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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDDY RODRIGUEZ,

Defendant and Appellant.

G044311

(Super. Ct. No. 07CF1368)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed as modified.

Diane Nichols, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia, Elizabeth A. Hartwig, and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Freddy Rodriguez appeals from a judgment after a jury convicted him of first degree murder committed for a criminal street gang purpose, possession of a firearm by a felon, and street terrorism, and found true street terrorism and firearm enhancements. Rodriguez argues: (1) insufficient evidence supports his convictions for murder and street terrorism; (2) the trial court erroneously instructed the jury on consciousness of guilt; (3) there was cumulative error; (4) the court should have stayed his sentence for street terrorism; (5) and we must strike the sentence on the street terrorism enhancement as to his murder conviction. We agree with Rodriguez's contentions concerning his sentencing, but his other claims are meritless. We affirm the judgment as modified.

## FACTS

### *The Shooting*

On the evening of April 18, 2007, the Aquino brothers (Timothy, Christian, Paul, and Martin)<sup>1</sup> set out on their evening constitutional. When they were nearly home, they watched a dark color Toyota Corolla pass them and stop just past their house. They saw red and yellow paper dealer plates on the car.

Two Hispanic males got out of the back of the car and walked towards the Aquino brothers. The first Hispanic man, who was taller and wearing a New York Yankees baseball hat, asked the brothers if they were "gang-banging." They responded, "No."

As Paul tried to hit the tall Hispanic man, the tall Hispanic man pulled a gun from his waistband. Simultaneously, the second Hispanic man, who was shorter, pulled out a gun and pointed it at Timothy. The Hispanic men backed up and started pulling the triggers but the guns did not fire. As the Hispanic men tried to chamber rounds, the Aquino brothers scattered. Christian shined a flashlight at the Hispanic men

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<sup>1</sup> Because they share the same last name, we will refer to the Aquino brothers by their first names for the sake of clarity. We mean no disrespect.

to blind them. The tall Hispanic man moved towards Martin, Martin punched him, and the man punched Martin. The Hispanic men backed up towards the car and continued trying to fire their weapons to no avail. Paul asked the men whether the guns were toys.

The car's driver, who was also Hispanic, got out of the car, and the tall Hispanic man said, "Shoot them, shoot them." Timothy climbed the fence to his backyard. Paul saw the driver pull out a gun and fire it at him and Martin. Christian saw the driver pull out a gun and fire the gun. Christian hid behind a bush. He heard three or four additional shots that came from behind the car where the driver stood. The three men got back into the car and drove away. Someone called 911.

Martin had been shot in the chest and collapsed on the ground in Paul's arms. Paul found a magazine clip under his brother's body. Undercover police officers Ed Wilson and his partner, who were nearby, responded to the scene. Martin died minutes later from a gunshot wound to the chest. Wilson radioed a description of the men and the car to dispatch. He found a .380-caliber magazine for a semi-automatic handgun and shell casings on the ground. A senior forensic specialist recovered six .38-caliber shell casings, a magazine containing two cartridges, and blood samples from the scene.

#### *Photographs*

About two hours after the shooting, the Aquino brothers looked at photographs at the police station. Timothy was shown approximately 234 photographs and identified 11 men as looking similar to the driver. Christian looked at 50 or 60 photographs but could not identify anyone. Paul looked at many photographs and indicated he could not identify anyone.

#### *The Arrest*

The next evening, Officers Mario Corona and Brian Booker were separately on patrol when they received a call of possible narcotics use in an apartment complex. As they walked into the complex, they saw Rodriguez walking towards them. Rodriguez

made eye contact with the officers and fled. Corona and Booker chased Rodriguez, and they saw him reach into his waistband, remove a gun, and toss it over a fence. After Corona and Booker caught and arrested Rodriguez, Corona recovered the .38-caliber Colt handgun with a broken, pearl handled grip.

After Rodriguez was advised of and waived his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), Officer Andrew Alvarez interviewed him. Rodriguez said he ran because he was scared. Rodriguez claimed he was coming from the apartment of a woman he could not name and who's apartment number he could not provide. He said he was on his way to a friend's house to get a ride, but he could neither name his friend nor provide his friend's address. Rodriguez claimed that as he walked through the apartment complex he was "hit up" by four Santa Ana Latin Boy gang members. He then saw the police officers and ran.

Alvarez saw Rodriguez had a large "D" and a large "S" tattooed on his shins. Alvarez knew that stood for "Darkside," the street gang Rodriguez admitted belonging to since he was "jumped in" at the age of 15. Rodriguez described Darkside's claimed territory, its identifying color (which he was wearing), and its rival gangs (Middle Side and 17th Street). Rodriguez admitted he knew approximately 15 Darkside gang members of the 30 or 40 who belong to the gang. He also admitted he had gotten the tattoos within the last year.

Rodriguez denied taking a gun from his waistband or throwing a gun despite Alvarez telling him two officers saw him do so. Rodriguez said it was probably a Latin Boy gang member because he knew gang members carry guns. Rodriguez said his DNA would not be on the gun. He provided a buccal swab for DNA analysis. At the end of the interview, when Alvarez pointed out Rodriguez was a gang member and just said gang members carry guns, Rodriguez said he was no longer a Darkside gang member. When Alvarez reminded him he admitted he just got the tattoos, Rodriguez looked down and was silent. Rodriguez admitted he was on gang probation terms.

### *The Gun*

Officer Mark Waldo took custody of the Colt firearm after Rodriguez was arrested. The gun was a Colt .38-caliber semi-automatic handgun, with pearl grips, although one side of the grip was broken. Waldo could not obtain fingerprints from the gun. He swabbed the trigger and grips for DNA with one swab. With another swab, he swabbed the magazine for DNA. He moistened a third swab with distilled water to serve as control for DNA analysis.

Rocky Edwards, a forensic firearm expert, examined the Colt .38-caliber semi-automatic handgun, which Rodriguez had discarded as he ran from police. After explaining how a gun leaves marks on a casing when a bullet is fired, Edwards stated he examined the six shell casings collected from the murder scene, test fired the Colt handgun, and compared the results. He opined all six casings were fired from the Colt handgun and the bullet recovered from Martin's body was fired from the Colt handgun. He also concluded, however, that the .380-caliber magazine for a semi-automatic handgun was not from the Colt. The gun was used in another crime in February 2007.<sup>2</sup>

### *The Car*

Two days after the shooting, Officer John Keeley spotted a black Toyota Corolla that had been reported stolen. The Toyota Corolla still had paper dealer plates from the dealer. Keeley saw the car a second time after it had been moved to a different location in the parking lot. Keeley detained the car's three occupants in a fast food restaurant: Christian Banuelos, Raymond Alvarado, and Exzay Barajas. The car's fourth occupant, Emmanuel Rodriguez (Emmanuel), was detained outside. All four teenage Hispanic males were wearing dark clothes. The detaining officers described Alvarado as

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<sup>2</sup> Rodriguez was in jail in February 2007.

five feet five inches tall and 195 pounds and Emmanuel as six feet tall and slimmer. The Toyota Corolla was impounded. Buccal swabs were taken from the four men.

Police took the three Aquino brothers to the fast food restaurant for a curbside lineup of the Hispanic males who had been in the stolen Toyota Corolla. Officers admonished them that persons involved in the shooting might or might not be present. Timothy identified one man, Emmanuel, as the tall man with the New York Yankees baseball hat. Timothy said one of the shorter men, Banuelos, looked familiar, but he was not sure. He said the Toyota Corolla looked like the car from the night of the shooting. Paul said one of the men looked like the guy with the New York Yankees baseball hat. He was initially 95 percent sure but later told the officer he was 100 percent sure. Timothy and Paul said the Toyota Corolla looked like the car from the night of the shooting.

#### *Six-Pack Photographic Lineup*

The following week, Timothy, Paul, and Christian viewed six-pack photographic lineups. None of them identified Rodriguez, who was in position number 3, as looking familiar. Timothy said one of the men looked like the man who was wearing the New York Yankees baseball hat.

#### *The Searches*

Investigator John Maciel executed a search warrant at Rodriguez's home. In Rodriguez's bedroom, he found items with Rodriguez's name and gang moniker, "Freaks." In the closet, in a man's tennis shoe, he found one .380-caliber bullet; there was also women's clothing in the closet. A probation search of Emmanuel's residence uncovered a photograph of Emmanuel, Rodriguez, and three of Rodriguez's siblings.

#### *DNA*

Forensic scientist Aimee Yap compared DNA samples to the Colt handgun's grip, trigger, and magazine. She could not exclude Rodriguez as a major

contributor to DNA on the magazine and a minor contributor to the DNA on the grip and trigger.

Forensic scientist Annette McCall compared the DNA samples to the six casings and the magazine found under Martin's body. McCall discovered the DNA profile from the casings contained a mixture of DNA from at least two individuals and Rodriguez could not be eliminated as one of the contributors. McCall found the DNA profile from the magazine contained a mixture of DNA from at least three people and she could not eliminate Martin as a major contributor and Rodriguez as a minor contributor.

*Trial Proceedings*

A second amended information charged Rodriguez with murder committed for a criminal street gang purpose (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(22))<sup>3</sup> (count 1-04/18/07), possession of a firearm by a felon (§ 12021, subd. (a)(1)) (count 2-04/19/07), and street terrorism (§ 186.22, subd. (a)) (count 3-04/18/07-04/20/07). The second amended information alleged Rodriguez committed counts 1 and 2 for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), he personally discharged a firearm causing death as to count 1 (§ 12022.53, subd. (d)), he was a gang member who vicariously discharged a firearm causing death (§ 12022.53, subds. (d) & (e)(1)), and he personally discharged a firearm causing death as to count 1 (§ 12022.53, subd. (d)). The second amended information also alleged Rodriguez had suffered a prior serious and violent felony conviction (§§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1)), and a prior serious felony conviction (§ 667, subd. (a)(1)).<sup>4</sup>

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<sup>3</sup> All further statutory references are to the Penal Code.

<sup>4</sup> The second amended information also charged Emmanuel, but he was tried separately. He is not a party to this appeal.

### *Prosecution Evidence*

At trial, the prosecutor offered the testimony of gang expert, Officer George Kaiser. After detailing his background, training, and experience, Kaiser testified concerning the culture and habits of traditional, turf-oriented criminal street gangs. Kaiser explained how to join a gang, what it means to claim a gang, and the concept of “hit[ting] up” rival gang members. He also explained the importance of tattoos, respect, and weapons within the gang culture.

Kaiser testified that at the time of the offenses, Darkside was an ongoing organization with more than three members. He described its allies and rivals, its common signs or symbols (D.S.), its colors, and its turf. Kaiser opined its primary activities were assault with a deadly weapon, vehicle theft, hit and run, and possession of a loaded firearm. He also testified concerning the statutorily required predicate offenses.

With respect to Rodriguez, Kaiser testified that in May 2006 Rodriguez pled guilty to unlawful taking of a vehicle; he was with a known Darkside gang member. At his sentencing hearing, Rodriguez admitted he was a Darkside gang member and he took the vehicle for the benefit of a criminal street gang. Kaiser testified that during interviews with law enforcement, Rodriguez admitted he was jumped into Darkside in 2000 or 2001, was never jumped out, and had D.S. tattooed on his shins. Based on his background investigation of Rodriguez and his review of this case, Kaiser opined Rodriguez was an active participant in Darkside at the time of the offenses. Kaiser noted that while Rodriguez was in jail awaiting trial, Rodriguez wrote Darkside gang graffiti on his cell wall and wrote “jail house correspondence” where he identified himself as “Freaks” from Darkside. Kaiser detailed his numerous contacts with Rodriguez. During one of the contacts, Kaiser spoke with him about gang guns and Rodriguez said that if a gang member carries a gun, he is going to use it. During another contact, Rodriguez told Kaiser that the “harder . . . you bang” the more respect you earn in the gang.

Based on a detailed hypothetical question matching the facts of this case, Kaiser opined the offenses were committed for the benefit of, in association with, or at the direction of Darkside. Kaiser based his opinion on the fact the offenses occurred in an area where several gangs have fought over territory and the gang challenge. He also opined the victims challenged the assailants and the assailants quickly retaliated with great violence. He stated that because there were three assailants, news of the offenses would spread to other gang members and the public generally. He explained the offenses instill great fear in the community by demonstrating the gang members are capable of committing violent acts against innocent citizens. Kaiser also opined the offenses furthered, promoted, or assisted Darkside for the same reasons.

On cross-examination, Kaiser testified concerning “gang guns.” Kaiser admitted gang members pass guns to other gang members to use to commit crimes or to avoid being caught with a “hot” gun, a gun used in a crime. Kaiser stated it is common for a non-involved gang member to hold a gun until “the heat dies down” or to dispose of the gun.

#### *Defense Evidence*

Rodriguez was just over six feet tall wearing shoes and weighed 194 pounds.

There was testimony concerning how another Darkside gang member previously obtained the Colt handgun used it to kill Martin, and how the Colt handgun was stolen from that Darkside gang member.

McCall testified she excluded Banuelos, Alvarado, Barajas, and Emmanuel as contributors to the DNA on the casings and magazine but that does not establish they did not touch those items.

Officer Philip Schmidt interviewed Emmanuel two days after the offenses. After Schmidt advised him of his *Miranda* rights, Emmanuel admitted he had a Yankees hat but claimed he had not worn it in a year. Emmanuel stated he saw Rodriguez with an

automatic handgun at the home of another Darkside gang member. Emmanuel admitted handling the gun on the same occasion. There was evidence Banuelos, Alvarado, and perhaps another Darkside gang member also handled the gun on that occasion.

Rodriguez offered the testimony of gang expert, Officer Mark Nye, who authored a gang training manual for the United States Department of Justice. Nye testified a gang gun is given to hardcore gang members who can be trusted with the gun. Nye said that whether a gang member who is not involved in the crime is given a gun to hold depends on the circumstances. Nye explained a gang member who is involved in a shooting in a gang war will assume his identity is known and will temporarily dispose of the weapon but will maintain access to the gun. He also stated that in a gang war situation a gang member will borrow a gun from another gang member, use the gun to commit a crime, and return the gun to the other gang member. On cross-examination, based on a hypothetical question tracking the facts of this case, Nye stated it was not a gang war situation. The prosecutor also offered Nye two hypothetical questions, one tracking Rodriguez's numerous law enforcement contacts and the other tracking the evening Rodriguez fled from officers and tossed the gun. Nye opined the person was an active participant in a criminal street gang (and not a noninvolved gang member), and the gang member is not someone holding the gun until the heat dies down.

Rodriguez offered the testimony of a second gang expert, retired Officer Steven Strong. Strong, a private investigator, testified he has learned that not everything gang members do is for the benefit of a criminal street gang. He stated gang members often act spontaneously, for their own self interest. He explained gang members prefer to have a trusted gang member hold on to a gun until it is needed. He added that if a gun is used in a fatal shooting, a gang member will give it to another gang member to dispose of, but often times the gang member who was supposed to get rid of the gun sometimes keeps the gun. When given a hypothetical question tracking the facts of the case, Strong opined it sounded like "typical gang warfare typical gang motivated crime."

Defense counsel also offered Strong the following hypothetical: there was an unsolved shooting in February 2007; there was a gang member in jail at the time of the shooting; the next month, the gang member is released from jail and put on probation gang terms; and he is soon given possession of a gang gun. Strong agreed that scenario is consistent with how a gang gun is passed around.

The jury convicted Rodriguez of all counts and found true the special circumstance allegation and the enhancements. Rodriguez admitted he suffered the prior convictions. Rodriguez requested the trial court pronounce his sentence immediately and waived his right to a probation report.

The trial court sentenced Rodriguez to prison as follows: a determinate term of five years for the prior serious felony conviction; with respect to count 1, the court sentenced Rodriguez to life in prison without the possibility of parole with a consecutive term of 25 years to life for being a gang member who vicariously discharged a firearm and the court imposed and stayed the sentences for the street terrorism and personally discharging a firearm enhancements; as to count 2, the court sentenced him to six years plus a term of four years for the street terrorism enhancement to run concurrent to count 1; and with respect to count 3, the court sentenced him to six years to run concurrent to count 1.

## DISCUSSION

### *I. Sufficiency of the Evidence*

“The standards for appellate review of a sufficiency of evidence claim are well settled. “The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a

reasonable doubt.” [Citations.] [¶] “In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court “must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” [Citations.] The court does not, however, limit its review to the evidence favorable to the respondent. . . . “[O]ur task . . . is twofold. First, we must resolve the issue in the light of the *whole record*—i.e., the entire picture of the defendant put before the jury—and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to ‘some’ evidence supporting the finding, for ‘Not every surface conflict of evidence remains substantial in the light of other facts.’” [Citation.] [¶] Finally, although reasonable inferences must be drawn in support of the judgment, this court may not ‘go beyond inference and into the realm of speculation in order to find support for a judgment. A finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed.’ [Citations.]” (*People v. Memro* (1985) 38 Cal.3d 658, 694-695, overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) “The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

#### A. Murder

Rodriguez argues insufficient evidence supports his murder conviction because there was no direct evidence he was present at the shooting and the circumstantial evidence was too speculative to support his conviction. We disagree.

“Murder is the unlawful killing of a human being . . . with malice aforethought.” (§ 187, subd. (a).) Possession of the murder weapon is circumstantial evidence a defendant committed the charged offenses. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1052.)

Although Rodriguez insists he is not asking us to reweigh the evidence, we agree with the Attorney General that is essentially what Rodriguez asks us to do. Needless to say, that is not our role on appeal. Rodriguez spills much ink detailing how the Aquino brothers provided different, if not conflicting descriptions of the driver/shooter and could not positively identify the driver/shooter. All three Aquino brothers testified they did not get a good look at the driver/shooter and thus it is not surprising they could not positively identify him. Rodriguez also asserts his fingerprints were not recovered from the Toyota Corolla and thus this undermines the conclusion he was the driver of the Toyota Corolla. But these facts do not undermine the other circumstantial evidence he was the driver/shooter.

The jury heard evidence that approximately one week before the shooting, Rodriguez was seen with the murder weapon. There was evidence Rodriguez's DNA was on the murder weapon and its magazine, and the six casings recovered from the scene of the crime. Additionally, Rodriguez's DNA was on the magazine found under Martin's body, which used .380-caliber bullets, the type of bullet found in a shoe in Rodriguez's closet. Finally, the day after the murder, Rodriguez fled police, tried to discard the murder weapon, and lied to the police about where he was coming from, where he was going, and whether the gun he tossed was his. The jury could rely on this evidence as consciousness of guilt.

Rodriguez reliance on *People v. Trevino* (1985) 39 Cal.3d 667 (*Trevino*),<sup>5</sup> is misplaced. In that case, the California Supreme Court held highly speculative and equivocal identification testimony and a single fingerprint "of some unknown vintage" was not sufficient evidence to support a defendant's murder conviction. (*Id.* at p. 697.) Here, although the Aquino brothers could not identify Rodriguez as the driver/shooter, we have overwhelming DNA evidence connecting Rodriguez to the murder weapon. As

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<sup>5</sup> *Trevino* was disapproved on another point in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221.

we explain above, the DNA evidence and Rodriguez's post-shooting conduct were sufficient evidence for the jury to reasonably conclude Rodriguez was the driver/shooter. Thus, based on the entire record, there is sufficient evidence supporting Rodriguez's conviction under both the federal and state constitutional due process clauses. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

### *B. Street Terrorism*

Rodriguez contends insufficient evidence supports his conviction for count 3 because he essentially acted alone in committing counts 1 and 2. He claims there was no evidence the two men he was with when he shot Martin were Darkside gang members, and he was alone when he unlawfully possessed the firearm.<sup>6</sup> This issue is currently before the California Supreme Court in *People v. Rodriguez* (2010) 188 Cal.App.4th 722, review granted January 12, 2011, S187680, and two cases from this court, *People v. Cabrera* (2010) 191 Cal.App.4th 276 (*Cabrera*), review granted March 23, 2011, S189414, and *People v. Gonzales* (2011) 199 Cal.App.4th 219, review granted December 14, 2011, S197036.

The street terrorism substantive offense, section 186.22, subdivision (a), states: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished . . . in the state prison for 16 months, or two or three years." There are three elements to the substantive street terrorism offense: (1) active participation in a criminal street gang; (2) knowledge the gang's members have engaged

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<sup>6</sup> Contrary to the Attorney General's claim otherwise, we do not construe Rodriguez's argument to challenge the sufficiency of the evidence as to the street terrorism enhancements.

in a pattern of criminal gang activity; and (3) willfully promoting, furthering, or assisting in any felonious criminal conduct by members of the gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 56 (*Albillar*).

In *People v. Ngoun* (2001) 88 Cal.App.4th 432 (*Ngoun*) and *People v. Salcido* (2007) 149 Cal.App.4th 356 (*Salcido*), panels of the Fifth District Court of Appeal concluded section 186.22, subdivision (a), extended to a defendant acting solely as the perpetrator of the crime. The reasoning for this conclusion was that an active gang member who directly perpetrates a gang-related offense contributes to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct. (*Ngoun, supra*, 88 Cal.App.4th at p. 436; *Salcido, supra*, 149 Cal.App.4th at pp. 369-370.) In *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1307-1308 (*Sanchez*), the Court of Appeal, Fourth Appellate District, Division Two, followed *Ngoun* and *Salcido* and held similarly.

Rodriguez's reliance on *People v. Castenada* (2000) 23 Cal.4th 743, and *Albillar, supra*, 51 Cal.4th 47, is misplaced. Neither case addressed the issue we are faced with here, and language in an opinion is not authority for propositions that are not considered. (*People v. Jennings* (2010) 50 Cal.4th 616, 684.)

We are persuaded by the reasoning of *Salcido*, *Ngoun*, and *Sanchez*, and conclude someone can "promote" or "further" felonious criminal conduct by acting alone, without assistance or participation by others. The Legislature surely did not intend for an active gang participant committing a felony alone to be punished less harshly than an active gang participant assisting such felonious conduct.

Finally, in his opening brief, Rodriguez argued Kaiser's testimony exceeded the scope of permissible gang expert testimony because the prosecutor's hypothetical questions were too case specific. The Attorney General responds Rodriguez forfeited appellate review of the issue and his contentions are meritless. In his reply brief, Rodriguez withdraws his claim based on the California Supreme Court's recent

decision in *People v. Vang* (2011) 52 Cal.4th 1038, 1041, where the court held: “It is required, not prohibited, that hypothetical questions be based on the evidence. The questioner is not required to disguise the fact the questions are based on that evidence.”

## II. CALCRIM No. 362

Rodriguez asserts CALCRIM No. 362 violated his federal constitutional rights to due process, a fair trial, and equal protection of the laws. We disagree.

The trial court instructed the jury with CALCRIM No. 362 as follows: “If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself.”

Rodriguez acknowledges the California Supreme Court has approved the giving of CALCRIM No. 362’s predecessor instruction, CALJIC No. 2.03. “The inference of consciousness of guilt from willful falsehood or fabrication or suppression of evidence is one supported by common sense, which many jurors are likely to indulge even without an instruction.” (*People v. Holloway* (2004) 33 Cal.4th 96, 142 [addressing CALJIC No. 2.03, “Consciousness Of Guilt-Falsehood,” CALCRIM No. 362’s predecessor]; *People v. Geier* (2007) 41 Cal.4th 555, 589.) However, he argues that because CALCRIM No. 362’s language is not identical to CALJIC No. 2.03’s language, the reasoning is not sound and CALCRIM No. 362 creates an “impermissible permissive presumption of guilt.” The California Supreme Court has rejected arguments attacking the constitutionality of this instruction (*People v. Howard* (2010) 42 Cal.4th 1000, 1024-1025 [rejecting contention consciousness of guilt instructions like CALCRIM No. 362 invite jury to draw irrational and impermissible inferences regarding defendant’s state of mind at time offense committed]), and we do so here.

Based on evidence of Rodriguez's false statements to police concerning the gun, the trial court properly instructed the jury with CALCRIM No. 362. The giving of CALCRIM No. 362 did not implicate Rodriguez's federal constitutional rights.

### *III. Cumulative Error*

Rodriguez claims the cumulative effect of the errors requires reversal. We have concluded there were no errors, and therefore, his claim has no merit.

### *IV. Section 654*

Rodriguez contends the trial court erred by failing to stay the sentence on count 3, street terrorism, pursuant to section 654 because he had the same intent and objective in count 1 (first degree murder), or count 2 (possession of a firearm by a felon). We agree.

Section 654, subdivision (a), in relevant part provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

In *People v. Herrera* (1999) 70 Cal.App.4th 1456 (*Herrera*), defendant, a gang member, fired three shots at a rival gang member's house from the front passenger seat of a vehicle. One bullet struck an 11-year-old boy and another bullet struck a man in the left shoulder. The vehicle made a U-turn and returned for a second pass, and approximately 10 additional shots were fired but there were no further injuries. As relevant here, jury convicted defendant of two counts of attempted premeditated murder and one count of street terrorism, and the trial court sentenced defendant on the three counts without staying the sentence on any of the counts. (*Id.* at pp. 1465-1466.) After discussing relevant California Supreme Court case authority, the court concluded section 654 did not apply, relying on the distinctions between the requisite intents for the two crimes. The court said the crime of attempted murder required defendant to have the

specific intent to kill, whereas the crime of street terrorism required defendant to have the intent to actively participate in a criminal street gang. (*Id.* at p. 1467.)

In *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (*Sanchez*), our colleagues in the Fourth District, Division Two disagreed with the *Herrera* court's reasoning. In *Sanchez, supra*, 179 Cal.App.4th at page 1301, a jury convicted defendant of committing a robbery with a confederate and street terrorism. In finding defendant could not be punished for both crimes, the court stated: "Here, the underlying robberies were the act that transformed mere gang membership—which, by itself, is not a crime—into the crime of gang participation. Accordingly, it makes no sense to say that defendant had a different intent and objective in committing the crime of gang participation than he did in committing the robberies. Gang participation merely requires that the defendant 'willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of that gang . . . .' [Citation.] It does not require that the defendant participated in the underlying felony with the intent to benefit the gang. [Citations.] [¶] In our view, the crucial point is that . . . defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself." (*Id.* at p. 1315.)

We note that in the 10-year span between *Herrera* and *Sanchez*, other cases have addressed the issue we face here. (*People v. Vu* (2006) 143 Cal.App.4th 1009; *People v. Ferraez* (2003) 112 Cal.App.4th 925; *In re Jose P.* (2003) 106 Cal.App.4th 458.) And subsequent to *Sanchez*, one published decision followed *Herrera*, *People v. Mesa* (2010) 186 Cal.App.4th 773 (*Mesa*), and one published decision followed *Sanchez*, *People v. Duarte* (2010) 190 Cal.App.4th 82 (*Duarte*), yet another case from this court. The California Supreme Court has granted review on this issue in both cases.<sup>7</sup> Although

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<sup>7</sup> *Mesa, supra*, 186 Cal.App.4th 773, review granted October 27, 2010, S185688; *Duarte, supra*, 190 Cal.App.4th 82, review granted February 23, 2011,

the issue is currently before the California Supreme Court, we must resolve the issue before us.

Section 654 does not include any language that permits the circumvention of the prohibition against multiple punishments because a defendant had multiple intents or intended multiple impacts in a *single act scenario*. The cases interpreting section 654 require a trial court to determine whether the series of acts amount to a course of conduct subject to a single intent, or multiple intents and objectives, only when a defendant engages in *multiple acts*. *Herrera, supra*, 70 Cal.App.4th 1456, appears to have extended the “intent and objective” test articulated in *Neal v. State of California* (1960) 55 Cal.2d 11, to impose separate punishments for the street terrorism offense and the underlying felony even if those offenses arise out of a *single act*. (*Herrera, supra*, 70 Cal.App.4th at p. 1468; see *Sanchez, supra*, 179 Cal.App.4th at p. 1312 [*Herrera* treated defendant’s two counts of attempted murder as a single drive-by shooting].)

We conclude the “intent and objective” test as applied in *Herrera* is inapt when a defendant’s conduct is but a single act. The purpose of section 654 is to prevent multiple punishments for a single act and thereby shield a defendant from multiple punishments. We find no support in applicable California Supreme Court decisional authority for the proposition a single act can be carved up based on intents or objectives and thereby pierce section 654’s protections. We agree with the *Herrera* court’s statement the Legislature intended to create a new crime to address the serious threat street gang violence posed to public safety. But that intent is not instructive in interpreting the plain language of section 654.

As relevant here, the information charged Rodriguez with murder, possession of a firearm by a felon, and street terrorism. The trial court instructed the jury section 186.22, subdivision (a)’s felonious criminal conduct requirement was defined as

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S189174. The Supreme Court also granted review in *People v. Ballard* on March 2, 2011, S190106.

“Murder in the first degree or the lesser included offense of murder in the second degree or the lesser included offense of voluntary manslaughter; [p]ossession of a firearm by a felon.”

It is clear that when the jury convicted Rodriguez of count 3 it did so based on felonious conduct he was charged with and convicted of in counts 1 or 2, even though counts 1 and 2 were committed on different days and the information alleged count 3 continued over a span of three days. Thus, the trial court should not have imposed the six-year concurrent sentence on count 3 as one of the underlying felonies, counts 1 or 2, was used to satisfy the felonious conduct element of section 186.22, subdivision (a)’s street terrorism charge in count 3.

#### *V. Street Terrorism Enhancement*

Relying on *People v. Lopez* (2005) 34 Cal.4th 1002 (*Lopez*), Rodriguez contends the trial court erroneously imposed and stayed a 10-year enhancement on count 1, murder, pursuant to section 186.22, subdivision (b)(1)(C), because murder is punishable by life in prison. The Attorney General concedes the error.

In *Lopez, supra*, 34 Cal.4th at page 1004, the California Supreme Court held “first degree murder is a violent felony that is punishable by imprisonment in the state prison for life and therefore is not subject to a 10-year enhancement under section 186.22(b)(1)(C).” The trial court erred in imposing and staying a 10-year street terrorism enhancement under section 186.22, subdivision (b)(1)(C). We modify the judgment by striking the 10-year street terrorism enhancement.

#### DISPOSITION

The six-year concurrent sentence on count 3 is ordered stayed. The 10-year enhancement imposed on count 1 pursuant to section 186.22, subdivision (b)(1)(C), is ordered stricken. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting the modified sentence and to forward a copy of the

amended abstract of judgment to the Department of Corrections and Rehabilitation,  
Division of Adult Operations. We affirm the judgment as modified.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.