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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY MANUEL PEREZ,

Defendant and Appellant.

F062339

(Super. Ct. No. BF131156A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Louis P. Etcheverry, Judge.

Deborah L. Hawkins , under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, Barton Bowers and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, appellant Anthony Manuel Perez was convicted of two counts of attempted premeditated murder of a peace officer (counts 1 & 2), two counts of assault upon a peace officer with a semiautomatic firearm (counts 3 & 4), two counts of unlawful possession of a firearm by a criminal street gang member (counts 7 & 11), and one count of possession of a stolen vehicle (count 8). With respect to counts 1, 2, 3, 4, 7, and 8, the jury found the offenses were committed for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1).<sup>1</sup> With respect to counts 1 through 4, the jury found appellant was a principal in the offenses and at least one principal personally discharged a firearm in committing the offenses within the meaning of section 12022.53, subdivision (e)(1). However, the jury found appellant did not personally discharge a firearm in committing the offenses within the meaning of section 12022.53, subdivision (c). Appellant received a total determinate sentence of 47 years 8 months, plus a total indeterminate sentence of 30 years to life.

On appeal, appellant contends that (1) the trial court prejudicially erred in instructing the jury on uncharged-conspiracy and aiding-and-abetting theories of liability, (2) insufficient evidence supports the section 186.22 and section 12022.53 enhancements because there was insufficient evidence the crimes were gang related, (3) section 12022.53 violates equal protection, and (4) the abstract of judgment must be amended to award appellant additional presentence credits. We agree with appellant's last contention, which respondent concedes, and order the abstract of judgment to be amended accordingly. In all other respects, the judgment is affirmed.

### **FACTS**

On February 20, 2010, Bakersfield Police Officer Paul Yoon was working with his partner, Rudy Berumen. Their shift was from 1:00 p.m. until 11:00 p.m. The particular

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise specified.

part of town they patrolled was “[c]ommonly described as Old Kern” and defined partly by the following streets: “Kentucky, East Truxtun, Beale Avenue, [and] Mount Vernon.”

Around 9:00 p.m., Officer Yoon, who was driving the patrol car, observed a blue Honda Civic travelling south on River Boulevard from Bernard Street. Once he got behind the Honda, Officer Yoon noticed it had paper plates instead of a regular vehicle plates and it did not have a temporary DMV registration tag.

As a result of these observations, Officer Yoon activated his red and blue lights to conduct a traffic stop. The Honda did not pull over immediately but slowed and continued about a block before it finally pulled over to the right at Beale Avenue and Monterey Street, just in front of the AM/PM gas station.

Officers Yoon and Berumen exited their patrol car and approached the Honda. After Officer Yoon had taken about two steps towards the car, it accelerated and fled southbound on Beale Avenue at a high rate of speed.

The officers ran back to their patrol vehicle and started to pursue the Honda, which continued to travel at a high rate of speed. The Honda ran a red light and made a sharp left turn to go eastbound on East Truxtun Avenue. A hundred yards later, the Honda made a right turn from East Truxtun Avenue to go southbound again on Beale Avenue.

As soon as the Honda turned off on Beale Avenue, Officer Yoon positioned the patrol car directly behind the Honda. The officer then heard a gunshot or loud pop and saw the lower portion of the back windshield shatter outwards. The portion that shattered was at the bottom center of the window where the third brake light would be.

The first shot was followed by a second shot which shattered the entire rear window of the Honda. Officer Yoon realized that he and Officer Berumen were actively being shot at and started taking evasive actions with the patrol car, veering back and forth in an attempt to turn the patrol car into a moving, rather than a stationary, target.

As Officer Yoon maneuvered the patrol car, shots continued to be fired from the Honda. The third and fourth shots came as they were continuing southbound on Beale Avenue to East California Avenue. Officer Yoon recalled a total of four shots were fired at him between East Truxtun and East California Avenues.

Officer Yoon was unable to see who fired the first shot. However, when the second shot was fired, he was “able to see the muzzle flash coming over the back of the vehicle right by the third brake light or middle brake light” The rear passenger also appeared to fire the third and fourth shots. Officer Yoon explained: “I could see him looking over and turning his body around and aiming down the sight of the pistol and pointing directly at our patrol vehicle as it was firing.”

When the Honda turned left from Beale Avenue onto East California Avenue, it did not stop at the stop sign. From East California Avenue, the Honda turned right onto South Owens Street, after which it made an immediate left to go eastbound in a small alley on the south side of East California Avenue. As the Honda was making all these turns, it was going at a high rate of speed, causing the car to skid and fishtail. The lights on the Honda were also turned off after it entered the alley.

Officer Yoon recalled that at least two shots were fired from the Honda when they were travelling through the alley. The Honda eventually turned out of the alley and started travelling southbound on Dr. Martin Luther King, Jr. (MLK) Boulevard.

After the Honda turned onto MLK Boulevard, it made an immediate right turn to go westbound on East Eleventh Street. The Honda began to fishtail and lose traction during the turn. The Honda then made a quick left turn to go south on Clyde Street.

After turning onto Clyde Street, the Honda came to a stop. Three people exited the vehicle—the driver, the right front passenger, and the rear passenger—and fled on foot. The front and rear seat passengers ran westbound into a residential area, while the driver ran the opposite direction, running eastbound into another residential area. Officer Yoon started chasing after the driver but eventually lost sight of him.

Officer Berumen fired his weapon when he saw the two passengers running. They both continued running. Officer Berumen followed them for awhile and then stopped to wait for other units to arrive.

On February 20, 2010, at 9:32 p.m., Jeffrey Cecil, a crime scene technician with the Bakersfield Police Department, was called out to East Eleventh and Clyde Streets to process the crime scene. Among other things, Cecil found a black diaper bag outside the Honda. The bag contained “a black ski mask that had holes for the eyes and the mouth.” In addition, the bag contained glass particles and “a gold colored mask, a red colored mask, some binoculars, and a [loaded, Norinco] model 212 nine millimeter handgun.”

Cecil searched the interior of the Honda and found a number of items of significance, including five pairs of work gloves in various colors. Cecil also found a police radio scanner on the front passenger’s seat. When the radio was on, Cecil could hear it was tuned to “BPD channel one” which was “the main police channel for the east side,” the area they were in.

Cecil located three shell casings inside the Honda. One was on the rear seat on the passenger’s side, another was on the rear seat on the driver’s side, and one was underneath the front passenger’s seat. Cecil found an additional shell casing inside the black diaper bag. These shell casings were all nine-millimeter in caliber and had the same brand logo (i.e., “FC”). Bullet fragments were also found in the trunk.

Paula Herrera testified she had known appellant for five years and the two of them were romantically involved. On February 25, 2010, she was driving with appellant in her car when police conducted a traffic stop and found a firearm in her car.

On February 24, 2010, Herrera had been watching a news program with appellant when a story came on about the police pursuit of the Honda. Appellant told Herrera that he knew who was involved in it. Herrera claimed she could not recall telling police that appellant started laughing when the news story came on.

On February 24, 2010, around 10:30 a.m., Herrera sent a text message about appellant to a friend. The text read: “He shot at a cop over the weekend, he on the run, so we will see what happens with him.”

Bakersfield Police Officer Paul Bender testified that on February 25, 2010, he was on duty, conducting surveillance at an address on Virginia Avenue. During the surveillance, he started following a vehicle and then conducted a traffic stop on Eureka Street. Before initiating the traffic stop, Officer Bender observed the vehicle was occupied by a male in the front passenger’s seat (appellant) and a female driver (Herrera). At one point, Officer Bender passed the vehicle and noticed appellant had his seat reclined all the way back and would not look at the officers when they passed.

Before approaching the vehicle, Officer Bender saw appellant move his arms towards his waistband or lap area and then bend over as if he were placing an object under the seat. As a result, Officer Bender told his partner, Officer Cooley, to watch appellant. Officer Bender walked up and contacted Herrera. Herrera immediately turned her body towards the officer, gestured with her hand, moving her index finger back and forth, and said appellant had a gun.

The officers took appellant into custody and searched the car. As Officer Bender was taking appellant into custody, appellant said, “I fucked up again. Yeah, I had a gun. My fingerprints are on it. But it is not my gun.”

Under the front passenger’s seat, the officers found a black Smith and Wesson, nine-millimeter semiautomatic pistol. It was loaded with nine rounds of Federal ammunition. The abbreviation that appears on Federal casings is “FC, like Federal Cartridge.”

In the glove compartment, Officer Bender found a photograph of appellant with Robert Hurtado, whom the officer knew to be a gang member. Appellant and Hurtado had their hands in the shape of the letter “V.” Based on his experience and training, Officer Bender knew the handsign stood for the Varrío street gang.

After the traffic stop, Officer Bender conducted a search of appellant's residence. Officer Bender testified as to what he found: "There was a blue baseball cap with the letters KC which is significant because it stands for Kern County with a variety of street names both Hispanic and Black. Also there was [sic] some additional photographs of [appellant] throwing gang signs. And there was a notebook seized with some gang writing in it."

Dianna Matthias, supervising criminalist of the Kern County Regional Criminalistics Laboratory, testified as a ballistics expert for the prosecution. Matthias described the testing she conducted on the subject Honda. She opined that two holes found in the rear back deck area of the car were caused by gunshots. She further opined that "the person who shot those two shots in the vehicle was situated in the rear seat of the vehicle."

Matthias tested three shell casings and the model 212 Norinco nine-millimeter semiautomatic pistol. She concluded all three casings were fired by the Norinco pistol. She also determined the same Norinco pistol fired two casings recovered from another crime scene on January 24, 2010.

Bakersfield Police Detective Richard James Dossey, Jr., was assigned as the lead investigator of the February 20, 2010 incident. The three suspects he developed were appellant, Jaime Aguirre and Juan Oregon.<sup>2</sup>

Detective Dossey spoke with Herrera. She told the detective that appellant "was watching the newscast and started laughing when the news broke in about the officer involved shooting incident." Herrera also told Detective Dossey that she was unaware appellant was carrying a firearm until the point the car stop was initiated, at which time she saw appellant pull the firearm out of his waistband and place it under the front passenger's seat where he was sitting.

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<sup>2</sup> Appellant was charged jointly with Aguirre and Oregon but tried separately.

Detective Dossey and his partner, Detective Moore, interviewed appellant. During the first interview, appellant maintained that he was home with his mother all night on Saturday, February 20, 2010. However, during a second interview initiated by appellant, appellant admitted he was in the Honda and was the right front passenger. He identified Oregon as the driver, and Aguirre as the rear seat passenger. Appellant denied being the shooter and identified Aguirre as the shooter.

When asked about the black bag, appellant said he did not remember who had it or whether he touched it, but that he “maybe” touched it. When asked what was in the bag, appellant said there was a BB gun and something else, but he could not remember what because he was drunk at the time.

When Detective Moore told appellant the gun in the bag turned out not to be a BB gun, appellant responded: “No there was, there was ... but the BB gun got away. I left it at the house. At my pad.” When asked if the black bag was at his house, appellant replied: “No they brung it. Cause they came to the house when we were drinking.”

Appellant stated his fingerprints and DNA were “probably” on the gun found in the black bag because he “might’ve touched it like a stupid ass.” But he denied firing the gun out of the back window of the Honda during the police pursuit.

Detective Dossey also testified regarding his training and experience investigating vehicle theft, theft in general, robbery, and other crimes of violence. Detective Dossey testified that a key ring with 10 shaved keys was found inside the Honda. The detective explained what shaved keys were and how they could be used to start ignitions other than the ones for which they were primarily designed.

Detective Dossey testified that, in the gang context, he had seen individuals “use a stolen vehicle to be undetectable to law enforcement when they commit their violent crimes or their crimes of violence against the public.” The detective explained: “They will generally ... select a car, steal the car and use it to commit the crime, therefore, to keep it undetectable and no way of tying it back to them.” Detective Dossey testified that

other items seized during the investigation in this case, such as the masks, binoculars, and firearm, would be similarly useful to committing crimes of theft or violence.

In addition to the gloves found in the Honda, which, according to Detective Dossey “were spread out throughout the car[,]” the police found a black T-shirt, a blue beanie, and a black baseball cap with the white letter “T” on the bill. Ten .45-caliber rounds were also recovered from the trunk.

Juan Carlos Alaman testified that he was the owner of the Honda and that someone took the car without his permission on February 11, 2010.

Christian Ramirez testified he was robbed by gunpoint on January 24, 2010. There were three robbers; appellant was not one of them. Ramirez identified two of the robbers as Joseph Gonzales and Aguirre, appellant’s confederate in the instant case.

According to Ramirez, two guns were involved in the robbery. Aguirre had a black, nine-millimeter gun, and the other gun was a small chrome gun. The robbers fired at Ramirez when he tried chasing them in the parking lot. Police came afterwards and picked up the shells. Matthias’s testimony, discussed above, established that the Norinco pistol found in the black diaper bag in the instant case was the same gun that fired shell casings collected in the investigation of the January 24, 2010 robbery.

### ***Gang evidence***

Officer Brent Stratton testified as a gang expert and described the Varrrio Baker criminal street gang in Bakersfield. According to his testimony, there are in excess of 300 documented members of the gang in Bakersfield, and their primary activities are murder, assault with a firearm, firearm possession, robbery, narcotics sales, burglaries, and carjackings.

Officer Stratton opined that appellant and his two confederates—Aguirre and Oregon—were active members of the Varrrio Baker gang. Presented with a hypothetical based on the facts of this case, Officer Stratton opined that the conduct described “would

be done in association with and for the benefit of the Varrío Baker criminal street gang.”

Officer Stratton explained:

“The presence of the Varrío Baker gang members, the ... different types of crimes that were committed which, in my opinion, are primarily activities of the criminal street gang. The type of clothing suggested, the color of the clothing in your hypothetical. As well as the presence of other things, such as binoculars, scanners, firearms and masks, which in and of themselves may be benign. However, the presence of them together, given the totality of the circumstances, in my opinion makes it more significant in a gang context. Because of all those factors, it would help me to formulate my opinion that this was done in association with and for the benefit of the Varrío Baker criminal street gang.”

Officer Stratton explained that the hat with a “T” on it was significant because “it could stand for Traviesos, ... a subset of the Varrío Baker criminal street gang.” The blue colored beanie was also significant because blue is the color associated with the gang.

Officer Stratton further testified as to the gang-benefit of the conduct:

“Not only does it enhance each gang member’s reputation on their own, I believe it enhances the lawless and notorious reputation of the gang as a whole. I believe that the attempted escape or shooting of an officer would facilitate that escape which, for lack of a better word, helps them to live to see another day, continue criminal activities. I believe that respect in a gang culture is huge and I believe the gang member gains respect for—amongst their gang, amongst their peers, by showing a willingness to take on law enforcement. And I believe that it would enhance their reputation within the gang. And as I stated earlier, would enhance the reputation of the gang as a whole as a violent and lawless notorious organization.”

## **DISCUSSION**

### ***I. Instructional error***

Appellant claims a number of prejudicial errors occurred in the trial court’s instructions on the uncharged-conspiracy and aiding-and-abetting theories of liability relied on by the prosecution. We find none of his claims persuasive.

**A. *Natural and probable consequences doctrine***

One of the theories under which appellant was prosecuted for the attempted murders was that he joined a conspiracy to commit robbery or assault, and that attempted murder was a natural and probable consequence of the conspiracy. The trial court, over the defense's objection, instructed on this theory pursuant to CALCRIM No. 416 (evidence of uncharged conspiracy)<sup>3</sup> and CALCRIM No. 417 (liability for coconspirators' acts).<sup>4</sup>

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<sup>3</sup> CALCRIM No. 416 provided: "The People have presented evidence of a conspiracy. A member of a conspiracy is criminally responsible for the acts or statements of any other member of the conspiracy done to help accomplish the goal of the conspiracy. [¶] To prove that the defendant was a member of a conspiracy in this case, the People must prove that: [¶] 1. The defendant intended to agree and did agree with one or more of the other coparticipants (Jaime Aguirre and Juan Oregon) to commit robbery or assault; [¶] 2. At the time of the agreement, the defendant and one or more of the other alleged members of the conspiracy intended that one or more of them would commit robbery or assault; [¶] 3. The defendant, Jaime Aguirre or Juan Oregon committed at least one of the following overt acts to accomplish robbery or assault: [¶] 1. Unlawfully acquired a blue Honda Civic, [¶] 2. Acquired three face masks, [¶] 3. Acquired one radio scanner capable of monitoring police channels, [¶] 4. Tuned the above scanner to monitor the Bakersfield Police Departments channel one[,] [¶] 5. Acquired one pair of binoculars, [¶] 6. Acquired multiple pairs of gloves, [¶] 7. Acquired at least one 9mm semi-automatic handgun, [¶] 8. Put items in 2, 3, 5, 6, and 7 into the Honda Civic[,] [¶] 9. Drove the Honda Civic in the direction of Varrio Baker territory, [¶] 10. Fled from police in a high-speed pursuit, [¶] 11. Fired multiple rounds at the pursuing officers; [¶] AND [¶] 4. At least one of these overt acts was committed in California. [¶] ... [¶] The People must prove that the members of the alleged conspiracy had an agreement and intent to commit robbery or assault. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit those crimes. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crimes."

<sup>4</sup> CALCRIM No. 417 stated: "A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan. [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of the common plan. [¶] To prove that the defendant is guilty of the crimes charged in Counts One, Two, Three and Four [*under a conspiracy theory*] the

Appellant, relying on *People v. Baker* (1999) 74 Cal.App.4th 243 (*Baker*), argues the court's conspiracy instructions presented the jury with an invalid theory of attempted felony murder. In *Baker*, the defendants were charged with murder, attempted murder, assault with a deadly weapon, conspiracy to commit assault with a deadly weapon, and residential burglary. (*Baker, supra*, 74 Cal.App.4th at p. 247.) The defendants claimed the instruction presented to the jury on the theory of conspiracy felony murder was legally insufficient, as assault with a deadly weapon was not one of the listed felonies in section 189 that governs the felony murder rule. (*Baker*, at p. 248.) The court in *Baker* agreed and reversed the judgment. (*Ibid.*) Appellant argues: "By the same analysis, [] section 189 does not list either conspiracy or attempted assault as the basis for criminal liability under that code section. Thus, there is no crime of attempted felony murder based upon conspiracy to commit an assault."

We find *Baker* inapposite and agree with respondent that the trial court did not instruct the jury on a felony-murder theory of attempted murder but properly instructed the jury as to the natural and probable consequences doctrine under a valid conspiracy theory. Under this theory and pursuant to CALCRIM Nos. 416 and 417, the prosecution was required to establish that appellant formed an agreement with Aguirre or Oregon (or both) to commit robbery or assault, committed one of the enumerated overt acts, and that the attempted murder of a police officer was the natural and probable consequence of the conspiracy itself. The instructions were correct. Under a conspiracy theory, each conspirator is responsible for everything done by his coconspirators, including the natural

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People must prove that: [¶] 1. The defendant conspired to commit one of the following crimes: Robbery or Assault; [¶] 2. A member of the conspiracy committed attempted murder of a police officer/assault on a peace officer with a semi-automatic firearm to further the conspiracy; [¶] AND [¶] 3. Attempted murder of a police officer/assault on a peace officer with a semi-automatic firearm were natural and probable consequences of the common plan or design of the crime that the defendant conspired to commit. [¶] The defendant is not responsible for the acts of another person who was not a member of the conspiracy even if the acts of the other person helped accomplish the goal of the conspiracy."

and probable consequences of the conspiracy. (*People v. Zacarias* (2007) 157 Cal.App.4th 652, 657.)

In addition to claiming the conspiracy instruction presented the jury with an invalid theory of attempted felony murder, appellant argues the natural and probable consequences doctrine is inapplicable to attempted murder because the doctrine does not require proof of specific intent to kill. Attempted murder requires express malice (i.e., specific intent to kill), not implied malice. (*People v. Collie* (1981) 30 Cal.3d 43, 62.) Appellant suggests that the natural and probable consequences doctrine is a form of implied malice because a coconspirator need not have the specific intent to kill.

Our courts, however, have held that the natural and probable consequences doctrine in aiding and abetting situations can support a conviction of attempted murder. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 262-263 (*Prettyman*)).) The specific intent necessary for conviction of an aider and abettor is not “the specific intent to kill, but the intent to ‘encourage and bring about conduct that is criminal.’” (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1379 [rejecting implied malice arguments for aider and abettor liability].)

As discussed in *People v. Medina* (2009) 46 Cal.4th 913, it is quite foreseeable that a gang-related assault will result in murder or attempted murder, even if the aider and abettor does not know the principal is armed. ““A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably foreseeable*. [Citations.]” (*Id.* at p. 920.)

Similar principles govern the vicarious liability of coconspirators.

“““The general rule is well settled that where several parties conspire or combine together to commit any unlawful act, each is criminally

responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine.... *Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan.* Nevertheless the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design.” [Citations.]” (*Prettyman, supra*, 14 Cal.4th at pp. 260-261; see also *People v. Hardy* (1992) 2 Cal.4th 86, 188 [“The challenged instruction correctly states the long-settled law of conspiracy. [Citations.] As we explained regarding the analogous situation of aiding and abetting liability . . . , ‘[i]t is the intent to encourage and bring about conduct that is criminal, *not the specific intent that is an element of the target offense*, which . . . must be found by the jury.’”].)

Appellant cites no published case holding that the natural and probable consequences doctrine is analogous to or a form of implied malice. There are, however, “a number of California cases which hold murder or attempted murder can be a natural and probable consequence of [aiding and abetting a] robbery. [Citations.]” (*People v. Cummins* (2005) 127 Cal.App.4th 667, 677.) We similarly conclude that the jury was correctly instructed that appellant could be found guilty of attempted murder under a conspiracy theory of liability if it found the natural and probable consequence of the uncharged conspiracy to commit robbery or assault was the attempted murder of a police officer.

***B. Evidence of uncharged conspiracy to commit robbery***

Appellant contends there is insufficient evidence to support the theory that he was guilty of attempted murder based on a conspiracy to commit robbery. He asserts there was no evidence (only “mere speculation”) of an agreement to commit a robbery. Accordingly, he argues the jury should not have been instructed on this theory.

“[A] trial court in a criminal case is required—with or without a request—to give correct jury instructions on the general principles of law relevant to issues raised by the evidence.” (*People v. Mutuma* (2006) 144 Cal.App.4th 635, 640.)

A conspiracy may be found where two or more people agree to commit a crime, they specifically intend both to agree and to commit the crime, and one of them performs an overt act in furtherance of their agreement. (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1603, disapproved on another ground in *People v. Palmer* (2001) 24 Cal.4th 856.) The agreement may be proved by circumstantial evidence, without showing a meeting or an express or formal agreement. (*People v. Zamora* (1976) 18 Cal.3d 538, 559.) The agreement may be inferred from the defendants' conduct in mutually carrying out an illegal purpose, the nature of the acts committed, the relationship of the parties, and the interests of the alleged conspirators. (*People v. Superior Court (Quinteros)* (1993) 13 Cal.App.4th 12, 20.) An inference of a conspiracy may also be supported by, though not exclusively based on, the defendants' membership in the same gang. (*Ibid.*) “[E]vidence of conspiracy may be admitted even if the defendant is not charged with the crime of conspiracy.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1134 (*Rodrigues*).

“Once there is proof of the existence of the conspiracy there is no error in instructing the jury on the law of conspiracy. [Citation.]” (*Rodrigues, supra*, 8 Cal.4th at p. 1134.) “To determine whether there was sufficient proof of a conspiracy in this case, we apply the following rules. ‘Although the existence of the conspiracy must be shown by independent proof [citation], the showing need only be prima facie evidence of the conspiracy. [Citation.] The prima facie showing may be circumstantial [citation], and may be by means of any competent evidence which tends to show that a conspiracy existed. [Citation.]’ (*People v. Jourdain* [(1980) 111 Cal.App.3d 396,] 405.)” (*Rodrigues, supra*, 8 Cal.4th at p. 1134.) “Evidence is sufficient to prove a conspiracy to commit a crime ‘if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]’” (*Id.* at p. 1135.)

The evidence here was sufficient to support instructing on conspiracy to commit robbery as a theory of liability. Appellant, Aguirre, and Oregon were members of the same gang. The gang expert testified that robbery was one of the primary activities of their gang. The three men were travelling together in a stolen vehicle, inside which police found 10 shaved keys, multiple pairs of cotton gloves, and a functioning police scanner specifically tuned to the channel for the area where they were driving. After they abandoned the Honda, police recovered a black diaper bag containing three masks, binoculars, and a loaded, nine-millimeter semiautomatic firearm.<sup>5</sup> We find the foregoing circumstances, considered together, were sufficient to make a prima facie showing of a conspiracy to commit robbery and, therefore, the trial court did not err by instructing on this theory.<sup>6</sup>

**C. *Validity of uncharged conspiracy as theory of criminal liability***

Appellant claims that, as a matter of law, uncharged conspiracy is not a valid theory of criminal liability in California, and, therefore, the trial court erred in giving CALCRIM Nos. 416 and 417. Appellant's claim is contrary to established case law.

For more than a century, our Supreme Court has held that defendants may be convicted as principals to crimes in their role as conspirators. (See *People v. Kauffman* (1907) 152 Cal. 331; see also *In re Hardy* (2007) 41 Cal.4th 977.) "It is long and firmly

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<sup>5</sup> The inconsistent statements appellant made in his police interview regarding his knowledge of the black diaper bag and its contents, including the semiautomatic firearm, which he conceded "probably" bore his fingerprints and DNA, belie appellant's assertion on appeal that "no evidence supported the inference that appellant himself had used the equipment or intended to."

<sup>6</sup> We have reviewed and find inapposite *People v. Schader* (1965) 62 Cal.2d 716, 731, which explains the circumstances under which "[a] killing committed during a conspiracy to commit robbery" can constitute felony murder. As discussed above, the court did not instruct on a felony-murder theory of liability. The proposition that the felony-murder doctrine only applies to killings committed "in furtherance of" or "to perpetrate" the underlying felony was not at issue here. (See *People v. Slaughter* (1984) 35 Cal.3d 629, 656.) Rather, the issue was whether the attempted murders of the police officers were a natural and probable consequence of the conspiracy to commit robbery or assault.

established that an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator.” (*People v. Belmontes* (1988) 45 Cal.3d 744, 788, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Nonetheless, appellant argues at length that uncharged conspiracy is not a proper theory of liability in this case. Specifically, he notes that section 31<sup>7</sup> limits principals to those who actually commit the crime and those who aid and abet in the commission of the crime. Appellant acknowledges that a number of cases in California have held contrary to the express language of section 31, allowing conspiracy to form a legal theory of criminal liability. Appellant essentially asks this court to overlook case precedent, and adhere to the language of section 31, rejecting conspiracy as a theory of criminal liability.

Our Supreme Court has recently declared without reservation that section 31 forms the basis for criminal liability based on conspiracy. In *In re Hardy, supra*, 41 Cal.4th 977, the court stated, “[o]ne who conspires with others to commit a felony is guilty as a principal. (§ 31.) Thus, if petitioner conspired with others to kill the victims for financial gain, he is as guilty of their murders as the person who actually stabbed them. [Citation.]” (*Id.* at pp. 1025-1026.)

We reject appellant’s claim under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, and find no error in the trial court’s conspiracy instructions.

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<sup>7</sup> Section 31 provides: “All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, or persons who are mentally incapacitated, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.”

**D. CALCRIM No. 400**

Relying on *People v. McCoy* (2001) 25 Cal.4th 1111 (*McCoy*), *People v. Samaniego* (2009) 172 Cal.App.4th 1148 (*Samaniego*), and *People v. Nero* (2010) 181 Cal.App.4th 504 (*Nero*), appellant contends the trial court prejudicially erred when it instructed on aiding and abetting under CALCRIM No. 400<sup>8</sup> because that instruction states an aider and abettor is “equally guilty” of the crime committed by the direct perpetrator even though an aider and abettor can also be guilty of a crime that is a lesser offense of the direct perpetrator’s crime.

Initially, we address the issue of forfeiture. Relying on *Samaniego, supra*, 172 Cal.App.4th 1148, respondent suggests appellant’s challenge to CALCRIM No. 400 was forfeited by the absence of contemporaneous objection. We are not persuaded. *Samaniego* concluded that a challenge to CALCRIM No. 400 was not preserved for direct review because modification or clarification had not been sought below. (*Samaniego*, at p. 1163.) We differ with *Samaniego* on the question of forfeiture. A defendant’s claim that an instruction misstated the law or violated his due process right “is not of the type that must be preserved by objection.” (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; see also § 1259.) We believe *People v. Flood* (1998) 18 Cal.4th 470, 482, footnote 7, and *People v. Smithey, supra*, 20 Cal.4th at page 976, footnote 7, necessitate the conclusion that the instructional challenge presented here is cognizable despite the absence of contemporaneous objection.

As the court in *Samaniego* explained, the now superseded version of CALCRIM No. 400 given in this case is generally an accurate statement of law regarding an aider

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<sup>8</sup> As given in this case, CALCRIM No. 400 read: “A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator who directly committed the crime. A person is [equally] guilty of the crime whether he [committed] it personally or aided and abetted the perpetrator who committed it.” (Second bracketed insertion added.)

and abettor's liability, but should be modified in those "exceptional cases" where the jury could be misled because various codefendants may have acted with different mental states in committing the charged crimes. (*Samaniego, supra*, 172 Cal.App.4th at pp. 1163-1165.) In *Samaniego*, where two victims were killed in a gang-related shooting and there was no evidence as to who fired the fatal shots, the court held it would potentially be misleading under those particular facts to give the jury CALCRIM No. 400 without modification or clarification of the words "equally guilty" to properly assess each defendant's individual mental state. (*Samaniego*, at pp. 1164-1165.) In so holding, the court reviewed *McCoy, supra*, 25 Cal.4th 1111, which made clear that in cases involving accomplices charged with specific intent offenses, the jury must separately determine each codefendant's mental state and may convict an accomplice of a greater offense than the actual perpetrator under an aiding and abetting theory of liability. (*Id.* at pp. 1116-1117.) By parity of reasoning, the court in *Samaniego* determined an accomplice may be convicted of a lesser offense than the perpetrator as well, "if the aider and abettor has a less culpable mental state." (*Samaniego, supra*, 172 Cal.App.4th at p. 1164.)

*Nero, supra*, 181 Cal.App.4th 504 essentially followed the holding of *Samaniego, supra*, 172 Cal.App.4th 1148, but expanded its application to even cases involving "unexceptional circumstances" where the facts showed jury confusion regarding the instructions on aider and abettor liability and lesser and greater mental states. (*Nero, supra*, at pp. 518-520.) The court in *Nero* reached the conclusion that the jury was misinstructed and misled by the "equally guilty" language of the precursor to CALCRIM No. 400 (CALJIC No. 3.00) based on the facts of that case, which showed the jury had asked several times whether it could convict the defendant's sister as an aider and abettor of a lesser crime than the charged murder committed by the defendant and the court merely reread CALJIC Nos. 3.00 and 3.01. (*Nero, supra*, at p. 517.) The *Nero* court also

suggested that the pattern instruction be modified to address the risk of confusion. (*Id.* at p. 518.)<sup>9</sup>

The applicable test for assessing prejudice in this instance is the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Samaniego, supra*, 172 Cal.App.4th at p. 1165; *Nero, supra*, 181 Cal.App.4th at pp. 518-519.) “Under that test, an appellate court may find the error harmless only if it determines beyond a reasonable doubt that the jury verdict would have been the same absent the error. [Citation.]” (*Samaniego, supra*, 172 Cal.App.4th at p. 1165.)

Appellant contends the instructional error was prejudicial because he “was seated in the front seat of the car and did not shoot at the officer.” Thus, “[t]he jury could have found that, even if co-defendant Aguirre had the intent to kill ..., appellant, who was merely a passenger in the car, did not.” Appellant suggests that under the “equally guilty” language of CALCRIM No. 400, the jury would have necessarily found him guilty of attempted murder as an aider and abettor even if he, unlike Aguirre, did not intend to kill the officers.

Contrary to appellant’s focus solely on the “equally guilty” language of CALCRIM No. 400, the jury was not given such instruction in a vacuum. The court also read CALCRIM No. 401.<sup>10</sup> By its plain language, CALCRIM No. 401 advised the jurors

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<sup>9</sup> *Nero*’s suggestion concerning modification of the pattern instructions was adopted by the Judicial Council of California. In April 2010, CALCRIM No. 400 was reworded and the problematic word “equally” was eliminated. CALCRIM No. 400 now provides, in relevant part: “A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.”

<sup>10</sup> CALCRIM No. 401 provided: “To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant’s words or conduct did in fact aid and abet the perpetrator’s commission of the crime. [¶] Someone aids and abets a crime if he knows of the perpetrator’s unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator’s commission of that crime. [¶] If all these

that appellant could not be found guilty of aiding and abetting a crime unless the direct perpetrator committed that crime, appellant knew of the direct perpetrator's intent to commit the crime, appellant shared the same intent as the direct perpetrator, and before or during the commission of the crime, appellant did in fact aid and abet the perpetrator in committing the crime. Based on the elements in CALCRIM No. 401, if appellant was found not to be an actual perpetrator, but found to be only involved in the crimes while having a less culpable mental state than the actual perpetrator, he could not have been held liable as an aider and abettor (*People v. Beeman* (1984) 35 Cal.3d 547, 560) because “[t]here must be proof that the accused not only aided the actor but at the same time shared the criminal intent” (*Pinell v. Superior Court* (1965) 232 Cal.App.2d 284, 287) for such liability.

Our conclusion that appellant was not prejudiced is bolstered by the fact the jury was only instructed on a direct aiding and abetting theory and not on the natural and probable causes doctrine of aiding and abetting. (See *McCoy, supra*, 25 Cal.4th at p. 1118 [“outside of the natural and probable consequences doctrine, an aider and abettor’s mental state must be at least that required of the direct perpetrator”].) The jury was instructed on the natural and probable causes doctrine only in connection with the uncharged conspiracy theory discussed above. For reasons discussed above, this was a valid theory of liability and we therefore reject appellant’s assertion that “the jury was incorrectly instructed on all applicable theories of vicarious liability.”

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requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] If you conclude that defendant was present at the scene of the crime, or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.”

## ***II. Sufficiency of the evidence of the gang and firearm enhancements***

Appellant contends that the gang enhancements (§ 186.22, subd. (b))<sup>11</sup> and gang-related firearm enhancements (§ 12022.53, subd. (e))<sup>12</sup> should be reversed due to insufficiency of the evidence. Specifically, he claims there was insufficient evidence to establish the second prong of the gang enhancement: the “specific intent to promote, further, or assist in any criminal conduct by gang members ....” (§ 186.22, subd. (b)(1).) This is so, appellant argues, because there was no substantial evidence the crimes were gang related. Appellant argues Officer Stratton’s expert opinion, standing alone, was insufficient to find the offenses were gang related. Appellant further argues that the evidence showed “merely a car full of individuals who did not want to make contact with the police” and that their intent was “to avoid being stopped to benefit themselves, not some organization they belong[ed] to.” We reject appellant’s arguments and conclude ample evidence supported the conclusion that his crimes were gang related.

We review the sufficiency of the evidence to support enhancement allegations under the same standard we apply to a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1456-1457.) In deciding the sufficiency of the evidence, we draw all reasonable inferences from the record to support

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<sup>11</sup> Section 186.22, subdivision (b)(1), states: “[A]ny 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows ....”

<sup>12</sup> Section 12022.53 provides: “(e)(1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d) [including attempted murder, as specified in subdivision (a)(1) & (18)].”

the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We do not weigh the evidence to decide the credibility of the witnesses. (*Ibid.*)

At the outset, we note that our Supreme Court's recent discussion in *People v. Albillar* (2010) 51 Cal.4th 47 (*Albillar*) casts doubt on the proposition that an expert's opinion is insufficient to support a finding that a crime was for the benefit of a gang. According to *Albillar*, "[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of ... a[] criminal street gang' within the meaning of section 186.22(b)(1). [Citations.]" (*Id.* at p. 63.) Here, Officer Stratton testified the criminal conduct in this case would benefit the Varrío Bakers gang because it would "[n]ot only does it enhance each gang member's reputation on their own" but "would enhance the reputation of the gang as a whole as a violent and lawless notorious organization." This was sufficient evidence that the crimes were gang related.

Moreover, under existing case law, the fact that appellant, a member of the Varrío Baker gang, committed the crimes in the company of two other members of the same gang, supports an inference that the crimes were gang related. (See *People v. Miranda* (2011) 192 Cal.App.4th 398, 412-413 [commission of crime accompanied by gang members or associates supports inference defendant intended to benefit gang]; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 [non-gang member's commission of crime in association with known gang member supports inference crime was gang related]; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198-1199 [commission of crime with fellow gang members supports inference crime was committed in association with gang].)

Appellant relies on *People v. Ochoa* (2009) 179 Cal.App.4th 650 (*Ochoa*) to support his argument. In *Ochoa*, a lone gang member committed a carjacking. Based on the defendant's tattoos and admissions, the prosecution experts testified that the defendant was a gang member. (*Ochoa, supra*, 179 Cal.App.4th at pp. 653-654.) These experts also testified that the defendant committed the carjacking for the benefit of the

gang, even though they acknowledged that the gang's signature crime was car theft and that car theft was distinct from carjacking. (*Id.* at pp. 654-656.) *Ochoa* noted that “[t]here was no evidence that *only* gang members committed carjacking or that a gang member could not commit a carjacking for personal benefit, rather than for the benefit of the gang.” (*Id.* at p. 662.) *Ochoa* also focused on the absence of evidence, stating:

“Defendant did not call out a gang name, display gang signs, wear gang clothing, or engage in graffiti while committing the instant offenses. There was no evidence of bragging or graffiti to take credit for the crimes. There was no testimony that the victim saw any of defendant's tattoos. There was no evidence the crimes were committed in Moreno Valley 13 gang territory or the territory of its rivals. There was no evidence that the victim of the crimes was a gang member or a Moreno Valley 13 rival. Defendant did not tell anyone, as the defendant did in [*People v. Ferraez* (2003) 112 Cal.App.4th 925, 928], that he had special gang permission to commit the carjacking. [Citation.] Defendant was not accompanied by a fellow gang member.” (*Ochoa, supra*, 179 Cal.App.4th at p. 662, fn. omitted.)

Thus, *Ochoa* held that there was insufficient evidence to support the gang enhancement findings.

*Ochoa* differs from this case in significant aspects and is not controlling. Unlike the defendant in *Ochoa*, appellant committed criminal offenses that the gang expert identified as being the primary activities of his gang (i.e., attempted murder, assault with a firearm, unlawful possession of a firearm). He did not commit the crimes alone but in the company of two other members of his gang. Gang-related clothing was found inside the stolen car they were driving and numerous items useful for committing robbery and crimes of violence were found in and near the car after they abandoned it. There was also evidence that appellant, unlike the defendant in *Ochoa*, bragged or took credit for the shooting. Appellant reportedly laughed when a news story about the shooting came on television, and his girlfriend sent a text message to a friend stating he “shot at a cop over the weekend.” Thus, unlike the court in *Ochoa*, we may conclude there was substantial evidence supporting the gang enhancements and gang-related firearm enhancements.

### **III. Constitutionality of section 12022.53**

Appellant contends section 12022.53, subdivision (e)(1) violates equal protection by treating aiders and abettors of gang offenses differently from aiders and abettors of nongang offenses. The courts in *People v. Gonzales* (2001) 87 Cal.App.4th 1 (*Gonzales*) and *People v. Hernandez* (2005) 134 Cal.App.4th 474 (*Hernandez*) have already rejected this claim, and we find no basis to depart from this established authority.

“The constitutional guaranty of equal protection of the laws has been judicially defined to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness. [Citations.] The concept recognizes that persons similarly situated with respect to the legitimate purpose of the law receive like treatment, but it does not, however, require absolute equality.

[Citations.] Accordingly, a state may provide for differences as long as the result does not amount to invidious discrimination. [Citations.]” (*People v. Romo* (1975) 14 Cal.3d 189, 196.)

““The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” [Citations.]” (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1427.) “If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold.” (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.) The court in *Gonzalez, supra*, 87 Cal.App.4th at page 13 expressly addressed and rejected appellant’s argument that an aider and abettor of a gang member who discharges a firearm is similarly situated to an aider and abettor of a firearm user who is not a member of a criminal street gang. The court explained that “[u]nlike other aiders and abettors who have encouraged the commission of a target offense resulting in a murder, defendants committed their crime with the purpose of promoting and furthering their street gang in its criminal conduct.... [¶] Defendants were not

similarly situated with other aiders and abettors, and on that basis, their equal protection argument fails.” (*Ibid.*)

But even if appellant could show that he was similarly situated with aiders and abettors of non-gang members, ““a second level of analysis is required. If the law in question impinges on the exercise of a fundamental right, it is subject to strict scrutiny and will be upheld only if it is necessary to further a compelling state interest. All other legislation satisfies the requirements of equal protection if it bears a rational relationship to a legitimate state purpose. [Citation.]”” (*Gonzalez, supra*, 87 Cal.App.4th at pp. 12-13.) Though appellant contends aiding and abetting a gang shooting involves the exercise of a fundamental right subject to strict scrutiny, the court in *Hernandez, supra*, 134 Cal.App.4th at page 483 determined that rational basis review was the appropriate test to resolve an equal protection challenge to section 12022.53, subdivision (e)(1). The rational basis test typically applies to an equal protection challenge to a criminal statutory scheme where there is no claim that the classification at issue involves a suspect class or harsher treatment for a juvenile than an adult. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838 (*Wilkinson*).

The court in *Hernandez, supra*, 134 Cal.App.4th at page 483, further concluded that the enhancement provided by section 12022.53, subdivision (e)(1) satisfied the rational basis test: “Clearly the Legislature had a rational basis for imposing a 25-years-to-life enhancement on one who aids and abets a gang-related murder in which the perpetrator uses a gun, regardless of the relationship between the aider and abettor and the perpetrator. As we previously observed, the purpose of this enhancement is to reduce through punishment and deterrence ‘the serious threats posed to the citizens of California by gang members using firearms.’ One way to accomplish this purpose is to punish equally with the perpetrator a person who, acting with knowledge of the perpetrator’s criminal purpose, promotes, encourages or assists the perpetrator to commit the murder.” (Fn. omitted.)

Citing *People v. Olivas* (1976) 17 Cal.3d 236 (*Olivas*), appellant argues that we should not adopt the rational basis test endorsed by *Hernandez, supra*, 134 Cal.App.4th 474. Appellant's argument is contrary to law. In *Wilkinson, supra*, 33 Cal.4th 821, the California Supreme Court held that the statutory scheme governing the offense of battery on a custodial officer did not violate equal protection principles. (*Id.* at pp. 838-841.) In reaching its conclusion, the court rejected the defendant's argument that strict scrutiny was required according to *Olivas*, a case involving an equal protection challenge to a statute which gave the trial court discretion to commit a defendant, convicted as an adult and between the ages of 16 and 21, to the California Youth Authority for a longer term than the defendant would have received if he or she had been sentenced as an adult. (See *Wilkinson, supra*, at p. 837.) The *Wilkinson* court concluded that *Olivas* did not stand for the proposition that strict scrutiny is required for an equal protection challenge on the grounds a penal statute authorizes different sentences for comparable offense. The court explained that *Olivas* "'requires only that the boundaries between the adult and juvenile criminal justice systems be rigorously maintained. We do not read *Olivas* as requiring the courts to subject all criminal classifications to strict scrutiny requiring the showing of a compelling state interest therefor.' [Citation.] Other courts similarly have concluded that a broad reading of *Olivas*, as advocated by appellant here, would 'intrude[] too heavily on the police power and the Legislature's prerogative to set criminal justice policy.' [Citations.]" (*Wilkinson, supra*, at pp. 837-838.) Accordingly, the rational basis test applied in *Hernandez* is applicable and results in the conclusion that section 12022.53, subdivision (e)(1) does not violate equal protection principles.

#### ***IV. Abstract of judgment***

The trial court awarded appellant 424 days of actual custody credits and 62 days of conduct credits, for a total presentence credit of 486 days. Appellant contends, and respondent concedes, appellant was entitled to 425 days of actual custody credits and 63 days of conduct credits, for a total presentence credit of 488 days. We accept

respondent's concession and direct the trial court to amend the abstract of judgment accordingly.

**DISPOSITION**

The trial court shall amend the abstract of judgment to reflect an award of 425 days of actual custody credits, and 63 days of conduct credits, for a total presentence credit of 488 days, and provide an amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HILL, P. J.

WE CONCUR:

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WISEMAN, J.

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FRANSON, J.