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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

AYLWIN DWAYNE JOHNSON, JR.,

Defendant and Appellant.

F066878

(Super. Ct. No. 1252397)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. John D. Freeland, Judge.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Aylwin Dwayne Johnson, Jr., was charged with murdering Rodolfo “Rudy” Macias (Pen. Code, § 187, subd. (a)¹ [count I]); attempting to murder Jose Macias (§§ 187, subd. (a), 664 [count III]); and assaulting Rudy and Jose² with a firearm (§ 245, subd. (a)(2) [counts II & IV]). The information further alleged (1) as to counts I and III, defendant was lying in wait (§ 190.2, subd. (a)(15)) and personally and intentionally discharged a firearm, which proximately caused great bodily injury or death (§ 12022.53, subd. (d)); (2) as to counts II and IV, he personally used a firearm (§ 12022.5, subd. (a)); (3) as to counts III and IV, he personally inflicted great bodily injury (§ 12022.7, subd. (a)); and (4) as to each count, he committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)).

On October 3, 2011, the jury found defendant guilty as charged on counts I, II, and IV and found true the allegations he (1) intentionally killed Rudy by means of lying in wait; (2) personally and intentionally discharged a firearm, which proximately caused Rudy’s death; (3) personally used a firearm in the commission of each assault; and (4) inflicted great bodily harm upon Jose. The jury deadlocked on count III and the gang enhancement allegation, resulting in a mistrial on those matters. Defendant subsequently filed two separate motions for a new trial. He claimed (1) the trial court admitted certain irrelevant and inflammatory gang evidence; and (2) he discovered new evidence. Both motions were denied. (See at pp. 16-19, 24-29, *post.*)

Defendant was sentenced to (1) life without the possibility of parole (LWOP), plus a consecutive 25 years to life for firearm discharge proximately causing death, on count I; and (2) a consecutive four years, plus a concurrent 10 years for firearm use and a

¹ Unless otherwise indicated, subsequent statutory citations refer to the Penal Code.

² To avoid confusion, we identify individuals who share the same surname by their first names. No disrespect is intended.

consecutive three years for infliction of great bodily injury, on count IV. The trial court also imposed four years, plus a concurrent 10 years for firearm use, on count II, but stayed execution of this sentence pursuant to section 654.

On appeal, defendant argues the trial court should have granted his new trial motions. We find no abuse of discretion in the trial court's rulings.³ Defendant further argues—and the Attorney General concedes—the trial court improperly imposed a parole revocation fine on count I. We agree.

In her brief, the Attorney General asks us to stay the concurrent firearm use enhancements on counts II and IV. We find the trial court erred when it ordered the section 12022.5, subdivision (a), enhancements to run concurrently. We vacate the sentences on counts II and IV and remand those counts for resentencing.

STATEMENT OF FACTS

I. Prosecution case-in-chief.

a. Crime scene and suspects.

On October 21, 2008, at approximately 12:39 a.m., Stanislaus County Sheriff's Department deputies encountered a blue Ford Expedition resting three to four feet in front of a tree stump at 1308 Faustina Avenue in Modesto. The front bumper displayed a scuff mark. There were neither acceleration nor braking marks in the vicinity. The back window on the passenger side was completely shattered. Broken glass and two beer cans littered the ground. One of the beer cans had bullet holes. A bullet fragment was located amidst the glass.

Inside the vehicle, Rudy—the driver—had been shot in the back of the head. He was pronounced dead at the scene. Meanwhile, Jose—the front passenger—was bleeding

³ Because we find no abuse of discretion, we need not address defendant's claim of prejudicial error.

profusely from the torso, but remained conscious and responsive. There were no further bullet fragments, holes, or ricochet marks.

An eyewitness saw two individuals running eastbound toward Leon Avenue. A K-9 unit detected an odor at the northwest corner of Faustina Avenue and Leon Avenue and followed the scent trail to defendant's residence at nearby 1205 Pelton Avenue. At the house, deputies arrested Joel Bejaren, but did not find a gun.

Jose was shown a six-pack photo lineup that included a picture of defendant. He identified defendant as the gunman.

On October 22, 2008, defendant turned himself in. He did not exhibit any facial injuries.

b. *Medical examinations.*

A forensic pathologist performed Rudy's autopsy. He noted Rudy sustained a gunshot wound to the left side of the back of the head "[10] centimeters from the top of the head and three centimeters from the midline [of] the head." The bullet was embedded in the right side of the brain; its trajectory was "from left to right, back to front." The "star shape" of the entry laceration and the amount of subcutaneous gunpowder residue suggested the firearm was discharged while in direct contact with Rudy's head.

An emergency physician examined Jose and observed the following injuries: (1) a "severe" gunshot wound in the left side of the back behind the shoulder, accompanied by a clavicular fracture; (2) a "through[-]and[-]through"⁴ gunshot wound in the left arm; (3) a through-and-through gunshot wound in the left chest; (4) a gunshot wound in the right chest; and (5) a "serious" gunshot wound in the right hand. The "oval or oblique" shape of the chest lacerations indicated the bullets penetrated angularly "from left to right." Because the bullets traveled along such a trajectory, they missed the vital organs in the thoracic cavity.

⁴ At trial, the doctor described a "through[-]and[-]through wound[]" as one "where there's an[] entrance wound and exit wound."

c. Jose's testimony.

Jose and his younger brother Rudy were active Norteños from San Jose. The former was known by the gang moniker “Yogi” while the latter was known by the gang moniker “Spiderman.” On October 20, 2008, the men were in Modesto, where Rudy intended to sell marijuana, hashish, and methamphetamine. That night, Rudy drove Jose and two female companions to M & S Market on the corner of Pelton Avenue and Colorado Avenue.⁵ Jose entered the store and purchased a cigar and beer. When he exited, he saw Rudy speaking to two strangers: defendant and Bejaren. Jose assumed defendant and Bejaren were also Norteños because “[Rudy] never associated with [anyone] other than active Northerners” Jose “paid [his] respects” to defendant and Bejaren, but the duo did not reciprocate.

Thereafter, Jose, Rudy, and their female companions drove to the women’s apartment on the corner of Pelton Avenue and Roselawn Avenue, where the group smoked marijuana and methamphetamine for at least half an hour. The men then left the apartment and planned to go home. As Rudy was reversing the Ford Expedition, someone hollered, “Spiderman.” Rudy asked, “Is that A-1?”⁶ Defendant approached the driver’s side and asked for a ride to his mother’s house. Rudy assented. Defendant sat behind Rudy and gave directions. The trio ended up at a residence on Victor Way. Defendant exited the vehicle, walked to a side gate, and reached over the top to grab something. He returned with his hands in his pockets, claimed his mother was out, and asked for a ride to a friend’s house. Rudy acquiesced. Defendant again sat behind Rudy and gave directions.

En route to defendant’s purported destination, Rudy—who still had drugs in his possession—drove slowly and obeyed stop signs to avoid confrontation with law

⁵ M & S Market is a short distance from 1205 Pelton Avenue.

⁶ “A-1” is defendant’s nickname.

enforcement. In the front passenger seat, with the window rolled down, Jose placed his right elbow on the sill and held a can of beer in his right hand. At some point, Rudy turned right onto Faustina Avenue and proceeded westward. Near the intersection of Faustina Avenue and Leon Avenue, Jose saw Bejaren walking southbound on Leon Avenue. Suddenly, defendant shot Rudy and Jose from behind, causing the Ford Expedition to decelerate and drift off the road. After the vehicle came to a halt, defendant tried to leave through the driver's side passenger door, but it remained locked. He kicked and smashed the back window on the passenger side, escaped through the opening, and fled toward Leon Avenue. Defendant dropped the gun on the corner of Faustina Avenue and Leon Avenue before he continued northbound on Leon Avenue. Bejaren appeared, picked up the weapon, and followed defendant.

In March 2009, several months after the shooting, Jose was arrested for motor vehicle theft and housed in a Norteño cell block at Stanislaus County Jail. He was shocked to find defendant in the neighboring cell. Jose asked defendant, "Why did you kill my brother ...?" Defendant asserted Rudy "robbed a big hom[ie]⁷," but did not name this individual. Jose remembered an altercation in late 2007 between Rudy and Benjamin Castillo, an East Side Norteño known by the moniker "Benzo." Castillo had been battering his girlfriend when Rudy "hit him in the face" and "took his jewelry" to "[p]ut him in his place ... [for] disrespect[ing] a lady"⁸

Jose and defendant were in adjacent cells for approximately one week. On the third day of his confinement, Jose sustained a gash on his left cheek when a Norteño cellmate attacked him with a razor blade. This "puta mark" conveyed he was "no longer

⁷ At trial, Jose described a "big hom[ie]" as a "higher up" in the gang who "keep[s] order in ... the facility," "see[s] that everything runs smoothly," and "[m]ake[s] sure that everybody is functioning," i.e., "wak[ing] up, roll[ing] your mattress up, brush[ing] your teeth, exercis[ing], engag[ing] in [Northern gangster history] studies."

⁸ At trial, Castillo acknowledged he had been beaten and robbed by Rudy sometime before August 2008. He was an active Norteño at the time of this incident.

welcome.” Afterward, Jose dropped out of the gang and was removed from the Norteño cell block.

d. *Froilan Mariscal’s testimony.*

Mariscal—a criminal investigator with the Stanislaus County District Attorney’s Office—developed his expertise on various gangs through field work and formal training seminars. In one instance, he attended a conference in 2008 on the subject of Norteños with military experience. The topic was pertinent in view of a January 9, 2005, incident in which a Norteño from Ceres—a former Marine—obtained an automatic rifle and killed three police officers.

Mariscal testified the Norteños are a criminal street gang whose primary activities include “murders, attempt[ed] murders, robberies, assaults, drug dealing, auto theft, home invasions, [and] vandalisms.” The gang’s symbols include the “Cesar Chavez huelga bird,” the “Northern star,” and the number 14,⁹ which is expressed in Arabic, Roman, and Mayan numerals. Many Norteños tattoo these symbols on themselves as a show of allegiance. In addition, members identify with the color red and wear red apparel. They tend to sport hairstyles such as the “[M]ongolian haircut” and “west side flap,” but there is no “hard and fast rule.”

Norteños mark their territory with graffiti and “instill fear in ... [the] community as a whole to control and be able to operate freely.” People living in Norteño-controlled neighborhoods who witness gang-related crimes often refuse to cooperate with law enforcement in fear of retaliation. Norteños also “instill fear in ... fellow gang members”

⁹ Mariscal explained “[t]he 14 is the 14th letter of the alphabet, which is N which stands for ... Norte[ñ]o.”

The decision to become a Norteño is heavily influenced by “family tradition.” If a person’s father, uncle, cousin, or other relative is a Norteño, that person is “expected to be a part of [the gang.]”

Norteños comprise the lowest echelon of a larger, three-tiered criminal organization. At the top of the hierarchy is the prison gang Nuestra Familia, which formed in the 1960’s in opposition to the rival prison gang Mexican Mafia. Nuestra Familia’s “main goal is to make money based on criminal activities.” It “use[s] the [Norteño] gang members on the streets ... to make money for the people in charge within the prison system.” One scheme calls for Norteños to “collect[] taxes from drug dealers who deal drugs on the streets” and “funnel [the money] to the leaders that are in the prison system.” One who fails to pay taxes is subject to assault, robbery, and/or murder.

Nuestra Familia’s decrees must be obeyed. Norteños who disobey become “target[s] for assault or discipline.” One such mandate is “no red-on-red crime,” i.e., a Norteño must not perpetrate a crime on a fellow Norteño. However, red-on-red crime may be sanctioned before or after the fact if the victim (1) “has broken a rule of the gang”; or (2) “has fallen out of favor with the gang enough to where the individuals who are targeting this person feel that their action[] [is] warrant[ed]” In either event, the red-on-red crime “sends a strong message[:] ... either you will follow the rules of the gang and ... orders or directives or you will be dealt with and you will suffer serious repercussions, up to murder.”

Mariscal cited examples of red-on-red crime. In one case, two Norteños murdered a fellow Norteño because he “turn[ed] [his] back on ... fellow gang member[s] to come to the aid[] of a ... dropout gang member.” In another case, gunfire erupted in the south side of Modesto between two groups of Norteños over “perceived ... disrespect.” In a third case, in Turlock, a Norteño faction asked a second Norteño faction for assistance in a dispute with a third Norteño faction. The second faction refused, resulting in a shootout between the first and second factions.

Many Norteño subsets inhabit Stanislaus County, including the West Side Boyz (WSBZ), Vernon Block Gangsters, Deep South Side Modesto, Parklawn Boyz, Varrio West Side Movement, Turlock Locos, Riverbank Varrio Locos, Empire Boyz, and Ghost Town Norteños. In particular, WSBZ claims the west side of Modesto as its territory, including the area bounded by Sutter Avenue, Pelton Avenue, Faustina Avenue, and Roselawn Avenue. It “taxes individuals who sell drugs in the[] neighborhood who are not part of the [subset]” “\$250 a month.” Bejaren is a WSBZ member: at one point, he was “the number two in command of the [subset].”¹⁰

Mariscal reviewed law enforcement documentation—e.g., police reports, field identification cards, jail classification cards—detailing various episodes involving defendant. On May 12, 2004, defendant and Luis Herrera—defendant’s brother-in-law and a documented Norteño known by the moniker “Beaner”—assaulted a male victim at 1205 Pelton Avenue. On August 21, 2004, a vehicle containing defendant and three documented Norteños—Herrera, Richard Castro, and Richard Williams—was pulled over. On January 28, 2006, a vehicle containing defendant and Jorge Rivas was pulled over. Defendant wore a red sweatshirt; Rivas was a documented Norteño. On September 21, 2008, defendant and Mara Tut-Smith were arrested in the wake of a fight involving armed subjects near 613 Hudson Lane. Tut-Smith was an admitted Norteño who perpetrated several robberies and was part of the gang regiment. On October 22, 2008, defendant was booked into a Norteño cell block. Although he did not claim a gang

¹⁰ Mariscal opined a gang member in Bejaren’s leadership position would be “viewed as [a] big hom[ie] or an individual that has influence over others within the gang [O]ther gang members who may be less experienced or younger ... respect the older gang members for having all that gang experience”

affiliation, he indicated “Sure[ñ]os were his enemies”¹¹ and “he runs with Northerners.”¹²

Mariscal also reviewed several “wilas,” i.e., “micro-writings” from jail that facilitate gang communication, “keep[] track of who is an active member,” “keep[] policies [and] procedures,” and “keep[] tabs on everybody in the prison system or in the jail system.” A wila dated February 19, 2009, specified Jose was on the “bad news list” (see fn. 16, *post*) for “snitching.” A wila dated March 9, 2009, identified Jose as a “new arrival[]” and “a witness on Mr. A-1’s” with “PW, [i.e.,] paperwork.”¹³ A second wila dated March 9, 2009, addressed to “La Casa”¹⁴ via “Blanco,” read:

“Allow me to extend my utmost love and respect and loyalty. Honor to you, sir. With that said, allow me to address the importance of this missive. [¶] ... [¶] ... This missive is in regards to ... Jose Luis Macias ... from San Jose aka Yogi. There’s no other way to address this matter to you, sir, so I’m going to get straight to it. I am an active Ner¹⁵ ... [¶] ... [¶] [w]ho is here for a 187 and 664/187. My 187 ... the victim is Jose Luis Macias[’] brother Rodolfo Macias aka Spider. [The] attempted murder I am accused of is against Jose Luis Macias aka Yogi. I have already done an IR on the incident and since have been fully cleared.¹⁶ To my knowledge, ... Jose has been deemed a[] [no good Norteño] due to some statements he made to

¹¹ Norteños are rivals with Sureños, who “give homage to the Mexican Mafia.” Norteños refer to Sureños pejoratively as “Scrap[s].”

¹² Mariscal said an inmate housed in a Norteño cell block will be assaulted if he is not an active Norteño.

¹³ Mariscal testified “an advisement that one gang member has paperwork ... prove[s] that the ... gang member has committed some sort of violation against the gang rules.”

¹⁴ “La Casa” is Spanish for “the house.”

¹⁵ Mariscal clarified “Ner” is an abbreviation for “Northerner.”

¹⁶ According to Mariscal, a Norteño inmate who commits an unsanctioned red-on-red crime must submit an IR, i.e., incident report, to gang leaders. An inmate who is cleared of any wrongdoing resumes participation in the gang’s activities; an inmate who is found to have violated the gang’s rules is placed on the “bad news list” and targeted for assault.

police ..., which I do have that paperwork. But, sir, here is where it gets interesting and complicated. [Jose] has since went against the statements he originally made and is currently incarcerated and housed next door to me.... [¶] ... [¶]

“... He was asked and stated he is not going to court and lie on me.^[17] Sir, as an active Ner and a youth in our cause, I am asking you to please take into consideration my life and my case. Sir, they have nothing on me, only this individual’s statements. I need him to believe everything is okay so he won’t go to court or when the time comes, he tells the Court the truth, that I am not the one responsible of this crime. Sir, I understand we cannot allow such filth to be in our presence and, sir, I do not mean to sound selfish or self-centered, because I am nothing of the sort. Sir, I am here for the cause. I live, breath[e], and bleed the cause and will assist in any way possible for the people. Sir, if I lose this case I will spend the rest of my life in prison. Sir, I am asking if there’s any way possible that you, sir, and the people can understand and take into consideration I have a chance to beat this case and make it back out to the streets and to my family. If something were to happen to this individual while he was my neighbor or on the same tier as me, sir, it would be devastating to me trying to beat this case. It would look really bad for me, sir. I know the proper and necessary action that need[s] to happen. I am asking you, sir, if you can please hold on handling this individual so I can at least use this individual to beat my case. I am asking as a fellow soldado^[18] ... [¶] ... [¶] ... [a]nd active Ner. And as a little brother, if the people can please grant this request so I can make it home to my family and not spend the rest of my life behind bars I am willing to do whatever it takes. I will be forever indebted to you, sir, and the people. I’ll take frontline status, et cetera. Sir, this individual I believe is not cooperating with police and switch[ed] his statements because he believes he is active. Sir, I hope you can find it in your heart to help a fellow brother in the struggle beat his case and make it home to his family and the hom[on]ies on the streets. I now step aside in love, respect and carnalismo,^[19] sir. Death before dishonor. One heart, one cause, one mind, one struggle....

“... [1.] Aylwin Dwayne Johnson Jr. aka A-1.... [2.] 8-14 of ’85. [3.] WSBZ, West Side Modesto. [4.] 187. 664/187, 245. [5.] No strikes. [6.] [N]o contraband. Much love and respect, sir.”

17 Jose denied telling defendant he would not testify against him.

18 “[S]oldado” is Spanish for “soldier.”

19 “Carnalismo” is a Spanish slang meaning “brotherhood.”

A different wila containing a roster of active Norteños confirmed defendant was a member of WSBZ.

Mariscal testified defendant satisfied six of the 12 criteria used for validating gang members: defendant (1) was previously arrested with other Norteños; (2) was identified as an active Norteño on a gang roster; (3) admitted being a Norteño; (4) wore red attire; (5) associated with other Norteños; and (6) admitted being a Norteño during jail classification.

e. *Case theory vis-à-vis the gang enhancement allegation.*

The prosecutor argued Bejaren ordered defendant to shoot Rudy and Jose because (1) they sold drugs in the west side of Modesto without paying taxes to WSBZ; and (2) Rudy wrongly attacked and robbed Castillo, a fellow Norteño.

II. Defense case-in-chief.

a. *Defendant's testimony.*

Defendant lived at 1205 Pelton Avenue with his grandmother. He was a drug dealer who mainly peddled methamphetamine. Defendant denied being a Norteño or having any involvement with the gang, but admitted having Norteño acquaintances. He also procured his drugs from and paid \$200 per month in "protection taxes" to a Norteño supplier, but "ha[d] no choice" because Norteños controlled his neighborhood; if he did otherwise, he and his family would have been susceptible "to robberies, home invasions, or things of that nature."

On the evening of October 20, 2008, defendant was at M & S Market, where he conducted several drug sales. He was accompanied by the father of his cousin's children, Bejaren, who needed to purchase baby formula. Defendant knew Bejaren was a Norteño. At some point, defendant and Bejaren were talking in front of the store when a blue Ford Expedition arrived. Two males and two females exited the vehicle. One of the males said, "A-1, what's up?" (*Ante*, fn. 6.) The speaker was Rudy, defendant's "very good friend[]" and a past customer. Defendant and Rudy shook hands and hugged. Rudy

asked for four ounces of crystal methamphetamine and agreed to pay \$800 per ounce. Defendant needed to contact his supplier first. The men decided to reconvene at defendant's house.²⁰

After 35 to 45 minutes elapsed, Rudy arrived at 1205 Pelton Avenue driving the Ford Expedition. Defendant approached the front passenger side, but saw it was occupied by someone named Jose, the same man who appeared with Rudy at M & S Market.²¹ Defendant entered the back seat, sat behind Jose and directed Rudy to a house on Nian Way. At this residence, defendant obtained four ounces of methamphetamine from his supplier. After defendant returned to the vehicle, Rudy drove to a secluded area on Figaro Avenue. Defendant gave a methamphetamine "shard" as a "tester" to Jose, who smoked it. Jose remarked, "[Y]eah, it's good. It's fire." When defendant inquired about payment, Jose pulled out a revolver.²²

Jose pointed the gun at defendant's face and proclaimed, "[B]race yourself, mother fucker. Empty out all your pockets."²³ Defendant, who was sitting in the middle of the backseat, asked Rudy, "[T]hat's how you're going to do me? All we been through, that's how you're going to do me?" As defendant was "trying to bargain [his way] out" of his predicament, a light from a nearby house activated. Rudy drove off at a speed of about 35 miles per hour. In the meantime, defendant attempted to open the back door on the driver's side, but it was locked. Jose "lunge[d]" at defendant, aimed the gun "right up to [defendant's] face," and uttered, "[M]other fucker, where you going? I ain't playing. Give me all the money. Give me all the dope." After Rudy turned onto southbound Colorado Avenue, defendant cried, "[A]w, fuck, the police. The police. Oh, look."

²⁰ Jose denied Rudy arranged to purchase drugs from defendant.

²¹ Defendant testified he did not know Jose and Rudy were brothers "until after [he] turned [him]self in and was incarcerated."

²² Jose denied possessing a firearm.

²³ Jose denied attempting to rob defendant.

When Jose turned his head, defendant tried to open the back door on the passenger side, but it was also locked. Defendant then noticed Jose “looking around in the front [floor] area.” Defendant looked down and spotted the revolver on the floorboard behind the driver’s seat.

Defendant seized the gun with his right hand²⁴ and said, “Let me out the fucking car.” Jose grabbed defendant’s wrist and the gun barrel. Defendant and Jose struggled for the firearm “like a tug of war”²⁵ while Rudy continued driving at a speed of 30 to 35 miles per hour. During the tussle, Rudy made a right turn onto Faustina Avenue. Eventually, defendant hit Jose, causing Jose to “fall[] back into the front seat” and then pointed the gun at Rudy, ordering Rudy to “[s]top the fucking car.” Rudy replied, “All right. All right. Just put the gun down.” As soon as Rudy turned his head to the left and decelerated, Jose pushed defendant’s right arm. When defendant “pulled back,” the gun accidentally discharged next to Rudy’s head. A few seconds later, the Ford Expedition hit a tree stump.

Defendant—sitting almost directly behind the driver’s seat and still holding the gun—saw Rudy “slumped over the driver’s seat.” He aimed the weapon at Jose and pleaded, “Let me out the car. I don’t want no problems.” Enraged, Jose threatened to kill defendant and “made a motion ... as if he was going to lung[e]” again. Defendant closed his eyes and fired the revolver multiple times. He opened his eyes and saw Jose “holding his chest” and “positioned ... where the dashboard and the door” connected. Defendant kicked and smashed the back window on the passenger side, “Superman’d out of the window,” and fled eastward on Faustina Avenue. He turned right on Colorado Avenue and tossed the gun. Defendant reached his uncle’s house and stayed there “until the morning of the day [he] turned [him]self in.”

²⁴ Defendant testified he is right-handed.

²⁵ Jose denied engaging in any struggle for control of a gun.

At Stanislaus County Jail, defendant informed deputies he was not a Norteño and was “cool” with “Northerners,” “south siders,” “blacks,” “whites,” and “Asians.” However, he was classified as a Norteño and housed in a Norteño cell block. Defendant submitted multiple requests to be reclassified, but to no avail. He ultimately feigned being a Norteño to “get by” and ensure his family’s safety. Sometime in March 2009, Jose was placed in a neighboring cell. Defendant asked him “why he made the statements he did to the police about what happened.” Jose admitted being “messed up” and “fucked up ... on drugs” and vowed “to go to the [district attorney] and the police and let [them] know the truth.”²⁶ Defendant later learned Jose was added to the “bad Norte[ño] list” for speaking to the police. He asked his cellmate—a man he knew as “Blanco”—to write a wila on his behalf imploring the gang to refrain from harming Jose. Defendant never read the wila.

DISCUSSION

I. Standard of review – the new trial motions.

“‘We review a trial court’s ruling on a motion for a new trial under a deferential abuse-of-discretion standard.’ [Citations.]” (*People v. Thompson* (2010) 49 Cal.4th 79, 140.) “‘“A trial court’s ruling on a motion for new trial is so completely within that court’s discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.”’ [Citations.]” (*Ibid.*) “Although this standard of review is deferential, ‘it is not empty [I]t asks in substance whether the ruling in question “falls outside the bounds of reason” under the applicable law and the relevant facts [citations].’ [Citation.]” (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659.) “The appellant has the burden to demonstrate that the trial court’s decision was ‘irrational or arbitrary,’ or that it was not “grounded in reasoned judgment and guided by legal

²⁶ Jose denied telling defendant he was “messed up,” was “fucked up on drugs,” and would accept culpability before the district attorney and police.

principles and policies appropriate to the particular matter at issue.” [Citation.]’ [Citations.]” (*Ibid.*)

II. Defendant’s July 18, 2012, motion for a new trial was properly denied.

a. Background.

In a July 18, 2012, new trial motion, defendant alleged “the court erred in admitting pre-offense and post-offense gang evidence.” (Capitalization omitted.) Regarding pre-offense gang evidence, he asserted the “2004 evidence of a fight at defendant’s grandmother’s residence and Field Identification cards from a traffic stop with family members and their friend,” “2006 evidence of being a passenger in a car driving on the wrong side of the road and Field Identification cards with other family members,” “a 2008 arrest on a misdemeanor warrant,” and Mariscal’s gang expert testimony²⁷ were “not relevant to motive and intent” and “simply introduced to cast defendant as gang-related and to inflame the jury with fear of the Norte[ñ]o street gang and anyone associated with the Norte[ñ]o Criminal Street gang.” Regarding post-offense gang evidence, defendant maintained the “post-offense WILAs were not relevant, but were extremely and uniquely inflammatory.” (Boldface & underlining omitted.)

In a January 17, 2013, order, the court denied defendant’s motion:

“A. Pre-Offense Gang Evidence

“Defendant contends the ‘gang evidence’ consisting of: 1) evidence of a fight at his grandmother’s in 2004, 2) field identification[] cards from a

²⁷ Defendant challenged Mariscal’s testimony about “the background and history of the Norte[ñ]os, the Mexican Mafia, the Nuestra Familia prison gang and their relationship to the Norte[ñ]os ‘out on the street’; several Stanislaus County gangs; the use of fear and intimidation; other gang members and their unrelated crimes including murder; the killing of a Ceres Police Officer by an ex-military member identified with the Norte[ñ]o gang; the family tradition of gang membership; gang crimes including murders, attempted murders, robberies, assaults, drug dealing, auto theft, home invasions, and vandalism; an unrelated murder case ... in [the south side of Modesto] as well as other unrelated crimes involving gangs.”

traffic stop with family members and their friend, 3) evidence that in 2006 Defendant was a passenger in a car driven on the wrong side of the road, 4) field identification cards with other family members, and 5) a 2008 arrest on a misdemeanor warrant amounted to bad character evidence, was not relevant to prove the ... [section] 186.22[, subdivision](b)(1) enhancement, and was not admissible to prove motive.

“In *People v. Martin* (1994) 23 Cal.App.4th 76, the defendant was convicted of first degree murder and a ... [section] 186.22[, subdivision](b) enhancement was found true. Defendant argued that it was improper to introduce evidence of his gang activity in support of the enhancement, but the court disagreed, noting that ‘[c]ontrary to defendant’s assertion, the motive here was relevant and important, both to the actual crime committed (first or second degree murder or manslaughter) and to the requisite intent for the enhancement. Case law holds that where evidence of gang activity or membership is important to motive, it can be introduced even if prejudicial.’ (*People v. Martin, supra*, 23 Cal.App.4th at p. 81.)

“Motive was shown in this case, and it was gang related. The jury was not able to agree as to whether the ... [section] 186.22[, subdivision](b)(1) enhancement was true. However, the issue before the court was one of admissibility....

“Defendant notes that *People v. Albarran* (2007) 149 Cal.App.4th 214 reversed a conviction on the ground that gang evidence was introduced to prove motive and intent. While the *Albarran* court may have reversed on those grounds, before it did so it recognized that ‘as a general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative.’ (*Id.* at p. 223.) The *Albarran* court’s decision to reverse the trial court was based on its finding that there was no evidence produced at trial that provided evidence of a gang motive. The gang expert testified that he did not know the reason for the shooting. (*Id.* at p. 227.) Here, the gang expert discussed motive due to the victim failing to pay taxes to the local gang and his beating up a gang member. The appellate court in *Albarran* was also troubled by gang evidence that was admitted because it was unrelated to the defendant or his crime. After summarizing this evidence (see *id.* at pp. 227-228), the *Albarran* court stated that this ‘gang evidence ... was so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of [the defendant’s] actual guilt.’ (*Id.* at p. 228.) No such inflammatory evidence was introduced in this trial.
[¶] ... [¶]

“B. Post-Offense Gang Evidence

“Defendant contends the court erred in allowing ‘post-offense gang evidence’ consisting of: 1) the ‘Blanco WILA,’ and 2) the ‘gang roster WILA.’ The Court’s discussion above concerning pre-offense gang evidence applies equally here.

“The Court permitted the prosecutor’s gang expert to testify about the WILAs because the prosecution represented to the Court that the expert relied on the WILAs in formulating his opinions in the case, and because the jury was admonished to not consider the content of the WILAs in determining Defendant’s guilt, but only to consider them in evaluating the expert’s testimony.^[28] The WILAs were not admitted for the purpose of determining the defendant’s guilt. Rather, the expert was allowed to discuss them in terms of supporting his opinions. The jury was admonished in this regard, and juries are presumed to understand and follow instructions. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1326.)

“An expert may generally base his opinion on any matter made known to him, including hearsay not otherwise admissible, which may be reasonably relied on for that purpose. (*People v. Montiel* (1993) 5 Cal.4th 887, 918.) Inadmissible hearsay evidence must be reliable. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 653.) ‘[B]ecause Evidence Code [section] 802 allows an expert witness to “state on direct examination the reasons for his opinion and the matter . . . upon which it is based,” *an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion.*’ (*People v. Gardeley, supra*, 14 Cal.4th at p. 618, emphasis added.)

“Gang experts rely on a wide variety of information to formulate their opinions, such as admissions by participants, field identification cards

28 This admonition stated:

“In this trial Investigator Froilan Mariscal is testifying both as an expert regarding gangs and as a criminal investigator who interviewed witnesses. In his testimony as a gang expert he, among other things, discussed past conduct by individuals and police contact with individuals. When he testifies to what someone else told him, or he testifies to things that he read, you may consider what he was told and the things he read only to evaluate the expert’s opinion. Do not consider those statements and things he read as proof that the information contained in the statements and documents is true.”

indicating gang association or involvement, items obtained during searches, such as letters, lists, magazines, and photographs, graffiti at their residences and on personal belongings and clothing, tattoos and nicknames, and statements to the police. (See *People v. Gardeley*, *supra*, 14 Cal.4th at pp. 612, 618-620; *People v. Valdez* (1997) 58 Cal.App.4th 494, 503, 507-512.) Gang experts also rely on investigations of gang-related offenses, conversations with defendants and other gang members, as well as information from fellow officers and various law enforcement agencies. (*Ibid.*)

“Here, the expert testified to the content of the WILAs in support of his opinions, as allowed by *Gardeley*. The fact that they were created post-offense is of no consequence. In *People v. Garcia* (2001) 168 Cal.App.4th 261, the trial court permitted the admission of two post-offense WILAs, written by someone other than the defendant, as substantive evidence on the issue of the defendant’s guilt. The appellate court ruled that admission of one WILA was proper, and the other was not. (*Id.* at pp. 286-290.) Similarly, in *People v. Ochoa* (2001) 26 Cal.4th 398, the defendant was charged with murder. The trial court permitted the prosecution to present evidence of defendant’s post-offense act of having a tattoo applied to his head with the number ‘187.’ An expert testified to the significance of the number. This post-offense conduct was found highly probative by the trial court, and upheld on appeal. (*Id.* at pp. 437-439.)

“A jury’s acquittal of a defendant on the gang enhancement ‘strongly indicates that the gang evidence was not unduly prejudicial.’ (See *People v. Garcia*, *supra*, 168 Cal.App.4th at p. 278.) Here, the jury’s failure to convict on the enhancement is a strong indicator that the gang evidence was not unduly prejudicial.”²⁹

b. *Analysis.*

“When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial ... [¶] ... [¶] ... [w]hen the court ... has erred in the decision of any question of law arising during the course of the trial” (§ 1181, subd. 5.) “[E]rrors ‘in the decision of any question of law arising during the

²⁹ Case citations in the quoted text have been reformatted to conform to the general rules of citation outlined by the California Style Manual. (See generally Cal. Style Manual (4th ed. 2000).) No substantive changes were made.

course of the trial” include those made “in connection with the admission of evidence.” (*People v. Perkin* (1948) 87 Cal.App.2d 365, 369.)

“The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) “‘Prejudice,’ as used in Evidence Code section 352, is not synonymous with ‘damaging.’” (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.) “Rather, it refers to evidence that uniquely tends to evoke an emotional bias against the defendant as an individual, and has little to do with the legal issues raised in the trial.” (*Ibid.*; see *People v. Doolin* (2009) 45 Cal.4th 390, 439 [“[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.”].)

On appeal, defendant contends the following subjects presented by Mariscal were irrelevant and/or inflammatory: (1) the history of Nuestra Familia and the Mexican Mafia; (2) Nuestra Familia’s control of Norteños through violence; (3) the enmity between Norteños and Sureños; (4) the various Norteño subsets in Stanislaus County; (5) Norteño symbols, colors, clothes, tattoos, hairstyles, and graffiti; (6) Norteño membership as a “family tradition”; (7) Norteños’ control of its own members and citizens through fear and intimidation; and (8) crimes in Stanislaus County involving Norteños, including the shooting of three Ceres police officers.³⁰ These matters were

³⁰ On appeal, defendant also challenges (1) Mariscal’s testimony regarding the Northern Riders dropout gang, criminal cooperation among the Norteño subsets, and Norteño “brainwash[ing]” of prospective recruits; and (2) certain gang-related testimony elicited from Jose and Castillo. He further argues gang evidence was

raised in the new trial motion (see *ante*, fn. 27), but the trial court did not expressly rule on them. Nevertheless, “[a] ‘ruling or decision, itself correct in law, will not be disturbed on appeal If right upon *any* theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.’” (*People v. Dawkins* (2014) 230 Cal.App.4th 991, 1004, italics added.)

In the instant case, the information alleged defendant murdered Rudy and assaulted Jose with a firearm “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” (§ 186.22, subd. (b)(1).) “In order to prove the elements of the criminal street gang enhancement, the prosecution may ... present expert testimony on criminal street gangs.” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.) “Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related. [Citation.] “[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.” [Citations.]’ [Citations.]” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168.) Motive—as well as specific intent, identity, modus operandi, and other issues pertinent to guilt of the charged crime—can be proven by “[e]vidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.)

Mariscal’s testimony about common signs of Norteño affiliation (e.g., red clothing, territorial graffiti), Norteño subsets in Stanislaus County, gang membership as a “family tradition,” and the rivalry between the Norteños/Nuestra Familia and the

“cumulative.” Defendant did not raise these issues in the new trial motion; therefore, he has forfeited them. (See *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 332.)

Sureños/Mexican Mafia was probative as to defendant's relationship with the Norteños, seeing as (1) defendant—in the company of a documented Norteño—had worn a red sweatshirt during an earlier traffic stop; (2) defendant lived in a neighborhood within WSBZ territory; (3) Bejaren—defendant's companion and the father of a cousin's children—was a high-ranking member of WSBZ; (4) Herrera—defendant's brother-in-law—was a documented Norteño; (5) defendant was housed in a Norteño cell block; (6) defendant indicated Norteños were his friends while Sureños were his “enemies”; and (7) a Norteño gang roster listed defendant as a WSBZ member.

Mariscal's testimony about Nuestra Familia and its control of the Norteños through violence, the Norteños' control of its own members through fear and intimidation, and various red-on-red crimes in Stanislaus County was relevant because it explained “the expectations of gang members ... when confronted with a specific action” (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1120, italics omitted) and “the ‘motivation for [the] crime’” (*ibid.*). According to Mariscal, a Norteño is expected to assault, rob, and even murder another Norteño if the victimized Norteño disobeys Nuestra Familia's rules (e.g., failing to pay taxes for drug dealing, attacking a fellow Norteño without justification, refusing to assist a fellow Norteño, and simply disrespecting a fellow Norteño).

As for Mariscal's mention of a January 9, 2005, incident in Ceres involving a Norteño—a former Marine—shooting and killing three police officers, the utterance was made at the outset of Mariscal's direct examination, when he initially set forth his qualifications via field work and specialized training. After he noted his attendance at a 2008 conference on the subject of Norteños with military experience, he briefly referred to the Ceres shooting. Taken in context, we do not believe this isolated remark “is of such nature as to inflame the emotions of the jury” (*People v. Doolin, supra*, 45 Cal.4th at p. 439.)

7Overall, Mariscal’s gang testimony was not only relevant, but was also “no stronger and no more inflammatory than the testimony concerning the charged offenses’ [Citation.]” (*People v. Eubanks* (2011) 53 Cal.4th 110, 144.) We also point out the jury did not find the gang enhancement allegation true, suggesting “the jury did not accept the gang evidence ... uncritically” (*People v. Williams* (2009) 170 Cal.App.4th 587, 613) and “strongly indicat[ing] that the gang evidence was not unduly prejudicial ...” (*People v. Garcia, supra*, 168 Cal.App.4th at p. 278.)³¹

III. Defendant’s July 31, 2012, motion for a new trial was properly denied.

a. Background.

In a July 31, 2012, new trial motion, defendant alleged “new evidence has been discovered that is material to [his] case, and which could not, with reasonable diligence, have been discovered and produced at trial.” He submitted declarations from Andrew Briseno and Adolfo Leyva.³²

Briseno—a Stanislaus County Jail inmate since May 2007—was a Norteño and a member of the gang’s “governing body” in the jail. Specifically, he investigated red-on-red crime involving Norteño inmates. In March 2009, en route to court in a prisoner transport vehicle, Briseno spoke to Jose about the “incident” with defendant. Jose revealed “[Rudy] told him that the black guy they were going to rob was a ‘nobody’ and

³¹ Given our disposition, we necessarily reject defendant’s claim the trial court’s denial “rendered the trial fundamentally unfair, in violation of [his] federal due process rights under the Fourteenth Amendment.” (Capitalization & boldface omitted.)

³² Defendant also submitted a declaration from the jury foreperson, which read: “... I have read the declarations of Andrew Briseno and Adolfo Leyva in support of Motion for New Trial – Newly discovered evidence. If the evidence set forth in either of these declarations were presented at the jury trial, I would not have voted to convict ... [d]efendant”

In his opening brief, however, defendant deemed this declaration “irrelevant to [the] new trial motion based on newly discovered evidence.”

didn't have any northerner connections," he "did not know that the black guy was family of Northerners," and "it was a robbery gone bad." Sometime in 2011, Briseno dropped out of the gang. In November or December 2011, when he heard Jose lied at defendant's trial, he contacted defendant and divulged the March 2009 conversation.

Leyva—a Stanislaus County Jail inmate since July 2007—rode in the same prisoner transport vehicle as fellow Norteños Jose and Briseno in March 2009. He overheard Briseno asking Jose for "[his] side of the story" and Jose answering "they were going to rob the guy," "he 'thought the guy was no good³³,'" and "things went bad." In June or July 2010, Leyva dropped out of the gang. In late 2011, he spoke to defendant, who was housed on the same floor of the jail, and found out Jose lied at trial. Leyva subsequently told defendant about Jose's prior remarks.³⁴

In a January 17, 2013, order, the court denied defendant's motion:

"[Section] 1181[, subdivision](8) permits the Court to grant a new trial when: [¶] ... new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given ...

"In addressing Defendant's motion, the Court must consider several factors: 1) whether the evidence, and not merely its materiality, is newly discovered, 2) whether the evidence is merely cumulative, 3) whether the

³³ Leyva believed this statement meant Jose thought defendant lacked any affiliation with the Norteños.

³⁴ Defendant previously asked the trial court to take judicial notice of February 7, 2012, printouts displaying information obtained from the Stanislaus County Superior Court's online case index. These printouts indicated Jose (Case No. 1258438), Briseno (Case No. 1230165), and Leyva (Case No. 1230193) each attended a court hearing on March 24, 2009. The court did not issue a ruling on the matter.

Defendant similarly filed a motion on appeal for judicial notice of the Superior Court printouts. We exercise our discretionary power pursuant to Evidence Code section 459 and grant the motion.

evidence would render a different result probable upon retrial of the case, 4) whether the defendant could have discovered the evidence prior to trial through the exercise of reasonable diligence and 5) whether the preceding four factors are shown by ‘the best evidence of which the case admits.’ (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)^{35]} ¶¶ ... ¶¶

“After a careful review of the *Delgado* factors, the Court finds that Defendant’s newly discovered evidence does not warrant the granting of a new trial under ... [section] 1181[, subdivision](8)... [T]here was a significant amount of forensic evidence presented at trial contradicting Defendant’s claim that he shot Rudy Macias during a struggle over his gun. In light of this evidence, the Court cannot find that Defendant’s new evidence would render a different result ‘probable’ upon retrial. ¶¶ ... ¶¶

“This Court has independently reviewed and weighed the evidence received during the trial. Having done so, the Court concludes that there is sufficient credible evidence to support the verdict. The weight of the evidence overwhelmingly points to the defendant’s guilt.

“This Court served as the trial judge and had the ability to hear the testimony of all the witnesses, and independently assess each witness’s credibility. The Court will not restate all of the evidence that supports the verdict. However the following is the most salient:

“1. Defendant admits he was in the vehicle being driven by victim Rudy Macias

“2. Defendant admits he is right handed, and that the gun was in his *right* hand when it discharged, shooting Rudy Macias in the head.

“3. Defendant admits the gun discharged while he was holding it, resulting in a bullet entering [Rudy] Macias’ skull.

“4. Defendant admits he fled the vehicle after breaking the rear, passenger side window, taking the gun with him.

“5. Defendant admits he tossed the gun after fleeing the vehicle.

“6. Medical evidence tells us the death of Rudy Macias was caused by a close contact gunshot wound to left side of the back of his head, and that the bullet traveled within the brain from left to right. The gunshot wound was [10] centimeters from the top of the head and three centimeters

³⁵ See *ante*, footnote 29.

from the midline. The star pattern to the skin surrounding the hole in the skull and the gunpowder found under the skin and in the skull indicates the barrel of the gun was in contact with the head at the time the gun was fired....

“7. After Rudy Macias was shot, the defendant admits he deliberately shot Jose Macias.

“8. Jose Macias sustained multiple gunshot wounds: to the right hand, to the upper thorax, and to the clavicular area.... The shot to the chest did not penetrate the thoracic cavity.... He had through[-]and[-]through wounds to his chest and left arm, with no fracturing of bone, no piercing of the chest cavity.... The wounds to the chest area were oval shape, which are not consistent with a straight penetrating wound, indicating the bullets entered the skin at an angle to the front of the body.... The emergency room doctor testified to five gunshot[] wounds in total.... The wounds came across the body from left to right....

“9. In the roadway leading up to the rear of the Macias’ vehicle, there were no braking marks, acceleration or deceleration marks, or S marks....

“10. No bullet holes were found inside the vehicle.... A bullet fragment was found on the ground outside the vehicle in the broken window glass.... Also found in this area w[ere] ... two Budweiser cans, one empty and one full. The empty can had a bullet hole on one side as the bullet entered, and another on the other side as the bullet exited....

“The jury’s implicit finding beyond a reasonable doubt that the defendant did not act in self-defense is supported by substantial evidence. The lack of tire marks on the roadway suggests no evasive action taken by the driver in response to some threat or fight occurring in the vehicle between the occupants. Minimal damage to the exterior front of the vehicle suggests it was traveling at a low rate of speed at the time Rudy Macias was shot. The bullet entered his skull in the back on the *left* side, traveling in his brain from left to right. [Defendant] is *right* handed. Defendant testified that the gun was in his *right* hand when it first discharged. Had there been a struggle between the two passengers essentially in the middle of the front and rear seats, it is inconceivable that the defendant’s right hand would be turned in such a fashion at just the exact moment during the struggle that the gun discharged to (1) cause the bullet to enter the skull on the left side, (2) and then travel from left to right inside the victim’s brain, (3) all at a time when the gun was neatly positioned in contact with or within millimeters of the victim’s head. As described below, defendant

says he was seated in the middle of the back seat. If so, and he is holding the gun in his right hand pointed at Rudy, the gun is on the right side of Rudy's head. There would be no reason for it to be on the left side. Jose then grabs the defendant's arm, pushing the arm, causing defendant to pull back, resulting in the gun discharging. Even if at that precise moment Rudy has rotated his head to the extreme left, it is nearly inconceivable that defendant's right wrist has cocked back (wrist extension) in such a fashion to cause the gun to be at the position needed for the bullet to enter the left side of the skull and travel from left to right inside Rudy's brain.

“According to defendant's testimony, after Jose pulls the gun and points it at the defendant, Rudy begins driving down the road at about 35 mph. During this time Jose is demanding defendant turn over his drugs and money. Defendant tries unsuccessfully to open the back passenger door. Jose again demands defendant's drugs and money. The vehicle travels on Figaro, then Colorado. Defendant says something about the police to distract Jose, causing Jose to face forward.... [A]gain defendant attempts to unsuccessfully exit the other door, but then sees Jose looking for something on the floor in the front. Defendant looks down and sees the gun on the floor behind the driver. Defendant picks up the gun and demands the vehicle stop so he can get out. Jose and defendant struggle over the gun.... The vehicle turns on Faustina. Defendant kicks Jose away, and defendant again has sole control of the gun. The vehicle is now going 30 - 35 mph. Defendant points the gun at Rudy and tells him to pull the car over and let him out. At this time defendant is in the middle of the back seat. Rudy is turning his head, and the car is slowing. Jose grabs defendant's arm and pushes. Defendant pulls back, and the gun discharges. The car then hits the tree stump. After Jose and defendant realize what has happened, Jose lunges at defendant.... Defendant says he is now seated more behind the driver than in the middle of the seat. Defendant closes his eyes and pulls the trigger He opens his eyes and sees Jose is seated in the front passenger seat next to the door, his body near the dashboard. Defendant then kicks out the back seat passenger window and exits through the opening....

“The physical evidence does not support defendant's version of events. Had the defendant pulled the trigger when Jose lunged at him, the trajectory of the bullets would have resulted in some or all of them striking something inside the vehicle even if one or two bullets didn't hit Jose. However, no bullet holes or bullet fragments were found in the vehicle. So, except for the bullet that entered and remained in the area of Jose's left shoulder, and the bullet that entered the right hand (with fragments exiting the hand), all fragments and all other bullets flew out of the open front

passenger side window.... The bullet that entered Jose's shoulder entered from the rear and traveled toward the front of Jose's body, not toward the center of his body.... The other bullets traveled laterally [through] Jose's body, suggesting the gun is firing at Jose from Jose's left side. The bullets that entered and left Jose's body flew out the open window and did so because the trajectory was such that the gun was pointed toward the open window. Jose was unaware of what was going to happen. After executing Rudy, the defendant turns the gun on Jose and begins to fire....

“If the incident occurred as described by defendant, then any beer can Jose was holding would have been dropped before Jose grabbed for the gun the first time. (Jose testified that he is holding a beer can at the time shots are fired....) If so, how does the beer can end up with bullet holes, yet no bullet holes or bullet fragments are found in the car? For the bullet to pierce the can and then leave the car or at least not strike the interior of the car, the can had to either be in Jose's hand above the door frame in the location of the door window when the bullet pierced it, or sitting on the front passenger window ledge. The latter is an impossible scenario, unless it was being held there by Jose. If it was anywhere else in the car, a bullet hole would be present inside the car. The only reasonable conclusion is that the can is in Jose's hand when the bullet enters the can, and if that is so, *then there never could have been a struggle between Jose and the defendant over the gun.* Any struggle over the gun means no can is in Jose's hand, thus requiring a bullet hole be located somewhere in the car. In other words, if there were two struggles over the gun, Jose obviously had better things to do with his hands during those struggles than hold onto his beer can. Before or as the first struggle begins, Jose drops the beer can. At the end of the second struggle Rudy is shot. Jose now sees his brother is dead. If you believe the defendant's version, then the beer can must somehow get back into Jose's hand before the next shot is fired. In those few seconds it is not reasonable to think that Jose, shocked by having just witnessed his brother's murder, decides to locate the beer can to use it as a weapon against the defendant. The defendant did not testify to any such action by Jose.

“While it might be slightly understandable why Rudy would continue to drive after a demand that he stop the vehicle since the rear doors are locked and cannot be opened except from the front, it stretches the imagination that he would continue to drive while defendant and Jose are struggling over the gun. The more likely scenario is that Rudy would have abruptly stopped the car and assisted his brother.

“Finally, the lack of bruising, scratches or other marks on [defendant] suggests that no struggle occurred....”

“The Court also finds that Defendant’s new evidence is cumulative. Defendant concedes the new evidence would have been used solely to impeach the credibility of Prosecution witness Jose Macias. Newly discovered evidence that serves merely to impeach the credibility of a witness will not ordinarily justify granting a new trial under ... [section] 1181[, subdivision](8). (See *People v. Quaintance* (1978) 86 Cal.App.3d 594, 602; *People v. Moten* (1962) 207 Cal.App.2d 692, 698.) Defendant attacked Macias’s credibility during trial, and Defendant has not shown this additional piece of impeachment evidence would ‘render a different result probable upon retrial of the case.’ The Court also finds the new evidence to be cumulative to testimony and arguments presented by Defendant at trial. Defendant’s defense was based, in part, on his claim that the Macias brothers tried to rob him and that he shot Rud[y] Macias during a struggle with Jose Macias over his gun. Jose Macias’s alleged statement that the shooting was ‘a robbery gone bad’ is cumulative to this claim, and as such, it does not warrant a new trial. (*People v. Quaintance, supra*, 86 Cal.App.3d at p. 602.)^[36]

“Finally, Defendant has not shown he could not have discovered this evidence prior to trial through the exercise of reasonable diligence. Defendant concedes he believed there was a Norte[ñ]o responsible for conducting an investigation for the shooting. Defense counsel argues that the secretive nature of the Norte[ñ]o organization made it impossible to discover the identity of this investigator. However, defense counsel’s statements are not set forth in a declaration under penalty of perjury – they are simply arguments set forth in Defendant’s moving papers. As such, they carry no evidentiary weight. Defendant has placed no evidence before the Court detailing the efforts he undertook to discover the identity of the Norte[ñ]o investigator. Given this, Defendant has not met his burden of proof, and the Court cannot find that Defendant’s new evidence couldn’t have been discovered sooner through the exercise of reasonable diligence.”

b. *Analysis.*

“When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial ... [¶] ... [¶] ... [w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable

³⁶ See *ante*, footnote 29.

diligence, have discovered and produced at the trial.” (§ 1181, subd. 8.) “When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given” (*Ibid.*)

“To entitle a party to a new trial on the ground of newly discovered evidence, it must appear,—‘1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.’ [Citation.]” (*People v. Sutton* (1887) 73 Cal. 243, 247-248; accord, *People v. Delgado* (1993) 5 Cal.4th 312, 328; *People v. Soojian* (2010) 190 Cal.App.4th 491, 511-512.)

We conclude the trial court did not abuse its discretion when it denied the July 31, 2012, new trial motion. Defendant testified Jose and Rudy attempted to rob him at the time of the shooting. Briseno’s and Leyva’s declarations stated Jose admitted trying to rob defendant. Because these declarations essentially repeat defendant’s testimony at trial, they are cumulative. (See *People v. Loui Tung* (1891) 90 Cal. 377, 378-379; *People v. Johnson* (1952) 111 Cal.App.2d 497, 499.) Furthermore, it does not appear a different result was probable on retrial had Briseno’s and Leyva’s declarations been presented. As the trial court thoroughly detailed in its order, defendant’s account of the shooting—i.e., he struggled with Jose for control of a gun, was sitting in the middle of the backseat to Rudy’s right when the gun accidentally discharged next to Rudy’s head, and closed his eyes and shot a lunging Jose—was undermined by the physical evidence, such as (1) Rudy’s gunshot wound in the left side of the back of his head; (2) Jose’s gunshot wound in the left side of his back; (3) Jose’s “oval or oblique” through-and-through chest wounds, indicative of angular “left to right” bullet penetration; (4) Jose’s gunshot wound in the right hand, coupled with the bullet hole in the can of beer; (5) the absence of bullet

fragments, holes, or ricochet marks inside the Ford Expedition; and (6) the absence of bruises, scratches, and other marks on defendant, inter alia.

IV. The parole revocation restitution fine must be stricken.

The record shows the trial court imposed, on count I, a \$10,000 parole revocation restitution fine pursuant to section 1202.45. However, such a fine “may not be imposed for a term of [LWOP], as the statute is expressly inapplicable where there is no period of parole.” (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) Given defendant was sentenced to LWOP on count I, the fine was improperly assessed and must be stricken.

V. The concurrent firearm use enhancements.

On counts II and IV the trial court imposed a base term for the offense, and then imposed a *concurrent* term of 10 years for the section 12022.5, subdivision (a) enhancement. The Attorney General asserts the trial court cannot impose a concurrent term for that enhancement. We agree.

A determinate term for a given offense may be lengthened by sentence enhancements. (*People v. Ahmed* (2011) 53 Cal.4th 156, 161; *People v. Felix* (2000) 22 Cal.4th 651, 655.) “[T]here are at least two types of sentence enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense.” (*People v. Coronado* (1995) 12 Cal.4th 145, 156.) The first category focuses on a defendant’s status as a repeat offender while the second category focuses on the circumstances of the crime charged. (*Id.* at pp. 156-157.) An enhancement for firearm use under section 12022.5 falls under the second category. (*People v. Coronado, supra*, at p. 157.)

Section 12022.5, subdivision (a) states, in pertinent part, “any person who personally uses a firearm in the commission of a felony or attempted felony *shall be punished by an additional and consecutive term of imprisonment* in the state prison for 3, 4, or 10 years” (Italics added.) It was therefore error for the court to impose a

concurrent term for the section 12022.5, subdivision (a) enhancement. Accordingly, as to counts II and IV, the sentence is vacated and the matter remanded for resentencing.

To guide the trial court on resentencing, we point out—in addition to not being able to be run concurrent—the section 12022.5, subdivision (a) enhancement cannot be stricken. (§ 12022.5, subd. (d)³⁷; *People v. Ledesma* (1997) 16 Cal.4th 90, 93; *People v. Thomas* (1992) 4 Cal.4th 206, 208.) Additionally, should the court choose to stay the base term on a count, the conduct enhancement to that count must also be stayed. (*People v. Guilford* (1984) 151 Cal.App.3d 406, 411.)³⁸

DISPOSITION

The trial court is ordered to strike the \$10,000 parole revocation restitution fine imposed under Penal Code section 1202.45. The sentence on count I is otherwise affirmed. The sentences on counts II and IV are vacated and, on those counts only, the matter is remanded to the trial court for resentencing. The judgment is otherwise affirmed.

DETJEN, Acting P.J.

WE CONCUR:

PEÑA, J.

SMITH, J.

³⁷ “Notwithstanding the limitation in subdivision (a) relating to being an element of the offense, the additional term provided by this section shall be imposed for any violation of Section 245 if a firearm is used” (§ 12022.5, subd. (d).)

³⁸ “[F]ailure to stay an enhancement, where the base term to which it is added is stayed, and requiring that time be served only for the enhancement[,] has the [improper] effect of elevating the enhancement to the status of an offense. Enhancements are not offenses, they are punishments. [Citation.]” (*People v. Guilford, supra*, 151 Cal.App.3d at p. 412.)