Filed 8/23/16 P. v. Garcia CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID GARCIA, Defendant and Appellant.	F054220 (Super. Ct. No. VCF164643B) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Eric L. Christoffersen, Deputy Attorneys General, for Plaintiff and Respondent.

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David Garcia (defendant) stands convicted, following a jury trial, of first degree murder of Fernando Barrera committed by an active participant in a street gang and carried out to further the activities of that gang (Pen. Code,[1] §§ 187, subd. (a), 190.2, subd. (a)(22); count 1), premeditated attempted murder of Rigoberto Martinez, Isidrio Martinez, and Manuel Chavez (§§ 187, subd. (a), 664; counts 2, 3, & 4, respectively), and shooting at an inhabited dwelling (§ 246; count 5).[2] He was found to have committed each offense for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). With respect to counts 1 through 4, jurors further found defendant personally used a firearm (§ 12022.53, subd. (b)) and personally and intentionally discharged a firearm (*id*., subd. (c)), and that a principal personally used a firearm (*id*., subds. (b), (e)(1)) and personally and intentionally discharged a firearm (*id*., subds. (c), (e)(1)). Defendant was sentenced to life in prison without the possibility of parole plus multiple determinate and indeterminate terms, and ordered to pay victim restitution and various fees and fines.[3]

Defendant timely filed a notice of appeal, but his appeal was dismissed for failure to file an opening brief, and remittitur issued. Upon his subsequent motion, and with the Attorney General's agreement, we recalled the remittitur and reinstated the appeal. We

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[1] All statutory references are to the Penal Code.

[2] The record contains multiple spellings of Fernando Barrera's and Isidrio Martinez's names. For consistency, we use those contained in the information and verdicts.

[3] Sentence on counts 2 through 4 was ordered to run concurrently with that imposed on count 1. Sentence on count 5 was stayed pursuant to section 654.

The abstract of judgment erroneously reflects defendant was sentenced to life *without* the possibility of parole on counts 1 through 4. As the sentencing minutes correctly show, he was sentenced to life *with* the possibility of parole on counts 2, 3, and 4. We presume this error will be corrected upon resentencing.

now hold the evidence was sufficient to sustain the convictions, but not the gang findings. Accordingly, we remand the matter for resentencing.

FACTS

I

PROSECUTION EVIDENCE

The Accounts of Those at the House and Other Evidence Related to the Shooting

On the evening of May 19, 2006, Rigoberto Martinez was at the home of Alena Hernandez, in the 14000 block of Road 190, Poplar.[4] Also present were Hernandez's brother and sister, Manuel Chavez, Hernandez and Rigoberto's month-old daughter, another baby, two of Hernandez's female friends, and Isidrio Martinez. All of them except the children and Hernandez's brother and sister were sitting on some lawn chairs in the garage, which was open, smoking a marijuana cigarette and trying to have a good time.

At first, everything was fine, then Jason Duke's car drove by. There were passengers in both the front and back seats, but Rigoberto did not recognize any of them. According to Rigoberto, those in the car screamed rude, but nongang-related, words. Rigoberto and those with him did not say anything, as they were trying to avoid problems.[5]

The car came by again and pulled over. Isidrio started getting upset. Rigoberto saw "a few heads going that way," so to keep the group from the car from getting close to him and his friends, he threw bottles at them. Those in the car threw rocks at Rigoberto's

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[4] References to unspecified dates in the statement of facts are to the year 2006.

Due to the duplicity of some surnames, certain persons will be referred to by their first names. No disrespect is intended.

[5] According to Hernandez, who had gone to school with Duke and recognized him driving the car, the group in the car yelled "[N]orte" and possibly "POG." The group at the house yelled back, "fuck you."

group and Hernandez's car in the driveway, and "[a] bo[u]lder" at Isidrio's truck, which was parked on the street. Hernandez moved her car into the garage, and Isidrio moved his truck into the driveway, and he and Rigoberto went back in the garage. Hernandez went into the house.[6]

About 10 to 15 minutes after the rock-throwing incident, the car returned, followed by another car. Both pulled over across the street from the house. Rigoberto saw people get out of Duke's car, but it was dark and he could not tell how many there were or if they were holding anything. Someone also got out of the second car. As a couple of people came into the driveway, Hernandez walked outside and told them she was going to call the police. They were yelling things at the men in the garage, but everything was happening quickly and she could not remember what they yelled.

Because there were "[t]oo many people" getting out and coming up toward the garage, Rigoberto decided to close the garage door to avoid problems. He, Isidrio, and Manuel were in the garage, but then Manuel said "no, they have a gun." Manuel ran inside and told those in the house to get down.[7] Rigoberto did not believe him and thought he was just being a coward, so he decided to stay where he was. He could see "[a] bunch of shadows" approaching, but did not see a gun. As the group approached, they were asking if Rigoberto and the others "bang[ed]" and were "scrapas." Rigoberto told them no. This yelling was going on as the garage door was going down.

Rigoberto pulled the garage door down from the middle. It did not close all the way, however, because there was a block at the bottom to keep the garage open for ventilation. He saw a hand in the gap, trying to push the door back up. He stepped on

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6 Hernandez recalled the rock throwing taking place the second time Duke's car passed. The third time by, the car stopped as if its occupants were going to get out and start a fight. It was then the group at the house started throwing bottles, and the car left.

7 Manuel said there was a gun as the group from the first car was approaching the garage. The other car had just pulled up. Rigoberto was pulling down the garage door as the person was exiting the second car.

the door so it could not be pushed up. Shortly after that, he heard a lot of banging and then a gunshot. When he heard the gunshot, he was standing on the left-hand side of the garage. Isidrio was on the right side. The two had moved to the sides so that if the door was forced open, one of them would be in each corner. Rigoberto only heard the first gunshot, which came right after he closed the door. Some of the pellets penetrated the door. Had they struck him, he would have been hit around the waist or midline groin area.[8] Rigoberto did not see the shooter.

Hernandez was outside when she heard someone say, "oh, I have the shotgun. I have the shotgun." She saw flashes. The shooting happened not too far from her. She heard a boom, then glass breaking on Isidrio's truck, then another boom. When the muzzle flashes went off, she saw the figure of the shooter, but did not see his face. She thought it was defendant. The person was shooting from the driveway toward about the middle of the garage.

After the shot, Rigoberto and Isidrio jumped the back fences and left. Rigoberto believed Manuel was still inside the house. Hernandez went inside and called the police. In the 911 call, which was received about 9:23 p.m. and a recording of which was played for the jury, Hernandez identified Duke as one of the perpetrators. She related there were perhaps seven people in the car; all were "common gang members" in the area, but she did not know who actually did the shooting.[9] When Hernandez went back outside to see if the police had arrived yet, she saw a dead body lying in the driveway, almost in the street.

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[8] Rigoberto subsequently told a detective it looked like the shot was fired down, not up, and bounced off the concrete before entering the house. Rigoberto based this on a smashed, marble-type BB that was located underneath a car in the garage.

[9] Rigoberto and Isidrio were not Sureños and did not associate with Sureños. Prior to this day, Rigoberto had exchanged some words with Duke, however. Hernandez had cousins who were southern affiliated, and there was Sureño graffiti inside the garage.

Fernando Barrera's body was found at the end of the driveway, near the sidewalk. His head was closer to the road than his feet. An autopsy showed he sustained a shotgun wound to the head, with an entry wound on the left and an exit wound behind the right ear. The track was left to right, approximately in a horizontal plane, and approximately 40 degrees front to back.[10] There were multiple shotgun pellets and fragments of pellets inside the skull, together with shotgun shell wadding, and extensive injury of the skull. There was some powder stippling and tattooing around the entry wound, as well as a small amount on the left shoulder. The marks on the skin suggested there was some distance between the shotgun muzzle and the head. The shot essentially separated the brain from the brain stem and blew the brain apart. The cause of death was shotgun wound to the head. Death was basically instantaneous.[11]

Sheriff's personnel found one spent double-aught buck 12-gauge shotgun shell between Barrera's legs and another in the street. There were what appeared to be pellet strike marks on the garage door. One was six feet four inches off the ground, and a second was six feet five inches off the ground. These were toward the upper right of the garage door, as viewed from the street. There was a third pellet strike that was two feet 11½ inches off the ground, and six holes in the garage door where projectiles penetrated the door and went all the way through. These were two feet nine and one-half inches off the ground, and about nine feet from each side of the garage door. Some of the projectiles passed through the garage wall into the bedroom beyond.[12] The eight holes in

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[10] Dr. Hartman, who performed the autopsy, explained that all injuries are described with the body in the anatomic position, meaning standing straight up. He did not know the actual position of the body at the time the wound was received.

[11] Hartman explained there would have been no voluntary movement on Barrera's part after the wound was received. If he were moving at the time, however — for example, running away from the garage — the body would have continued to move in the direction he was running.

[12] According to Sheriff's Sergeant McKay, a double-aught buck shell contains nine .32-caliber projectiles. As it hits the body, it spreads and can cause a lot of damage to a

the common wall of the garage and bedroom ranged from one foot one inch to one foot nine inches in height on the bedroom side, and slightly higher on the garage side. There was one bullet hole in the far wall of the bedroom at a height of one foot. A crib was along this wall.

The Accounts of Those in the Car

Anthony Chavez, who was known as "Lips," and Barrera, who was known as "Redman," were cousins. Chavez knew defendant as "Chuco."

On May 19, Chavez, Ricardo Cisneros (Little Ricky), and Jimmy Domingo were in the back seat of Duke's car.[13] Duke was driving. Defendant was the front passenger. They had told Chavez to hurry up and get in, because some "Scraps" where throwing things.[14] Chavez thought they were going to "box," i.e., fight. They had an old BB gun in the back seat of the car.

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body. The farther the shooter is from the target, the greater the spread. The closer the shooter is to the target, the more pellets will hit the target. According to Sheriff's Detective Meek, the entry holes in the two-foot range were a spread pattern that represented one shot. The higher pellet strikes could represent a second shot. McKay opined some of the strikes did not penetrate the garage door because the projectiles had lost their velocity for some reason, such as hitting something else first.

[13] At trial, Cisneros and Domingo (both of whom were teenagers at the time of events, as was Chavez) admitted being present at the outset of the evening, but denied being present at the time of the shooting. Both told detectives they were present and described events, however. At trial, they testified they told lies to the detectives, because the detectives pressured, threatened, and scared them.

[14] Chavez denied still being a northern gang member as of the time of trial. He had a northern gang tattoo, however, that consisted of four dots on the web of one hand. "Scraps" were Sureños. They were on opposite sides from northern gangs. When Chavez's residence was searched several months after the shooting, a necklace that said "Poplar 14" and "Anthony Chavez" was found.

When Cisneros's room was searched following the shooting, officers found red bandanas and a red belt. The bandanas belonged to Cisneros. According to him, the red belt and a notebook with gang-related drawings belonged to friends of his.

Domingo claimed he associated with northerners, but not with southerners. He had problems with southerners before. There were not many southerners around

The group drove down the street and stopped. Some people at a house threw bottles at those in the car, nearly hitting Chavez. Chavez, Duke, and defendant went to the canal and picked up some rocks. The group picked up Barrera, then drove back by the house. Chavez and Barrera intended to throw a rock in an attempt to break the windows of a truck in the driveway, but the rock was too big to throw.

They drove to a small alley on Kilroy, where there was a lot of Norteño POG graffiti. There, Vincent Cardenas, who was known as "Pato," showed up in a small green car. They got out of Duke's car to talk to Cardenas, and told him some people were throwing bottles at their car. Cardenas suggested they go back, and said he would follow them.

As Domingo and Chavez walked back to Duke's car, Domingo said he thought "they" — meaning defendant, Cardenas, and Barrera — had a gun.[15] After everyone got back in the car, they agreed that all they were going to do was "smash" — fistfight those at the house — and they shook hands on the agreement. Cardenas was in a different car and was not part of this agreement. After everyone got back in the car and they were driving to the "Scrap house," Chavez thought he heard the sound of a gun being racked in the front of the car.[16] Someone said something about having a shotgun, but Chavez did not remember who. Chavez did not see a gun.

Poplar. Domingo socialized with members of the Poplar Original Gangsters (POG), but denied being "down with" POG and Norte. When Domingo's room was searched, a binder with gang-related writings and indicia was found.

[15] Cisneros told detectives the group got a pump shotgun from Cardenas, who showed defendant, Duke, and Barrera how to load it. This was the first time Cisneros met Cardenas, who "looked pretty old," like he perhaps was in his 30's. On the drive back to the house, defendant had the gun. Domingo — who also met Cardenas for the first time that night — told detectives Cardenas gave a gun to defendant just before the shooting. According to Domingo, Cardenas did not tell defendant how to work the gun.

[16] Meek explained that when a pump shotgun is used, the handle has to be pumped back or racked in order to chamber the next round. This action, which makes a very distinctive noise, ejects the spent round, if one has been fired.

The group then drove back to the house with Cardenas following in the green car. Chavez did not remember how many people were present when his group arrived. His group exited the vehicle, and the people at the house started throwing bottles. Chavez and Cisneros ran back to Duke's car. Chavez saw Cardenas "walking up all hard." Someone said, "big, bad POG." The people at the house ran into the garage, which was open. Chavez recalled a lot of arguing and girls screaming. He told detectives he saw defendant with a gun that looked like a double-barreled shotgun. The people at the house were closing the garage door as Chavez's group approached. Chavez saw one of them pulling the door down. Barrera tried to open the garage door.[17] Chavez went to get the BB gun from the car to scare the people at the house, but he heard two shots and saw two muzzle flashes from a shotgun. Chavez believed defendant was holding the gun, because he realized defendant was standing by Barrera, and Duke was on the other side of the truck. He told detectives it was defendant, but he did not really know who it was.[18]

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[17] Cisneros told detectives he and Chavez stayed in the street, while Duke, defendant, Barrera, Domingo, and Cardenas ran into the yard. Chavez started pumping a BB gun and pointing it "over there," although he never fired. Gang-related slurs were yelled back and forth between the two groups. Cisneros did not know who was trying to open the garage, but it looked like some of his group were fighting to get the door open. It also looked to him like there were people on the other side of the garage door, inside the garage. They were trying to keep the door down, but Barrera had already grabbed hold of it. Defendant had the gun.

[18] Chavez explained detectives threatened him with a murder charge and pressured him into agreeing with them that defendant was the one who had the gun. Chavez told them he saw defendant get out of Duke's car with a gun he thought was a double-barreled shotgun. He actually thought it was Cardenas, however, because Chavez's group had not had the shotgun until Cardenas came. Cardenas was a small man, perhaps five feet two to four inches tall. Chavez told detectives that after the shooting, everyone in the car was saying they should blame Cardenas.

Cisneros told detectives he saw one or two flashes from the gun and heard two gunshots, and that defendant was holding the gun. Initially, however, he insisted Cardenas was the shooter. When the first shot was fired, Cisneros saw that the garage door was opened up. It looked to him like someone on the other side had been holding it

Everyone ran back to the car. Duke and defendant, who had been near Barrera, were the last to get in. They took off, while Cardenas left in his own car. Everyone was panicking, but defendant was panicking the most. Although at trial Chavez testified defendant did not say anything, he told detectives defendant said, "I think I shot him."

Realizing Barrera was not in the car, the group thought he had run somewhere else. They made a U-turn to check and saw someone on the ground, but they thought it was one of the girls from the house. After they drove away, Chavez said to stop the car and let him out, and he went home. He believed Barrera was shot by mistake. Nobody was supposed to be shot; however, Chavez admitted seeing the people running into the garage. He originally told police he was not there and did not know who was shot.

On the evening of May 19, Nick Ceballos followed defendant and Duke to a barn near Lindsay, where they dropped off Duke's car. As Ceballos drove them back to

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to keep it down. Cisneros did not see Barrera fall, but the garage door just shut. After the first shot, defendant immediately shot again.

Domingo testified he ran into Duke, defendant, and Barrera at a park. After drinking for a while, they got bored, and Duke suggested they "go for a cruise" to look for girls. Duke had a car. When they drove by Hernandez's house, they saw "a couple of scraps." Because they had had some problems, they picked up Chavez and Cisneros. They drove back by the house, and Duke started yelling. The people at the house also started throwing bottles. Those in the car drove off and picked up some rocks, then returned to the house and threw them. They then went to somebody's house, where Domingo saw Cardenas, an older person Domingo had not previously met, with a shotgun. Duke told Cardenas there were some scraps at the house, so everyone got back in Duke's car. Cardenas had his own car; the shotgun was in that vehicle. When Domingo saw Cardenas with a gun, he told them to let him out of the car. He got out and they drove away. About two minutes later, he heard gunshots. Before he got dropped off, there was no discussion about shooting anyone.

Domingo told detectives that after the group pulled up at the house, Barrera got out of the car and tried to open the garage door with his hands, as the people at the house had started running through the garage and closed the garage door upon the group's arrival. Barrera pulled up the garage door, then there was a gunshot. Defendant was holding a shotgun with two hands. Domingo said defendant shot Barrera and it was a mistake. He "guess[ed]" defendant mistook Barrera for "an enemy" and just shot.

Poplar, Duke said they were involved in a shooting and they were in the car. Defendant agreed. Ceballos dropped them off at Duke's residence.

Just before midnight, Sheriff's Detective Kennedy contacted Duke and defendant at Duke's home. Kennedy interviewed defendant, who was not under arrest.

During the interview (an audio recording of which was played for the jury), defendant said he had been with Duke since around 7:00 p.m., as Duke had gotten his first paycheck and they wanted to celebrate. Defendant said he had left a couple of times to check in with his older brother, who lived in Poplar, but then he returned to Duke's house.

Defendant related that when he and Duke went out, nobody else was with them. Told that Duke (whom Kennedy had interviewed before speaking with defendant) said someone named Fernando (Barrera) was with them, defendant said that was Duke's cousin. Defendant and Duke had been joking with him, and he had gotten mad and disappeared on them. Defendant did not know where he went. Defendant described Barrera as being 15 or 16 years old, with long hair and some facial hair.

Kennedy also told defendant that Duke said he (Duke) had had words with someone named Rigo. Defendant said he did not remember that and did not think he was there. Kennedy said witnesses at the house said they saw defendant and Duke pull up and exchange words with Rigo, and the next thing they knew, they heard someone saying, " 'I got the shotgun,' " and gunshots. Kennedy informed defendant that someone was dead. Defendant responded that he was not the type of person who used violence. He also said that if there had been an exchange of words, he would have handled it with punches. Told his and Duke's stories were not the same and they were driving around that night, defendant said they went to Porterville to look for girls after Barrera got out of the car. Defendant said he did not know where Duke left the car; they were both drinking, and so they got a ride back to Duke's house and had been there ever since.

On May 20, Kennedy and Detective Hunt had defendant transported to the Violent Crimes Unit, where defendant was advised of, and waived, his rights. This time, defendant admitted being in Duke's car with Duke and Barrera. He said the three of them had been "hanging out" at Duke's house, but at some point had driven past the house at which the shooting occurred, and some "dudes" threw bottles at them. Defendant's group drove a street over, gathered rocks, and returned to the house. Defendant was in the front of the car with Duke, while Barrera was in the back seat. Barrera threw a rock. Defendant then heard, "boom, boom." He hit the ground, then he heard another person hit the ground. He did not know where Duke was, but when defendant got to the car, Duke was already there. The two were "freaking," asking each other where Barrera was. Neither knew. They then jumped in the car and took off.

Confronted with the fact some witnesses had said two cars pulled up, defendant said they were lying. He admitted he, Duke, and Barrera got out of the car and approached the residence; defendant said he did not like that "those guys" threw bottles at them. Defendant said he got hit in the head by one of the bottles or a rock.

Defendant initially said he did not know where Duke's car was, but then confirmed they drove it to Porterville and then returned to Poplar. He said he did not know who had the gun that night, and he denied being the shooter. When told it was an accident and that the people at the house were not innocent, defendant still responded that he did not do anything.

Defendant gave a third statement, in which he admitted Cisneros, Domingo, and Chavez were also in the car. Defendant said that as they were driving around, Rigoberto threw bottles at him. The group then drove to a nearby road, picked up rocks, and returned to the house to throw them. Asked who had the gun, defendant said he did not know, but Chavez had a BB gun in the back seat. Defendant consistently denied having a gun, but said that if anything, it was Duke's fault everything happened. He said he saw a body on the ground, and that a shotgun killed a kid.

Kennedy subsequently searched Duke's room. It was completely red. There was gang graffiti in another room in the house. Kennedy also located Duke's car. A BB gun was found in the back. No other weapon was located.[19] Hunt searched defendant's brother's apartment. Numerous gang-related writings, pictures, and other items belonging to defendant were found.

The Gang Expert's Testimony

Sheriff's Detective Aguilar had been assigned to the gang unit for 12 years as of the time of trial, and had contacted gang members on the street, gathered information, and made arrests for any crimes, for most of that time. He had received training concerning gangs since 1995. His training involved various types of gangs, including Norteño gangs, and he had investigated crimes committed by Norteño gang members. He came into contact with gang members on a daily basis, and had assisted in search warrants on Norteño gang members' residences. He had become familiar with the gangs in various areas of Tulare County, including Poplar, and had patrolled Poplar.

Asked for a brief history of the Norteño gang, Aguilar explained that the northern gangs started in the prison system in the 1950's, then became formally organized out on the streets in approximately 1968. The street structure is not as well organized as in prison. Out on the streets, groups are basically formed by individuals who live in a particular town or by association or by friendship. They claim a specific color (red) and number (14) to separate themselves from rival gangs. Tulare County is the border between north and south, leading to a number of conflicts and turf wars in the county. Southerners are rivals of the Norteño gang; southerners claimed the number 13 and color blue. "[S]crap" is a derogatory term for a southerner, while "buster" is a derogatory term for a northerner. Calling a rival gang member the applicable term is a direct insult to that person and to his gang, and demands immediate retaliation.

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19 The shotgun used in this case was never found.

A count was last taken in 1995, at which time there were approximately 2,000 Norteños.[20] Aguilar himself had spoken to hundreds over the years. He explained that the Norteño gang has cliques, which are a specific identification of the group's location of origin. For example, if the group is from Poplar, its members will give themselves a specific name to show they are from there. The cliques work together, but use their names as a way of identifying the turf they claim. POG is a Norteño clique. Aguilar had had numerous contacts with POG members. He had also had the opportunity to read reports by, and talk to, other officers regarding the Norteño gang and its crimes.[21]

According to Aguilar, it is common to observe the number 14 on property belonging to Norteño gang members. They will wear items of red clothing or with four stripes. They will tattoo four dots on themselves, although gang members often no longer tattoo themselves because they believe tattoos identify who they are. In gang writings, the letter S will be crossed out as a sign of disrespect to Sureños.

Based on his training and experience, Aguilar identified some of the primary activities of the Norteño gang as drive-by shootings, armed robberies, vehicle thefts, simple assaults, assaults with weapons, murders, attempted murders, and shootings at inhabited dwellings. It is common for Norteño gang members to brag about their crimes; it increases their status within the gang subculture and gives credence to the gang as being powerful and someone to be feared. In addition, it is important to be able to tell others about putting in work for the gang; without that, someone has no street credibility. Street credibility is very important for an up-and-coming gang member.

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20 Aguilar did not specify if he meant within the county, or some other region.

21 Aguilar explained there is a trend in Tulare County for gang members to claim Norteño and Sureño, rather than specific cliques, because of an erroneous belief that someone not claiming a specific set cannot be identified as a gang member. Gang officers do not go by the specific set, however, but by whether the person claims north or south.

With respect to predicate offenses, Aguilar was familiar with Frank Gurrello, a northern gang member from Porterville. On November 19, 2005, Gurrello attempted to pressure a fellow gang member into committing a murder. When the person refused, his car was stolen and he was assaulted. Gurrello was convicted of assault and vehicle theft with a gang enhancement. Aguilar's opinion Gurrello was a Norteño gang member was based on Gurrello seeking to murder a rival gang member, being in the company of fellow gang members when he was attempting to do that, and being documented by the Porterville Police Department as being a northerner gang member.

Aguilar was also familiar with Jaime Benevente. Benevente was a northerner gang member out of the Cutler-Orosi area. On September 6, 2004, he went with fellow gang members to a family gathering at what they believed to be a rival gang member's residence. They confronted and assaulted some juveniles outside, then stole a vehicle and threw a rifle in the back and left the area. Benevente was convicted of carjacking. Aguilar had personal knowledge from documentation that Benevente was a northerner gang member at the time.

With respect to the current case, Aguilar reviewed reports and researched defendant's background. He explained that defendant's nickname — Chuco — is short for pachuco, which literally translates as "gangster" or "gang member." During execution of a search warrant at defendant's brother's home, a photograph was found of defendant and two other subjects dressed in red. One was "throwing the number four" for 14, while another was "throwing a P" for Poplar. One of the three was wearing a red belt, above which it had "Chuco." There were also gang writings typical of the Poplar area, which included the moniker Chuco, the number 14, Poplar, OG (original gangster), and Norteño. There were letters written to defendant in which red ink was used and every S was crossed out. There was also a small baseball bat, which bore the moniker Chuco, 14, POG X4, and Norte. There was also a red belt.

Aguilar also researched Duke. Everything in Duke's room — even the ceiling — was red. There were also writings such as signs with the S crossed out, X4 north POG, POGS with the S a little sideways and crossed out, Northside, Norte, Norte Poplar, and scrap killer with the S crossed out. The writings were consistent with Norteño gang graffiti. Graffiti is very important in gang culture; north and south are turf gangs, and in order to claim a turf, a gang has to show its presence to rivals and citizens at large. It is an intimidation factor.

With respect to Cardenas, he had "POG" tattooed in red on his stomach. He also had a tattoo of four dots. CD's (compact discs) found in Domingo's house bore red writing with the S's crossed out. One of the CD's was a red CD with gang stories and songs. Red clothing and a notebook with "Norte" and other gang writing on it were found in Domingo's residence. Items with similar writings were found at Cisneros's house. One such writing referred to Tulare County Norteños shooting and being ready to smash their enemies. Also found were items of red clothing and two red bandanas. A necklace with "14" on it was found in Chavez's residence. Photographs found at the house where the shooting occurred showed Sureño-related numbers, clothing, and hand signs.

When booked into jail, defendant wrote on the classification sheet that he considered southerners his enemies and he claimed northerner. Duke gave the same answers on his classification sheet.

Based on all the information, Aguilar opined defendant was an active member of the northerner gang at the time of the shooting. He further opined Duke committed the crime for the benefit of the gang, and that Domingo, Chavez, and Cisneros were associated with the Norteño gang.

Aguilar explained that fear is very important to gangs. In order to be able to hold on to territory, they have to show their rivals and other gang members that they hold power and are to be feared. Fear also allows them to control the population, so they can

commit crimes at will with witnesses not being able to come forward for fear of retaliation. It is common for Norteño gang members to carry firearms, as they increase the fear factor. It is important to display weapons, even if the weapons are not fired. Because many gang members are on probation, they will give their guns to a gang member who is not documented, in order to avoid their guns being confiscated during random searches. It is also common for one weapon to be shared among gang members.

Aguilar explained that trust and respect are extremely important in the gang subculture. Trust has to be placed in the subjects within the gang, and the mere accusation of being a rat can lead to retribution and serious injury. Respect was "everything," and if they believe someone disrespected them, it is immediate grounds for assault or worse. When gang members commit crimes together, there is a potential for escalating violence, because in order to get respect, one has to prove he or she will not back down.

According to Aguilar, "[b]acking up" means fellow gang members are sworn to help each other in a physical fight, or at least to be with each other while one occurs. "Putting in work" is very important; it is how someone proves to other gang members that he or she is in fact a gang member and "down for the cause." It can involve anything from being a lookout while others are doing graffiti, to personally doing the graffiti, to holding weapons for someone else, or even personally using them. It is common for more than one gang member to participate in committing crimes, in order to have backups and witnesses. Also, it is important to outnumber one's adversaries to guarantee success. For instance, if two rival gang members show disrespect, the disrespected person will gather as many as possible from his own side and confront them, showing by numbers that they will be overpowered.

According to Aguilar, gangs often shoot at occupied residences of rivals, because if someone is believed to be a rival gang member, he or she needs to be removed from the gang's turf. Shotguns tend to be favorite weapons of gangs, as most gang members do

not take formal instructions and so are bad shots. A shotgun guarantees they will hit something.

Gang slurs are commonly yelled before or during the commission of a crime to identify oneself and to insult the intended victim. Asking a person if he or she bangs is a way of verifying if the person is in fact a rival. It is common for gang members to be aware of crimes committed by gang members on the same side. They brag at parties where they gather about the work they have done.

In answer to a hypothetical question based on the evidence presented by the prosecution, Aguilar opined the crime in this case benefited the Norteño gang by garnering respect, in that they were showing they would not stand for a rival to insult them and were telling the rivals to get out of their turf. Shooting a fellow gang member would not, however, be something they would brag about. The crime was also committed in association with the Norteño gang, because turf was claimed and defended with the assistance of other gang members. The crime was also committed in association with the northern gang due to two or more members acting together.

II

DEFENSE EVIDENCE

Cardenas was presented to the jury so jurors could see his size and stature. Cardenas also showed his tattoos: POG in red letters across his stomach, Pato in blue letters on his back, X4 or 14 in Roman numerals on his right inside forearm, and four dots on his left wrist.

Defendant, who was 18 years old at the time of trial, testified Duke was one of his friends. Cardenas was "[s]ome older guy" defendant knew, although not personally. Defendant was fearful of him. Barrera was one of defendant's closest friends. Defendant denied shooting him. He had never shot a gun before or even had one in his possession, nor did he know how to load and fire one. He had never been instructed on how to fire any sort of weapon.

On the afternoon of the shooting, defendant, Barrera, and Cisneros were at Duke's house, celebrating Duke's receipt of his first check. They were drinking beer and playing video games. Defendant had consumed one beer. It was almost dark when they walked to the park down the street to look for some girls. Nobody had any kind of weapon. There were no girls at the park, but Domingo was there. They all went back to Duke's house. Their plan was to go for a ride and continue looking for girls. When they got back to the house, they got in Duke's car and left.

They drove all over town. At some point, they went to Road 190, not far from Walker Road and the canal. Defendant was not acquainted with Hernandez or Rigoberto, nor did he have any problems with them. He did not know if anyone at their house had any kind of gang affiliation. As Duke's car passed the house, however, the people there started cussing and throwing bottles at Duke's car. It was dark by this time. Duke got mad and started cussing back.

Defendant's group decided to go to Walker Road to pick up some rocks, in order to break a window. Duke handed defendant a large, heavy rock. At some point after the bottle throwing, they came upon Chavez walking, and they picked him up. They drove back by the house. Defendant attempted to throw the rock at a vehicle parked on the street, but the rock was too huge and just rolled on the ground. Duke was angry and was cussing at the people at the house, but he was not using gang slurs.

Duke then drove them to some alleys a couple of blocks away. Nothing was discussed in the car; Duke was upset, but nobody else was. Defendant just wanted to go back to Duke's house and "finish kicking it."

Duke stopped the car. They were going to talk to a teenage friend, "Chucky." Duke made the decision to stop at Chucky's house. All of a sudden, another car pulled up. Cardenas was driving. Duke got out and started talking to him. Other people in Duke's car also got out. Defendant got out to talk to Chucky, who was walking over to him.

Duke said to get back in the car, so they did. It was defendant's understanding they were going to "smash," i.e., fight. There was a BB gun, but nothing else, in the car. It took a couple minutes to get back to the house. During that time, those in Duke's car shook hands and made an agreement to "smash" and to find out why those at the house threw bottles at Duke's car. Defendant did not notice another car was following them until they stopped. Defendant's group arrived at the house first, but Cardenas was the first to get out of his car. Defendant did not know he was going to be there. They did not need him to help fight.

As soon as defendant got out of the car, he ran toward the truck. He was not paying attention to Cardenas or anyone else. He found a bottle on the ground. He broke the vehicle's window with it at almost the same time as he heard a shot. It sounded like the shotgun was in the street, but defendant could not tell from what direction the shots were coming. He was scared and thought someone may have been shooting at him. He did not know where Cardenas was at the time.

Defendant, who was by the driver's side window of the vehicle, hit the ground and, after a couple seconds, ran to the car. As he ran, he heard the second shot. He saw something fall. He thought it was a girl. Cisneros, Chavez, and Duke were already getting in and closing the car doors when defendant got in. Defendant did not know what happened to Domingo. Cardenas was the first one to leave. He "left quick." Duke and defendant talked about Barrera and decided he was with Cardenas or had left, because he knew Poplar well. Defendant denied ever having a weapon or shooting anything or anyone. He did not know who did the shooting.

Cisneros and Chavez said they wanted to get out of the car, so Duke stopped two or three minutes later and let them out. Before that, it was quiet in the car. They did not talk about anything and made no agreement to blame Cardenas.

Duke and defendant then drove to the home of someone they knew in Porterville. While they were there, Ceballos drove up. He followed them to Lindsay, where they left

the car. Ceballos then drove them back to Duke's house. During that drive, Duke said something about a shooting. Defendant did not say anything.

Defendant did not have any tattoos. The photographs of him with other friends making signs and wearing red were taken a couple years earlier. The letters with the S's crossed out were written to him by a girlfriend his freshman year. When he wrote things, he did not cross out S's. He had been known as "Chuco" since he was three or four years old and living in Oregon. His family gave him the nickname because he always danced to a particular song.[22] He denied being a member of a gang. Although he socialized with gang members, he was not willing to do something for the gang. He had never done anything illegal on behalf of any gang or been asked to do so. The red belt found at his brother's house was not his. As for the baseball bat, the writing was already on it when it came into defendant's possession. Defendant simply added his name and a one and a four. The numbers did not mean anything to him. He just wanted to decorate the bat.

With respect to the jail classification sheet, defendant was told to write one or the other in terms of his affiliation, for his safety. Because he had friends who were northerners, he indicated he was a northerner. He wrote that southerners were his enemy in order to protect himself. He did not want to be put with them, because they knew he associated with northerners. He also associated with nongang-affiliated people, however.[23]

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[22] Chris Sandoval, defendant's brother, confirmed their mother gave defendant the nickname when defendant was a small baby.

[23] According to Sandoval, one socialized with gang members in Poplar because "[t]hat's all there is." One could socialize with them without joining the gang, however, or wear red and not be affiliated.

Sandoval grew up with Cardenas. Cardenas had been known as a gangster in the community since eighth grade. Sandoval termed Cardenas a "thug" and a troublemaker who did drugs and got involved in fights because of northerner-southerner affiliation. Sandoval had seen him with a number of guns.

DISCUSSION

I

ISSUES CONCERNING INTENT

Defendant was convicted of first degree murder, on a theory of premeditation, in count 1, and of premeditated attempted murder in counts 2 through 4. Both crimes require express malice, that is, a specific intent to kill. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1223; *People v. Smith* (2005) 37 Cal.4th 733, 739; *In re Sergio R.* (1991) 228 Cal.App.3d 588, 595.) There was no evidence, and the prosecutor did not posit, defendant intended to kill Barrera. Rather, the People's theory was that defendant intended to kill those inside the garage, and, under the doctrine of transferred intent, defendant was liable for Barrera's murder.[24]

Defendant first contends there was no evidence he harbored a specific intent to kill anyone. The applicable legal principles are settled. The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact

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[24] "In its classic form, the doctrine of transferred intent applies when the defendant intends to kill one person but mistakenly kills another. The intent to kill the intended target is deemed to transfer to the unintended victim so that the defendant is guilty of murder. [Citation.]" (*People v. Bland* (2002) 28 Cal.4th 313, 317 (*Bland*); see generally *People v. Scott* (1996) 14 Cal.4th 544, 548-551.) " 'The transferred intent doctrine does not . . . denote an actual "transfer" of "intent" from the intended victim to the unintended victim. [Citation.] Rather . . . , it connotes a *policy* — that a defendant who shoots at an intended victim with intent to kill but misses and hits a bystander instead should be subject to the same criminal liability that would have been imposed had he hit his intended mark. [Citation.]' " (*People v. Sanchez* (2001) 26 Cal.4th 834, 851, fn. 9.) In other words, "[t]ransferred intent is a legal fiction, used to reach what is regarded with virtual unanimity as a just result: when an assailant, through 'bad aim' or other mistake, kills the wrong person, he is just as culpable, and should be punished to the same extent, as if he had hit the intended mark. [Citation.]" (*People v. Czahara* (1988) 203 Cal.App.3d 1468, 1474.) The doctrine does not apply to attempted murder (*Bland*, *supra*, 28 Cal.4th at p. 317), but does apply to the gang-murder special circumstance set out in subdivision (a)(22) of section 190.2 (*People v. Shabazz* (2006) 38 Cal.4th 55, 66).

could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson*, *supra*, at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). "Where the circumstances support the trier of fact's finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant's innocence. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.) This standard of review is applicable regardless of whether the prosecution relies primarily on direct or, as is usually the case where intent is concerned (*People v. Ramos* (2011) 193 Cal.App.4th 43, 48; *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690) on circumstantial evidence (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125).

The evidence adduced at trial is set out at length, *ante*, and need not be repeated here. It clearly is sufficient to sustain a finding of intent to kill *someone*, which is all that is necessary to sustain defendant's convictions for murder and at least one count of attempted murder. (See, e.g., *People v. Ramos*, *supra*, 193 Cal.App.4th at p. 48; *People v. Leon* (2010) 181 Cal.App.4th 452, 464; *People v. Chinchilla*, *supra*, 52 Cal.App.4th at p. 690; see also *People v. Perez* (2010) 50 Cal.4th 222, 225 (*Perez*) [mental state required for attempted murder is intent to kill a human being, not a particular human being].) That no one inside the garage was actually injured is of no import. (*People v. Avila* (2009) 46 Cal.4th 680, 702.) Nor does it matter jurors might have declined to find the requisite intent. " 'Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact. While reasonable minds may differ on the resolution of that

issue, our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.]' [Citation.]" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552; see *People v. Thompson* (2010) 49 Cal.4th 79, 114.)

Defendant submits that if we find evidence of an intent to kill, his convictions on two counts of attempted murder nevertheless must be reversed because, contrary to the prosecutor's theory, there was no "kill zone." We disagree.

Because the doctrine of transferred intent does not apply to the crime of attempted murder, "[a] person who intends to kill only one is guilty of the attempted (or completed) murder of that one but not also of the attempted murder of others the person did not intend to kill." (*Bland*, *supra*, 28 Cal.4th at p. 317.) Thus, in order to be convicted of multiple counts of attempted murder, each involving a different victim, the prosecution must prove the perpetrator acted with the specific intent to kill each victim. (*People v. Smith*, *supra*, 37 Cal.4th at p. 739.) "The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*Bland*, *supra*, 28 Cal.4th at p. 328.) This is so even though the defendant's conduct may have endangered the lives of more than one person. (See *Perez*, *supra*, 50 Cal.4th at pp. 225, 231.)

A person who shoots at a group of people may nevertheless be found guilty of the attempted murder of everyone in the group, even if he or she targeted only one of them, if the person also, concurrently, intended to kill others within what has been termed the " 'kill zone.' " (*Bland*, *supra*, 28 Cal.4th at p. 329.) " 'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, . . . consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and

attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.' " (*Id*. at pp. 329-330; see *People v. Vang* (2001) 87 Cal.App.4th 554, 563-564.)

The kill zone theory thus "addresses the question of whether a defendant charged with the murder or attempted murder of an intended target can *also* be convicted of attempting to murder other, nontargeted, persons." (*People v. Stone* (2009) 46 Cal.4th 131, 138.) In *Stone*, the California Supreme Court concluded the kill zone theory did not fit the charge or the facts of the case, where the defendant shot into a group of about 10 people, apparently without pointing the gun at anyone in particular, and was charged with the attempted murder of one specific member of the group. (*Id*. at pp. 134-135, 138.) The court held that, because the mental state required for attempted murder is the specific intent to kill a human being, not a *particular* human being, someone who fires a shot into a group of people, intending to kill one of the group but not knowing or caring which one, can be convicted of a single count of attempted murder. (*Id*. at pp. 134, 141.)

Here, defendant was charged with attempting to murder the intended targets — the three men in the garage when the bottle and rock throwing occurred. There was evidence

from which reasonable jurors could conclude defendant was pointing the gun and shooting at where he believed the intended victims were. His firing two rounds of double-aught buck — each containing multiple .32-caliber pellets — with a shotgun was akin to firing multiple rounds from an automatic weapon or using an explosive device. The kill zone concept was superfluous to this scenario, which was supported by the evidence and consistent with the court's instructions.[25]

On the evidence presented, jurors also could reasonably have convicted defendant of multiple counts of attempted murder based on the kill zone theory. This theory "does *not* apply if the evidence shows only that the defendant intended to kill a particular targeted individual but attacked that individual in a manner that subjected other nearby individuals to a risk of fatal injury. . . . Rather, the kill zone theory applies only if the evidence shows that the defendant tried to kill the targeted individual *by killing everyone in the area in which the targeted individual was located*. The defendant in a kill zone case chooses to kill *everyone* in a particular area as a means of killing a targeted individual within that area." (*People v. McCloud* (2012) 211 Cal.App.4th 788, 798; see *People v. Vang*, *supra*, 87 Cal.App.4th at pp. 563-564.)

In light of the circumstances here — and particularly the means of attack defendant employed — jurors reasonably could have concluded he primarily targeted Rigoberto, who was holding down the garage door, but "used lethal force designed and intended to kill everyone in an area around [Rigoberto] . . . as the means of accomplishing the killing of that victim." (*People v. Smith*, *supra*, 37 Cal.4th at p. 746; cf. *People v. Perez*, *supra*, 50 Cal.4th at pp. 225, 230-231 [indiscriminate firing of single shot at group of persons, without more, does not amount to attempted murder of everyone in group].) As stated in *Bland*, *supra*, 28 Cal.4th at pages 330-331: "Even if the jury

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25 Jurors were not constrained by the prosecutor's reliance on the kill zone theory. (*People v. Perez* (1992) 2 Cal.4th 1117, 1126; see, e.g., *People v. Barton* (1995) 12 Cal.4th 186, 203; *People v. Jeter* (1964) 60 Cal.2d 671, 675; see also § 1126.)

found that defendant primarily wanted to kill [the driver of the car] rather than [the driver's] passengers, it could reasonably also have found a *concurrent* intent to kill those passengers when defendant and his cohort fired a flurry of bullets at the fleeing car and thereby created a kill zone. Such a finding fully supports attempted murder convictions as to the passengers." (Fn. omitted.) An equivalent situation existed here.[26]

Defendant says even if this is so, his conviction on count 4 must be reversed, because there was insufficient evidence Manuel — having gone into the house before the first shot was fired — was in any kill zone. We find the premise of defendant's argument somewhat questionable, since pellets from one of the shots not only penetrated the garage door, but the wall of the house beyond. (See *People v. Adams* (2008) 169 Cal.App.4th 1009, 1023.) In addition, as we have explained, *ante*, jurors reasonably could have found defendant specifically intended to kill Manuel without reference to the kill zone theory.

In any event, "[o]ur courts have repeatedly ruled that persons who are charged with attempting to commit a crime cannot escape liability because the criminal act they attempted was not completed due to an impossibility which they did not foresee: 'factual impossibility is not a defense to a charge of attempt.' [Citations.]" (*People v. Reed* (1996) 53 Cal.App.4th 389, 396-397.) This principle applies when the intended target is absent (*People v. Pham* (2011) 192 Cal.App.4th 552, 559-560), even in kill zone situations (*People v. Vang*, *supra*, 87 Cal.App.4th at pp. 564-565).

In light of the foregoing analysis and conclusions, defendant's related argument — that the kill zone instruction should not have been given at all — necessarily fails.

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26 In a footnote, defendant suggests the prosecutor incorrectly stated the kill zone theory in his argument to the jury. We do not perceive defendant to be raising this as an issue (see Cal. Rules of Court, rule 8.204(a)(1)(B)), and so do not discuss the point further.

II

SENTENCING ISSUES

Defendant contends there was no substantial evidence of a criminal street gang; hence, all gang-related penalties must be stricken. He further contends (and the Attorney General concedes) he is entitled to resentencing on count 1 in light of *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] and *People v. Gutierrez* (2014) 58 Cal.4th 1354. Our conclusion defendant's first claim has merit renders moot his second claim.

The gang enhancements (§ 186.22, subd. (b)), gang-murder special circumstance (§ 190.2, subd. (a)(22)), and vicarious firearm enhancements (§ 12022.53, subd. (e)(1)) alleged and found true in the present case all required proof of the existence of a criminal street gang. (See *Salazar v. Superior Court* (2000) 83 Cal.App.4th 840, 846.) The principles that guide our review of a claim of insufficient evidence are set out, *ante*. They apply equally to convictions and enhancement allegations (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1197, disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Garcia* (2014) 224 Cal.App.4th 519, 522-523), and to special circumstances (*People v. Booker* (2011) 51 Cal.4th 141, 172).[27]

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[27] The prosecution's gang expert opined defendant was an active member of a "northerner gang" at the time of the shooting. Defendant contends such a gang is overly inclusive and violates his First Amendment rights of association and speech, as well as the Fourteenth Amendment. To the extent defendant's First Amendment claim is not directly related to or goes beyond the issue whether a criminal street gang was shown to exist, we agree with the Attorney General that it was not preserved for appeal because it was not raised in the trial court. (See *People v. McCurdy* (2014) 59 Cal.4th 1063, 1104, fn. 14.) An objection based on "profiling" does not, without more, preserve First Amendment issues. Insofar as the Attorney General suggests defendant was required to argue below that evidence of his active participation or membership in a " 'general' " Norteño gang was legally insufficient to support true findings on the gang allegations, we decline to depart from the general rule that " 'issues of sufficiency of the evidence are never [forfeited].' [Citation.]" (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 129.)

The Street Terrorism Enforcement and Prevention Act (the STEP Act) "defines 'criminal street gang' as any ongoing association that consists of three or more persons, that has a common name or common identifying sign or symbol, that has as one of its 'primary activities' the commission of certain specified criminal offenses, and that engages through its members in a 'pattern of criminal gang activity.' ([§ 186.22], subd. (f), italics [omitted].) A gang engages in a 'pattern of criminal gang activity' when its members participate in 'two or more' specified criminal offenses (the so-called 'predicate offenses') that are committed within a certain time frame and 'on separate occasions, or by two or more persons.' (*Id*., subd. (e).)" (*People v. Loeun* (1997) 17 Cal.4th 1, 4.) "Thus, for a group to fall within the statutory definition of a 'criminal street gang,' these requirements must be met: (1) the group must be an ongoing association of three or more persons sharing a common name or common identifying sign or symbol; (2) one of the group's primary activities must be the commission of one of the specified predicate offenses; and (3) the group's members must 'engage in or have engaged in a pattern of criminal gang activity.' [Citations.]" (*Id*. at p. 8.)

A pattern of criminal gang activity can be proven, inter alia, through evidence of the charged offense and another offense committed on a prior occasion by the defendant's fellow gang member (*People v. Gardeley* (1996) 14 Cal.4th 605, 625, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13) or by evidence of the offense with which the defendant currently is charged and proof of another offense committed on the same occasion by a fellow gang member (*People v. Loeun*, *supra*, 17 Cal.4th at p. 5.)[28] A predicate offense can be established by evidence

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28 The offense committed on the same occasion by a fellow gang member must be a separate offense from that committed by the defendant. A fellow gang member's aiding and abetting of the offense committed by the defendant is insufficient. (*People v. Zermeno* (1999) 21 Cal.4th 927, 932.)

of an offense the defendant committed on another occasion. (*People v. Tran* (2011) 51 Cal.4th 1040, 1044.)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . . [¶] Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony . . . ." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324.) The " 'primary activities' " requirement can be met by proof of either prior conduct or acts committed at the time of the charged offenses. (*Id*. at p. 323.)

POG was not shown to be a criminal street gang, as defined by the STEP Act, in its own right. Although we can surmise it was an ongoing association of three or more persons who shared a common name or identifying sign or symbol, no evidence was presented as to the group's primary activities (nor did Aguilar, the gang expert, testify that all Norteño cliques have the same primary activities) or that the group's members engaged in a pattern of criminal gang activity. However, the prosecution relied on the Norteño criminal street gang (which was also referred to as "the northern gang" and "the northerner gang") as the relevant gang.[29] Accordingly, we must determine whether the evidence sufficiently established such a gang.

If the prosecution's theory of why a criminal street gang exists turns on the conduct of one or more gang subsets, the prosecution is required "to introduce evidence

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[29] In his reply brief, defendant suggests there is a difference — beyond semantics — between the Norteño gang and gangs composed of northerners. It is apparent from the testimony at trial that the terms "Norteño," "northern," and "northerner" were used interchangeably. Nevertheless, the evidence is not such that we can say all who identify as northerners necessarily consider themselves members (or affiliates) of the Norteño criminal street gang.

showing an associational or organizational connection that unites members of a putative criminal street gang." (*People v. Prunty* (2015) 62 Cal.4th 59, 67 (*Prunty*).) There can be no doubt Aguilar's testimony was sufficient to show an associational connection between POG, which he explained was a Norteño clique, and the Norteño gang. His testimony also established defendant self-identified with POG and northerner, as did his companions at the time of the shooting.[30]

With respect to the requisite predicate offenses, however, Aguilar relied on a crime committed by a northern gang member from Porterville, and one committed by a northern gang member from the Cutler-Orosi area. Although Aguilar identified both perpetrators as being northerners, he also testified that the Norteño gang is composed of cliques that are formed based on locale or friendship, and that tend to be identified by their location of origin. Thus, we are constrained to conclude the perpetrators of the predicate offenses belonged to local cliques or subsets.

"[W]hen the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Prunty*, *supra*, 62 Cal.4th at pp. 67-68.)[31] Stated another way:

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[30] Aguilar relied in part on information defendant gave when booked into jail following the events of this case. Defendant was arrested after being interviewed by detectives, at the outset of which he was advised of, and waived, his rights. Accordingly, it does not appear admission of the booking information in the prosecution's case-in-chief violated *Miranda v. Arizona* (1966) 384 U.S. 436 (see *People v. Lewis* (2001) 26 Cal.4th 334, 386; *People v. Mickle* (1991) 54 Cal.3d 140, 171; cf. *People v. Elizalde* (2015) 61 Cal.4th 523, 527, 535, 538-540), and defendant does not contend otherwise.

[31] We see no reason *Prunty*'s reasoning and analysis should not apply equally to the section 190.2, subdivision (a)(22) special circumstance or the section 12022.53, subdivision (e)(1) enhancement. (See *Prunty*, *supra*, 62 Cal.4th at p. 72, fn. 3.)

"[W]here the prosecution's case positing the existence of a single 'criminal street gang' for purposes of section 186.22[, subdivision](f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets. That connection may take the form of evidence of collaboration or organization, or the sharing of material information among the subsets of a larger group. Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization.[32]

"Whatever theory the prosecution chooses to demonstrate that a relationship exists, the evidence must show that it is the same 'group' that meets the definition of section 186.22[, subdivision](f) — i.e., that the group committed the predicate offenses and engaged in criminal primary activities — and that the defendant sought to benefit under section 186.22[, subdivision](b). But it is not enough . . . that the group simply shares a common name, common identifying symbols, and a common enemy. Nor is it permissible for the prosecution to introduce evidence of different subsets' conduct to satisfy the primary activities and predicate offense requirements without demonstrating that those subsets are somehow connected to each other or another larger group." (*Prunty*, *supra*, 62 Cal.4th at pp. 71-72, fns. omitted.)

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32 The state high court cautioned: "[T]here are some limits on the boundaries of an identity-based theory. The evidence must demonstrate that an organizational or associational connection exists in fact, not merely that a local subset has represented itself as an affiliate of what the prosecution asserts is a larger organization. [Citation.] Although evidence of self-identification with the larger organization may be relevant, the central question remains whether the groups in fact constitute the same 'criminal street gang.' In making the required showing, . . . the prosecution must do more than simply present evidence that various alleged gang subsets are found within the same broad geographic area. . . . The prosecution must introduce evidence of the alleged subsets' activities, showing a shared identity that warrants treating them as a single group. . . . The key is for the prosecution to present evidence supporting a fact finder's reasonable conclusion that multiple subsets are acting as a single 'organization, association, or group.' [Citation.] Evidence of self-identification must refer to the particular activities of subsets, and must permit the jury to reasonably conclude that the various subsets are associated with each other because of their shared connection with a certain group." (*Prunty*, *supra*, 62 Cal.4th at pp. 79-80.)

Prunty was charged with attempted murder and assault with a firearm. To prove each offense was subject to a gang enhancement under section 186.22, subdivision (b), the prosecution introduced evidence from a gang expert, Detective Sample. Sample, who interviewed Prunty shortly after the latter's arrest, testified Prunty admitted he was a Norteño gang member and described his membership in the Detroit Boulevard Norteño " 'set.' " Sample also testified Prunty's clothing, previous contacts with law enforcement, and possession of Norteño graffiti and other paraphernalia were consistent with Norteño gang membership. (*Prunty*, *supra*, 62 Cal.4th at p. 68.) With respect to the prosecution's theory Prunty committed the charged offenses with the intent to benefit the Norteños, Sample testified concerning Norteños in general, and that Norteños in Sacramento (the relevant geographical area) were not associated with any particular " 'turf,' " but were found all over Sacramento with a lot of subsets based on different neighborhoods. (*Id*. at p. 69.) For predicate offenses, Sample described a confrontation between two Norteño gang subsets that resulted in the conviction of two Varrio Gardenland Norteños for a variety of offenses, and an incident in which members of the Varrio Centro Norteños shot at a former Norteño gang member. Aside from Sample's testimony the subsets referred to themselves as Norteños, the prosecution produced no specific evidence showing the subsets identified with a larger Norteño group, or that they shared a connection with each other or any other Norteño-identified subset. (*Ibid*.)

The California Supreme Court found the prosecution's evidence "fell short . . . with respect to the predicate offenses." (*Prunty*, *supra*, 62 Cal.4th at p. 82.) It noted Sample referred to two offenses involving three alleged Norteño subsets, but stated:

> "Although Sample characterized these groups as Norteños, he otherwise provided no evidence that could connect these groups to one another, or to an overarching Sacramento-area Norteño criminal street gang. Sample did not describe any evidence tending to show collaboration, association, direct contact, or any other sort of relationship among any of the subsets he described. None of his testimony indicated that any of the alleged subsets had shared information, defended the same turf, had members commonly

> present in the same vicinity, or otherwise behaved in a manner that permitted the inference of an associational or organizational connection among the subsets. . . .
>
> "Nor did Sample's testimony demonstrate that the subsets that committed the predicate offenses, or any of their members, self-identified as members of the larger Norteño association that [the] defendant sought to benefit. Although there was ample evidence that Prunty self-identified as both a member of the Detroit Boulevard Norteños and the larger umbrella Norteño gang, . . . the prosecution presented no evidence that the members of the Varrio Gardenland and Varrio Centro Norteños self-identified as part of the umbrella Norteño gang. Sample testified about the Sacramento Norteños' existence and their presence 'all over Sacramento' with 'subsets based on different neighborhoods.' But Sample never addressed the Norteño gang's relationship to any of the subsets at issue. And in describing the two alleged subsets that committed the predicate offenses, Sample offered no evidence that their members behaved in a manner that conveyed their identification with the larger association that Prunty sought to benefit. Instead, Sample simply described the subsets by name, characterized them as Norteños, and testified as to the alleged predicate offenses. He offered no additional information about their behavior or practices that could reasonably lead the jury to conclude they shared an identity with a larger group." (*Prunty*, *supra*, 62 Cal.4th at pp. 82-83, fn. omitted.)

The high court found evidence that Prunty claimed gang membership relevant to his intent in committing the assault. (*Prunty*, *supra*, 62 Cal.4th at p. 84.) It stated, however, that this evidence "provided no way for the jury to determine that the Norteños were an 'organization, association, or group' under the STEP Act's meaning — or, critically, that the alleged subsets that committed the predicate offenses were part of that group." (*Ibid*.) The court further found Sample's testimony about " 'the Norteños' " relevant, but found his "characterization of a group as a 'criminal street gang' . . . insufficient absent some reason to believe that conclusion was based on the evidence necessary to show a single criminal street gang to exist as the STEP Act defines it. . . . Sample's statements describing 'the Norteños' as 'a Hispanic street gang' are — for purposes of showing a criminal street gang to exist [citation] — purely conclusory and essentially of no use to the fact finder. [Citation.] Sample did not describe any facts

tending to show an organizational or associational connection among the Norteño subsets he described, nor did he articulate any reasons for concluding that all such subsets are part of a single criminal street gang. Nor did Sample describe the material he relied on in reaching his conclusions . . . about the Varrio Gardenland and Varrio Centro subsets and their relationship to one another or a larger group. Thus, his testimony on this point had no value to the jury. [Citation.] The jury could not have relied on Sample's testimony to find that the prosecution established the existence of a criminal street gang . . . ." (*Id*. at pp. 84-85.)

The evidence in the present case suffers from the same sort of deficiencies as the evidence in *Prunty*. The closest Aguilar came to describing any sort of organizational or associational connection among the various Norteño subsets was to testify they work together. He did not, however, describe any facts tending to support this statement. With respect to the perpetrators of the predicate offenses, some basis evidence was presented, but nothing to show the relationship of the individuals or their cliques to each other, POG, or a larger group, such as would "permit the jury to infer a relationship among the group's members." (*Prunty*, *supra*, 62 Cal.4th at p. 76, fn. omitted.)

We recognize Aguilar testified that gang officers do not go by the specific set, but by whether the person claims north or south. Nevertheless, his testimony was clear that what he termed the Norteño criminal street gang is made up of local subsets or cliques.

Under *Prunty*, the evidence was insufficient to establish the existence of a criminal street gang. (Compare *People v. Nicholes* (2016) 246 Cal.App.4th 836, 845-848 & *People v. Ramirez* (2016) 244 Cal.App.4th 800, 805-808, 815 with *People v. Ewing* (2016) 244 Cal.App.4th 359, 372-373, 375-377.) The gang-related penalty findings must be stricken.[33]

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[33] Jurors found defendant personally used, and personally and intentionally, discharged a firearm, and also that a principal did so. The enhancements involving a

Because our conclusion means defendant will no longer be facing a sentence of life in prison without the possibility of parole based on the jury's special circumstance finding, his claim he is entitled to be resentenced on count 1 in accord with *Miller v. Alabama*, *supra*, 567 U.S. ___ [132 S.Ct. 2455] and *People v. Gutierrez*, *supra*, 58 Cal.4th 1354, is moot. However, the trial court upon remand must afford defendant the opportunity to make a record of mitigating evidence tied to his youth. (*People v. Franklin* (2016) 63 Cal.4th 261, 268-269, 284.)

DISPOSITION

The special circumstance (Pen. Code, § 190.2, subd. (a)(22)) appended to count 1, gang enhancement (Pen. Code, § 186.22, subd. (b)(1)(C)) appended to all counts, and the firearm enhancements based on a principal's use of a firearm (Pen. Code, § 12022.53, subds. (b), (e)(1)) and on a principal's intentional discharge of a firearm (Pen. Code, § 12022.53, subds. (c), (e)(1)) appended to counts 1 through 4, are stricken. Retrial is barred. Sentence is vacated and the matter is remanded to the trial court for resentencing in accord with this opinion. In all other respects, the judgment is affirmed.

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DETJEN, Acting P.J.

WE CONCUR:

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FRANSON, J.

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SMITH, J.

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principal apply if defendant violated section 186.22, subdivision (b). Those vicarious enhancements are, therefore, affected by our ruling.