that while in prison, he heard "rumors" that certain VFL members were upset with him for another reason. Shortly before his 2009 arrest, Cervantes had raised money to buy a tombstone for a "little homie[]" that had been shot and killed in Vista. Although Cervantes had paid for the tombstone, he was never able to pick it up because of his arrest. Cervantes heard some VFL members believed he had kept or spent the money raised rather than purchase the tombstone.

Cervantes also testified that members of VFL might have been upset with him because after he got out of prison, he sold marijuana but did not pay "taxes"—or a percentage of the profit from the sales—to the gang as requested by one of its members.

Sergeant (then Detective) Jeffery Lauhon with the San Diego County Sheriff's Department testified on the day of the January 2013 shooting he was dressed in "plain clothes" and was driving an "unmarked" county vehicle about 1:00 p.m. in the De Luz area when he came upon two Hispanic males who appeared to be in their early 20's walking on the side of a road. Detective Lauhon did not contact the males. As he continued driving, Detective Lauhon rounded a corner and came upon a white Chevy pickup that had crashed into a chain-link fence. Detective Lauhon noted that the pickup had sustained front-end damage and a broken rear axle and that there was damage to the fence about 30 feet up from where the truck was stopped.

On inspection, Detective Lauhon found the pickup's engine running but the truck empty. As Detective Lauhon waited for backup to arrive, he was informed the driver of the pickup had been shot and taken to a hospital. As the area was secured, another deputy informed Detective Lauhon of the possible location of the shooting, where deputies found tire marks in the dirt, shoe prints, and a bandana lying on the ground. Defendant's fingerprint was subsequently found on the passenger door of Cervantes's truck.

Witness Julio Alonso testified that he was working in De Luz on the day of the January 2013 shooting. While preparing his lunch in a different location with his coworker, Alonso heard about three gunshots and, less than a minute later, saw a white truck go by traveling "really fast."

After Alonso and his friend ate their lunch, they went back to work, where they were contacted by law enforcement. Alonso and his friend were informed by law

enforcement they should be on the lookout for two men who "were armed and dangerous." Alonso then noticed a chain on the gate, which had been locked, was broken. Alonso testified at the time he did not think much about the broken chain. However, after law enforcement left, Alonso went to the area where he had been working before lunch and found his truck missing. Because the area was rural, Alonso had left his keys in the truck.

Alonso testified he next borrowed his friend's truck, found law enforcement, which were still investigating the shooting, and reported his truck stolen. Alonso's truck was subsequently located about 15 to 20 minutes from the scene of the shooting, after a report of a vehicle fire. According to Alonso, fire department responders had found his truck "fully" ablaze.

Detective William Yavno with the San Diego County Sheriff's Department testified he interviewed Cervantes at a Fallbrook hospital shortly after the shooting. Although Cervantes was in and out of consciousness, Cervantes was able to tell Detective Yavno that defendant had shot him; that he had been shot because he "want[ed] out of the life" and because of a "drug deal"; and that he had been shot after they had stopped at a store "to buy cigarettes or . . . refreshment[s]." (Italics omitted.) After the interview, Detective Yavno reported to his sergeant that the shooting "had the elements of a gang case."

Detective Roy Mayne with the San Diego County Sheriff's Department testified that in January 2013 he was assigned to investigate gang crimes in the Fallbrook area; that defendant then went by the moniker "Hunger" but, at the time of trial, went by the

monikers " 'Lil Youngs" and "Youngster2"; that defendant had two older brothers in VFL, one whose moniker was "Torito," "Toro," or "Chuy" and the other whose moniker was "Youngster"; that shortly after the shooting, defendant was identified as the suspect in the shooting; and that Detective Mayne was assigned to the case because defendant was then a known member of VFL.

Defendant was arrested on January 31, 2013, for shooting Cervantes. At the time of his arrest, defendant had the letter "F" tattooed on his left shoulder and an "F" with the letter "L" separated by three dots tattooed on his fist. Later while in custody, defendant had the number "6" tattooed near his right eye. Detective Mayne testified the number "6" referred to the letter "F" in the alphabet, "F" stood for Fallbrook, and the tattoo showed defendant was a proud member of VFL.

Detective Mayne interviewed Cervantes in the hospital the day after the January 2013 shooting. Cervantes confirmed that defendant had shot him and that defendant was with another Hispanic male that Cervantes did not know. During a follow-up interview, Cervantes agreed it was a "possibility" that he was targeted by VFL because he had "dropped out of the gang." (*Italics omitted.*) Cervantes also told Detective Mayne and other detectives he might have been targeted because of the "tombstone incident."

As part of his investigation, Detective Mayne searched defendant's cell where defendant was being housed. Defendant at the time did not have a cellmate. Inside, Detective Mayne found myriad "gang monikers" and/or references carved in the paint on the metal bed frame, including "Fallbrook Locos"; "Fallbrook"; "FLS"; "Fallbrook Varrio Locos"; "Tiny 1"; "Vago"; "Chucky 1"; "Little Youngster"; and "X-3. " Regarding "X-

3," Detective Mayne explained that the "X" stood for the number 10; that when you put 10 and 3 together, it represented the letter "M," the 13th letter in the alphabet; and that the letter "M" showed VFL's allegiance to the Mexican Mafia. Detective Mayne also found papers and photographs inside the cell referencing VFL.

Detective Mayne testified that several of defendant's jailhouse calls were recorded and that in some of those calls defendant spoke to other known members of VFL, including "Little Bullet," "Troubles," "Chino," and "Maniac."

Gang expert Zachary Harris with the San Diego County Sheriff's Department testified that he was a gang investigator in Fallbrook and that VFL was a criminal street gang as defined under the Penal Code.² Deputy Harris testified the criminal street gang "Vista Homeboys" was the primary rival of VFL. He noted that in the gang culture of a Hispanic criminal street gang like VFL, respect was likely the most important quality to a gang and was defined by gang members who tended to be the most violent and craziest, which in turn earned the gang respect for being dangerous.

Deputy Harris also testified that gangs like VFL imposed fear in the community; that they did so because the public would be fearful of retribution and violence and, thus, would be less likely to report gang-related crimes; that in certain communities where migrants live, those individuals might be even more afraid because not only were they concerned about attacks and violence by the gang, but also about being deported; and that those gang members who were violent created a more cohesive or unified gang because

² The record shows the parties stipulated that VFL met all the necessary elements of a criminal street gang as defined in section 186.22.

other gang members were less inclined to "break the rules, snitch, leave the gang" or fail to pay "taxes."

Deputy Harris testified that if a gang member lost respect, the gang's response "could be anywhere from [the member] getting beat up, or it could go . . . all the way up into getting stabbed, shot, murdered"; that if a gang member disrespected the gang or its other members and the gang failed to respond, it made the gang "look weak"; and that conversely, if the gang responded to the member who was disrespecting it or other gang members, it made the gang stronger because it showed the gang could "police [its] own people within [the] gang."

Deputy Harris corroborated Cervantes's testimony that the gang must give permission or authority for one gang member to "check[]" or "beat up" another gang member. The person in the gang that gave permission to assault or "check[]" another member was usually a person "higher in the gang, a shot-caller or leader." According to Deputy Harris, requiring a senior gang member to give permission to "check[]" another gang member also increased the cohesiveness of the gang. Conversely, a gang member who "checked" another gang member without permission might be viewed as disrespecting the gang and its senior members, which could lead to repercussions for that member.

Deputy Harris discussed what "putting in work" meant in gang culture. He testified it meant "[d]oing jobs for the gang," which could range from holding the drugs or weapons for other members (who were subject, for example, to a Fourth Waiver) to killing someone for the gang. Deputy Harris testified that when a person in a gang is

called "Big Homie," it means he is the boss; and that a "Big Homie" is usually an "original gangster or the guy with the most juice, the guy with the most power to authorize hits or make decisions within the gang." Deputy Harris corroborated Cervantes's testimony that, when gang members commit violent acts on behalf of the gang, they typically bring at least one witness.

Deputy Harris reviewed defendant's file and opined that defendant, as early as December 2007, was a member of VFL; that defendant was arrested in December 2007 for gang-related crimes, including tagging an apartment with the initials "VFL," "666," and "Fallbrook"; that during his arrest, defendant admitted he associated with VFL; that when defendant was contacted by law enforcement in October 2008, defendant had the initial "F" tattooed on his left arm, which he admitted stood for "Fallbrook"; that defendant and another VFL member were arrested in November 2009 for a gang-related crime; that law enforcement contacted defendant in January 2011 and he told them he went by the moniker "Little Rerun"; that defendant was arrested in May 2011 along with three other VFL members, including defendant's brother, "Torto"; that when defendant was arrested in May 2011, he told law enforcement his moniker was "Hunger"; and that when defendant was arrested on January 31, 2013, for shooting Cervantes, defendant had the initials "F" and "L" on his hand along with three dots, which Deputy Harris opined stood for VFL.

Deputy Harris testified the tattoo on defendant's hand was significant because the "hand is not something you can readily hide," and, thus, it showed defendant was "proud to be part of the gang." Deputy Harris also testified the three dots were not a specific

sign to VFL but rather was a sign commonly used by Hispanic gangs that meant "tres puntos or mi vida loco, my crazy life." (Italics omitted.)

Deputy Harris opined that when Cervantes went into protective custody while in prison, he disrespected the gang; that generally a gang member who went into protective custody does so because "they're acting as a snitch or an informant"; that the reason a gang member goes into protective custody does not typically matter to the gang; and that the gang in response would need to show it can "police their own" and, thus, would "assault" that gang member "or worse." Deputy Harris also opined that a gang would "hit" or "sever[ly] assault" one of its members if the gang perceived one of its members had stolen from the gang or if one of its members had sold drugs and not paid the gang "[t]axes."

Deputy Harris further opined that if a gang member affronted the gang by doing all three—going into protective custody, stealing from the gang, and not paying the gang taxes—the gang would respond and, in doing so, that response "would be done for the benefit, direction, and in association with the criminal street gang." Deputy Harris also opined that, if any one of these three scenarios were true or perceived to be true, in his experience it would be consistent with "gang practices" to shoot the gang member; and that if the person who did the shooting was actually a friend of the victim, this would further elevate the level of respect of the shooter in the gang because the shooter put the gang's interest above his friendship.

Deputy Harris reached the same conclusion if the "Big Homie" was present when the gang responded to one of its members who had disrespected the gang: "[Having the

Big Homie present] benefits the gang by [showing] they police their own; they gain respect from the outside gang member; and they gain intimidation in the community; and they gain intimidation in their own ranks, saying, [']Hey, don't do this or this is what's going to happen.['] [¶] If the Big Homie is there, it is probably done at the direction of the gang. And assuming that the Big Homie is part of the same gang, it's done in association with the criminal street gang." (Italics omitted.)

Deputy Harris also concluded that the person actually acting on behalf of the gang, the person committing the violent act, is also benefited because this gang member would gain respect in the gang for committing a violent act. In addition, the gang would also benefit from the violent act as the community would be intimidated by the gang.

Deputy Harris testified he investigated the incident in May 2013 when Flores shot at Cervantes; that Flores at the time was a documented member of VFL; and that, at the time, Flores did not have a moniker but since that time goes by "Crazy" or "Crazy Boy." Deputy Harris opined that the May 2013 shooting also "was committed for the benefit, direction of, or in association with the criminal street gang" because Cervantes was scheduled to testify in defendant's preliminary hearing about 10 days later.

DISCUSSION

I

Gang Enhancement

A. Guiding Principles

We review the sufficiency of the evidence to support a gang enhancement under the same standard we apply to a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758,

806.) We examine the record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a jury could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576, 578.) We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), and we will not reverse unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict." (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) We do "not reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses" when determining whether substantial evidence supports a conviction or a true finding. (See *People v. Little* (2004) 115 Cal.App.4th 766, 771.)

Section 186.22, subdivision (b)(1) prescribes a sentencing enhancement for "any person who 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." A gang enhancement under this statute contains two distinct prongs. (*People v. Albillar* (2010) 51 Cal.4th 47, 59 (*Albillar*)). The first prong requires a finding that the crime was "gang related" in the sense of being for the benefit of, at the direction of, or in association with a gang. (*Id.* at p. 60.) The second "specific intent" prong requires "only the specific intent to promote, further, or assist criminal conduct by *gang members*" (*id.* at p. 67) and "applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced" (*id.* at p. 66).

A jury may rely on expert testimony about gang culture and habits to reach a true finding on a gang-enhancement allegation. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) However, an expert's testimony "alone" is insufficient evidence from which a jury may reach a verdict on a gang-related offense or, as in the instant case, make a finding on a gang enhancement. (See *id.* at p. 931.) Instead, there must be some " 'evidentiary support' " in the record " 'other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang.' " (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.)

B. *Analysis*

Here, we conclude there is substantial evidence in the record to support the finding that defendant shot Cervantes in January 2013 for the "benefit of, at the direction of, or in association with" VFL. (See § 186.22, subd. (b)(1).) Indeed, the record shows at the time of the shooting defendant was with another individual whom *he* introduced as the Big Homie. Deputy Harris opined that a Big Homie was typically a shot-caller and that gang members committing particularly violent acts, such as what occurred in the instant case, had witnesses to ensure not only that the act was carried out, but to raise the level of respect within the gang for the individual committing the act. Cervantes, himself a former member of VFL, similarly testified that the Big Homie was present at the shooting to make sure defendant "carried out" the order. Such evidence amply supports the finding that the January 2013 shooting was "at the direction of, or in association with" VFL for purposes of section 186.22, subdivision (b)(1).

What's more, Deputy Harris opined that a gang member who was friends with another member that needed to be "checked" would earn respect in the gang because that individual was willing to elevate the gang above all else, including the friendship. In addition, the gang also would benefit according to Deputy Harris because having one gang member "check" another gang member under such circumstances would be viewed as a particularly violent act, increasing the gang's reputation for violence in, and further intimidating, the community.

As noted, immediately before the shooting Cervantes testified he was not concerned by the circumstances—even after being warned by his friend Anguiano and even after defendant introduced his companion as the Big Homie—because he and defendant were friends. Despite that friendship, the record shows defendant shot Cervantes three times at close range, saying "[d]ispensa" or "sorry" as he pulled the trigger. We conclude this evidence also supports the true finding that defendant carried out the January 2013 shooting to benefit VFL.

Moreover, the record shows that while in prison, Cervantes asked to be moved into protective custody. Cervantes testified while in protective custody he was debriefed by law enforcement regarding VFL. Deputy Harris testified that if a gang member went into protective custody, the gang would respond, including shooting that gang member, because the gang needed to "police" its own and its failure to respond would be seen as a sign of weakness. As opposed to merely dropping out of a gang, Cervantes also testified that if a criminal street gang believed one of its members was cooperating with law enforcement, that gang would "do whatever [it] can to take [that member] out."

In addition, Cervantes also testified that while serving prison time, he had heard "rumors" that members of VFL were upset with him because of the "tombstone incident." Deputy Harris opined that stealing from "brothers" in a gang would be another sign of disrespect, and that under such circumstances the gang would be expected to retaliate against a member.

Finally, Cervantes also testified he was not paying VFL "taxes," or a percentage of his profits, for drug sales. Detective Harris opined that not paying taxes would also be viewed as an affront to the gang, requiring a response.

We conclude evidence from any one of these three scenarios is more than sufficient to support the finding that defendant shot Cervantes in January 2013 "for the benefit of, at the direction of, or in association with" a criminal street gang for purposes of section 186.22, subdivision (b)(1). When considered collectively, this evidence amply supports such a finding.

Defendant also contends the evidence is insufficient to support the "specific intent" prong of section 186.22, subdivision (b)(1). We disagree.

As noted *ante*, the second prong of this enhancement requires "only the specific intent to promote, further, or assist criminal conduct by *gang members*" (*Albillar, supra*, 51 Cal.4th at p. 67) and "applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced" (*id.* at p. 66).

Because the specific intent required under subdivision (b)(1) of section 186.22 is to "promote, further, or assist in *any* criminal conduct by gang members," we conclude

defendant's own criminal conduct—shooting Cervantes three times at close range after making up an excuse for Cervantes to stop his pickup—qualified as the gang-related criminal activity. (Italics added.)

We also conclude there is substantial evidence in the record to show defendant had the "specific intent to promote, further, or assist in any criminal conduct by gang members" for purposes of subdivision (b)(1) of section 186.22. "There is rarely direct evidence that a crime was committed for the benefit of a gang. For this reason, 'we routinely draw inferences about intent from the predictable results of action. We cannot look into people's minds directly to see their purposes. We can discover mental state only from how people act and what they say.' " (*People v. Miranda* (2011) 192 Cal.App.4th 398, 411-412.)

Here, defendant did not declare he shot Cervantes three times at close range to promote or further criminal conduct by gang members. The jury, however, could reasonably infer under the circumstances of this case that defendant had the specific intent to do just that.

Indeed, as summarized *ante*, the record shows Cervantes was a longtime member of VFL; that based on his gang affiliation, while serving time in prison he was ordered by senior gang members to do various acts, which lengthened his prison term; and that with about five or six months of his sentence remaining, *he* sought protective custody away from the general prison population. Cervantes testified as a condition of being placed in protective custody, he provided law enforcement with information about, and thus "snitched on," VFL. Although there is no direct evidence defendant or any other member

of VFL had direct knowledge that Cervantes had "snitched on" VFL, both Cervantes and Deputy Harris testified that if a gang even suspected one of its members was cooperating with law enforcement, the gang would respond or "check" that member, including shooting him.

As also discussed, the record shows the shooting took place in front of another individual who, as we have noted, was introduced by *defendant* as the Big Homie. As discussed, both Cervantes and Deputy Harris testified that in gang culture, a Big Homie typically was a senior and/or a respected gang member who made decisions on behalf of the gang and that the permission of a senior gang member was required before a gang member could be "checked." In fact, Deputy Harris opined there would be repercussions if a gang member "checked" another member without such permission, as a gang had incentive to police its own in order to show cohesiveness. From this evidence, we conclude a reasonable jury could infer defendant shot Cervantes—his one-time friend and a former VFL gang member—while "putting in work" for VFL with the specific intent to promote, further, or assist criminal conduct by gang members. (See § 186.22, subd. (b)(1).)

II

Evidence Code Section 1040

Defendant next contends the court erred in sustaining a prosecution witness's claim of privilege under Evidence Code section 1040.

A. *Additional Background*

Supervising District Attorney Investigator Luis Rudisell with the San Diego County District Attorney's Office testified he was responsible for placing Cervantes in the witness protection program after Cervantes's attempted murder by gang members in January 2013. Investigator Rudisell testified one of the conditions of Cervantes remaining in that program was that Cervantes stay out of Fallbrook because there was a belief "the shooting was a result of an actual green light put on him by the gang." Investigator Rudisell testified a "green light" was an "open contract, orders, given by gang members to assault, attack, or kill the specific target or the person listed on that green light."

Investigator Rudisell testified that Cervantes initially was placed into the program after his release from the hospital in January 2013; that Cervantes was subsequently suspended from the program after he learned Cervantes had returned to Fallbrook on three different occasions without first notifying him; and that on about May 30, 2013, Investigator Rudisell was notified by Deputy Harris that VFL members had shot at Cervantes while Cervantes was at his grandparents' house in Fallbrook. In response to the second shooting, Investigator Rudisell picked up Cervantes and reinstated him in the witness protection program.

On cross-examination, defense counsel questioned Investigator Rudisell about the "green light":

"Q. You said that you believed that there was a green light on him by the gang. Do you remember him saying that?

"A. Yes, ma'am.

"Q. And you described the green light as being an open contract or orders by gang members towards him[,] correct?

"A. Yes, ma'am.

"Q. Did you have any information as to any -- and I'm talking about the first shooting only. Did you have any information as to any particular person who may have made those orders?

"The Witness: Your Honor, I think that may fall under [Evidence Code section] 1040. I would ask that a sidebar would be in order.

"The Court: I'll sustain the objection at this point."

The record shows at the conclusion of that day's testimony and outside the presence of the jury, the prosecutor addressed this specific issue, noting that he had spoken to Investigator Rudisell and then to defense counsel regarding the information Investigator Rudisell believed may have been subject to Evidence Code section 1040; that the issue "wasn't so much that it was a 1040 issue as [Investigator Rudisell] was concerned that he was going to say or lead us to a place that he wasn't sure that he was allowed to talk about. [¶] And that he was making reference to the defendant's older brothers and them being in Fallbrook Locos and his belief or understanding that one or both of them had some juice within V.F.L., and he didn't want to stumble into an area he wasn't supposed to talk about. [¶] And so I shared that information with [defense counsel] during our break while Mr. Rudisell was still on the stand."

The record shows the following colloquy took place:

"The Court: All right. Well, based on that information, did you want to go into that area further with Mr. Rudisell or not?

"[Defense Counsel]: I don't want to go into that information, but I think that, for a clean record, he should come testify as to what it was he was going to say, or we could just strike what the People said that --

"The Court: There's no need to strike the testimony. The only question is whether you wanted to explore it further because [the prosecutor] didn't want to because he didn't ask it on direct. But if you want to explore it further, then you can. If you don't want to, you don't have to.

"[The prosecutor]: I made sure to let [defense counsel] know while we were at break, before she was done with the witness, and so we stopped it at that point.

"[Defense counsel]: I think the Court is misunderstanding. I'm not looking to strike his testimony. I just think that the People's rendition of what he might or might not have said, I think that I would like to strike. And if we want to make a record of what he would have testified to, I think that would be more appropriate. [¶] That's the only objection I was making."

The record shows the court renewed its offer to the defense to recall Investigator Rudisell and ask him more questions, noting that would be the appropriate "remedy" in this situation.

B. Guiding Principles and Analysis

Evidence Code section 1040 provides in pertinent part: "As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made. [¶] (b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and: [¶] . . . [¶] (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice. . . ."

We review a challenge to a court's ruling under Evidence Code section 1040 for abuse of discretion. (See *People v. Walker* (1991) 230 Cal.App.3d 230, 237-238 (*Walker*)). "Where these governmental privileges are involved, the trial court 'retains wide discretion to protect against the disclosure of information which might unduly hamper the prosecution or violate some other legitimate governmental interest.'" [Citation.]' " (*People v. Acevedo* (2012) 209 Cal.App.4th 1040, 1055.)

Defendant contends the court erred when it sustained Investigator Rudisell's own objection under Evidence Code section 1040 to the question of who may have issued the "green light" on Cervantes because defendant thus was unable to inquire "about the basis for the witness's statement that a green light was issued by the VFL gang." He further contends this error was compounded because the court failed to follow the proper procedure before ruling that Evidence Code section 1040 applied.

However, as the record makes abundantly clear, at the conclusion of the day's proceedings the court twice offered the defense the opportunity to recall Investigator Rudisell as a witness and inquire about the green light, noting that the issue had come up *not* on direct but instead on *cross-examination*. The record also clearly shows defense counsel expressly stated she was *not* interested in getting into this information with this witness, but rather she merely wanted stricken from the record what the prosecutor had represented regarding defendants' brothers and the green light, which of course the jury never heard.

In our view, the record shows the issue between the parties regarding the green light had little or nothing to do with Evidence Code section 1040 or the defendant's

ability to cross-examine Investigator Rudisell on this subject matter. In any event, even assuming defendant did not forfeit this issue on appeal by failing to object or by refusing the court's invitations to recall Investigator Rudisell, we nonetheless conclude any alleged error in sustaining the "1040" objection was harmless because there was no reasonable probability the information sought could be considered material evidence on the issue of guilt that would result in exoneration. (See *Walker, supra*, 230 Cal.App.3d at p. 238 [noting a defendant has the burden of showing that, in view of the evidence, "there was a reasonable possibility that [the evidence sought to be disclosed] could constitute material evidence on the issue of guilt which would result in his [or her] exoneration".])

To the contrary, evidence that defendant's brothers ordered the green light on Cervantes likely would have been prejudicial to defendant, as defense counsel appeared to recognize when she declined the court's invitations to recall Investigator Rudisell as a witness and ask him additional details about the green light placed on Cervantes. Accordingly, the court's decision to sustain Investigator Rudisell's objection on Evidence Code section 1040 grounds did not deprive defendant of a fair trial nor did the court abuse its discretion in sustaining that objection. (See *Walker, supra*, 230 Cal.App.3d at p. 239.)³

³ Because we reached the merits of the issue, we deem it unnecessary to address defendant's alternate contention that he allegedly received ineffective assistance of counsel in connection with this issue. In any event, as we have noted it appears defense counsel made a (wise) tactical decision *not* to recall Investigator Rudisell as a witness and ask him about who ordered the green light, in light of the representation by the prosecutor that Investigator Rudisell would have testified it was defendant's brothers, who also were VFL gang members. (See *People v. Mai* (2013) 57 Cal.4th 986, 1009 [noting that in

III

Evidence Code Section 352

Defendant contends that the court abused its discretion by admitting evidence Cervantes was shot at in May 2013 by VFL member Flores and by admitting a recorded jailhouse conversation between defendant and another VFL member. Although defendant concedes this evidence was relevant, he nonetheless contends this evidence was more prejudicial than probative.

Turning to the May 2013 shooting,⁴ the record shows the prosecutor moved pretrial to admit this evidence because it showed the January 2013 shooting of Cervantes by defendant was, in fact, a gang-related crime, inasmuch as another VFL gang member (i.e., Flores) attempted another hit on Cervantes five months later. The prosecutor argued the May 2013 shooting was thus highly probative on the issue of the gang allegation in the instant case. In response and as relevant to this appeal, the defense argued the admission of such evidence would be "more prejudicial than probative" under Evidence Code section 352.

The court ruled to admit the evidence of the May 2013 shooting, reasoning as follows:

"examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance"].)

⁴ The record shows that the court disclosed it also had presided over the *Flores* case; that there was no conflict but the court nonetheless wanted counsel to know, which the defense acknowledged; and thus, that the court was "very familiar" with the facts of *Flores*.

"[O]ne of the elements of the [section] 186.22 allegation is that the defendant attempted to commit the crime for the benefit of, at the direction of, or in association with a criminal street gang. [¶] . . . [¶] So it's highly probative, not just marginally probative, but highly probative as to that issue, and certainly is relevant. [¶] Under [an Evidence Code section] 352 analysis, when I balance the probative value against the prejudicial effect, I see very little prejudicial effect to [defendant] in the sense that there is nothing to connect him to the crime because he was in custody. He was in jail. He could not have committed the crime. But the gang that he associates himself with did attempt to carry out the crime. So there is some prejudice in that regard. But the prejudice is minor when you consider the overwhelming probative value of what happened to this victim within a five-month period of time, when he is victimized by two members of the gang. And it is quite probative, very probative, on the issue of the theory, as to why the crime was committed. [¶] So the Court will allow the testimony relating to the Christopher Flores'[s] attack against Mr. Cervantes on May 30th, 2013."

Evidence Code section 352 vests the trial court with broad discretion to exclude otherwise relevant evidence if its probative value is substantially outweighed by the probability that admitting the evidence will unduly prolong the proceeding, prejudice the opposing party, confuse the issues, or mislead the jury. (*People v. Zepeda* (2008) 167 Cal.App.4th 25, 34-35; see Evid. Code, § 352.)

We conclude the evidence of the May 2013 shooting was substantially more probative than prejudicial. Indeed, this shooting took place just five months after the January shooting; the shooter—Flores—was in the *same* gang as defendant and the *same*

gang Cervantes sought to quit; before the shooting, Flores and Little Chucky told Cervantes he had "fucked up" for agreeing to testify against defendant; Cervantes knew Little Chucky's and Flores's older brothers, who were veteran members in the *same* gang; and after the first contact, Flores returned alone later that same night, to the same location, contacted Cervantes a second time and shot at him multiple times.

In addition, Cervantes and Deputy Harris both testified that Cervantes was targeted a second time by VFL because the gang knew he was cooperating with law enforcement and knew he would be testifying against defendant. Although defendant claimed the first shooting was not gang related, as noted *ante*, there is substantial evidence in the record showing otherwise, as the jury so found. We thus conclude evidence of the May shooting by an individual in the *same* gang as defendant, shortly before Cervantes—himself a former member of VFL—was set to testify against defendant, was highly probative on the issue of whether *defendant* committed the January shooting within the meaning of section 186.22, subdivision (b)(1).

We further conclude this evidence was not unduly prejudicial. For purposes of Evidence Code section 352, " 'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that ' "uniquely tends to evoke an emotional bias against defendant" ' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

Here, as summarized *ante*, there was already substantial *other* evidence before the jury regarding criminal street gangs in general and VFL in particular; defendant's membership in VFL; and the reason or reasons why VFL was (or according to defendant,

was not) targeting Cervantes in the January shooting. Thus, the May shooting also involving a VFL gang member was not such that it was likely to inflame the jury against defendant. (See *People v. Scott* (2011) 52 Cal.4th 452, 491 (*Scott*) [noting evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction].)

Accordingly, we conclude the court properly exercised its broad discretion when it ruled under Evidence Code section 352 the evidence of the May shooting was admissible in connection with defendant's shooting of Cervantes five months earlier. (See *People v. Tran* (2011) 51 Cal.4th 1040, 1049-1050 [noting a court's ruling on the admissibility of evidence under Evid. Code, § 352 is reviewed under the abuse of discretion standard].)

However, even *if* the court erred in admitting evidence of the May shooting, we conclude it was harmless. We determine whether the erroneous exclusion of evidence is harmless under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Welch* (1999) 20 Cal.4th 701, 749 (*Welch*).) Under *Watson*, a defendant must show a reasonable probability that he or she would have received a more favorable result absent the error. (*Welch*, at pp. 749-750.)

Here, as noted *ante*, there is substantial evidence *other than* the May 2013 shooting to support the true finding that defendant committed the offenses against Cervantes in January 2013 for the "benefit of, at the direction of, or in association with any criminal street gang." (See § 186.22, subd. (b)(1).) Indeed, in our review of that

issue we did not even rely on evidence from the May shooting in concluding there was substantial evidence in the record to support a true finding on this enhancement. As such, we conclude there was no reasonable probability defendant would have obtained a more favorable result with respect to this enhancement absent the alleged error.

We reach the same conclusion with respect to defendant's contention that the admission of a single jailhouse call from March 2013 was unduly prejudicial under Evidence Code section 352. Briefly, the prosecution sought to admit this evidence in which defendant was speaking to another VFL gang member about VFL and what was "going on out in the street." At the end of the phone call, defendant stated the phrase "F's up," which showed his continued affiliation with VFL.

After reading the transcript of the phone call, the court ruled that the conversation was not hearsay, as it was not being offered for the truth of the matter, and that it was relevant to show defendant at the time of the recording was *still* a member of VFL. In making its ruling, the court noted from its review of the transcript of the phone call that it was just "two guys talking about a bunch of nothing."

We conclude this evidence was probative as it showed defendant was still connected to the gang a few *months* after the shooting, while incarcerated, which tended to support the finding he committed the crimes against Cervantes for the "benefit of, at the direction of, or in association with any criminal street gang." (See § 186.22, subd. (b)(1).) For the same reasons we provided *ante* with respect to evidence of the May shooting by Flores, we further conclude the evidence of the jailhouse call involving defendant was not unduly prejudicial (see *Scott, supra*, 52 Cal.4th at p. 491), or even *if* its

admission was error, that it was harmless. (See *Welch, supra*, 20 Cal.4th at pp. 749-750.)⁵

IV

Sentencing

Finally, defendant contends the court erred in imposing and staying two, 5-year terms for the gang enhancement allegations in counts 1 and 3, respectively, and instead should have imposed a 15-year minimum parole period under section 186.22, subdivision (b)(5). The People agree, but only with respect to count 1 because defendant was sentenced under that count to a life term. (See *People v. Lopez* (2005) 34 Cal.4th 1002, 1007; see also *People v. Fiu* (2008) 165 Cal.App.4th 360, 390 [noting if a defendant is convicted of a "crime for which an *indeterminate term* of life in prison is [prescribed], the limitation upon parole eligibility provided for in subd. (b)(5) [of § 186.22] is applicable".])

As to count 3, because the crime was not punishable by a life term, the People contend an additional enhancement may be imposed. (See *People v. Montes* (2003) 31 Cal.4th 350, 352 [noting subd. (b)(5) of § 186.22 "applies only where the underlying felony [by its own terms] provides for a life sentence"].) We agree.

⁵ Defendant's final contention is that the cumulative effect of the alleged errors discussed *ante* deprived him of a fair trial and requires reversal of the judgment. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (See *People v. Hill* (1998) 17 Cal.4th 800, 844.) Here, because we conclude that there were no errors or even *if* we presumed such errors, that they were harmless, we further conclude the cumulative error doctrine does not apply in this case.

The issue becomes whether the court erred in sentencing defendant on count 3 to a five-year enhancement (§ 186.22, subd. (b)(1)(B)) as opposed to a 10-year enhancement (*id.*, subd. (b)(1)(C)), as the People contend. Specifically, the People contend that based on the personal use of a firearm enhancement under section 12022.5 and the great bodily injury enhancement under section 12022.7, defendant's conviction on count 3 was for a violent, as opposed merely to a serious, felony, and, thus, the additional term for the gang enhancement on this count should have been 10, and not five, years. (See § 667.5, subd. (c); § 186.22, subd. (b)(1)(C).) We agree.

DISPOSITION

The trial court is directed to prepare a corrected abstract of judgment to show that defendant is subject to a 15-year minimum parole period on count 1, as set forth in subdivision (b)(5) of section 186.22, and that he is subject to the 10-year enhancement on count 3 (with punishment stayed under subd. (a) of § 654), as set forth in subdivision (b)(1)(C) of section 186.22. The trial court is further ordered to provide the Department of Corrections and Rehabilitation with a certified copy of the corrected abstract of judgment. In all other respects, the judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

PRAGER, J.*

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.