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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.

JOEY ERIK GARCIA and SONNY RAY
AYALA,

Defendants and Appellants.

G049818

(Super. Ct. No. 12CF0068)

O P I N I O N

/Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed in part and reversed in part.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant Joey Erik Garcia.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant Sonny Ray Ayala.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, William M. Wood and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendants Joey Erik Garcia and Sonny Ray Ayala of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c); count 2),¹ dissuading a witness from reporting a crime (§ 136.1, subd. (b); count 3), discharging a firearm in a gun-free school zone (§ 626.9, subd. (d); count 4), and street terrorism (§ 186.22, subd. (a); count 5). The jury also convicted Garcia of attempted murder and, in doing so, found that he acted willfully, deliberately, and with premeditation. (§§ 187, subd. (a), 664, subd. (a); count 1.) The jury found true various enhancement allegations, including the commission of counts 1, 2, and 4 for the benefit of a criminal street gang (§ 186.22, subd. (b)) and the discharge of a firearm in connection with counts 1 and 2 (§ 12022.53). The court sentenced Garcia to 70 years, eight months to life in prison and Ayala to 30 years, eight months to life in prison. Defendants raise a variety of issues on appeal, including the propriety of their respective sentences, the correctness of jury instructions, and the sufficiency of the evidence to support certain convictions and enhancements. We affirm in part and reverse in part.

FACTS

There is no dispute on appeal that sufficient evidence supports the jury's verdict with regard to attempted murder (as against Garcia) and robbery (as against both

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All statutory references are to the Penal Code.

defendants). We briefly describe the evidence concerning these two separate incidents here, and reserve further recitation of the evidence so that it may be described alongside pertinent contentions in the discussion section of this opinion.

Count 1 — the Attempted Murder

On the night of January 7, 2012, victim Brandon R. was standing in an alley. Three individuals approached Brandon. One asked Brandon what gang he was in, then announced “17th Street.” Another pulled out a revolver and fired two to three shots, one of which hit Brandon in the ribs. Defendant Garcia was identified as the shooter.

Counts 2-4 — the Robbery and Related Crimes

Later that night, 14-year-old victim Brian M. was walking home from a friend’s house. A group of individuals stopped Brian near Rosita Elementary School, asked him what gang he was in, and demanded that Brian give them “everything he had.” Defendants Garcia and Ayala were among the individuals who robbed Brian. Garcia instructed Ayala to inspect Brian’s personal property. Afraid, Brian relinquished his cell phone, earphones, earrings, chain, and wallet before running away. Garcia warned Brian, “You know what happens if you throw a rata,” which Brian understood as a threat to remain silent about the robbery. Brian ran to his house about three minutes away and told his family what had happened. Within five minutes, Brian and several family members drove to the school to look for Brian’s assailants. Defendants were still near the school, though they had moved to the side of the school, inside the school property fence about half a block from the precise location of the robbery. Garcia threw a glass bottle at the car and Ayala fired two gunshots at the car.

DISCUSSION

Defendants collectively raise nine distinct issues on appeal, and both defendants join in the arguments made in the briefs of the other. We address four related issues together under the first heading of our discussion, two related issues under the second heading, and the remaining three issues under separate headings.

Street Terrorism and Gang Enhancements

Both defendants were charged in count 5 with street terrorism: “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 by imprisonment” (§ 186.22, subd. (a), italics added.) Both defendants were also charged with criminal street gang enhancements attached to counts 1, 2, and 4: “[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with *any criminal street gang*, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony,” receive additional punishment. (§ 186.22, subd. (b)(1), italics added.)

Thus, for both the substantive offense of street terrorism and the street gang enhancements, the prosecution was required to tie defendants’ criminal conduct to a “criminal street gang.” In relevant part, “‘criminal street gang’ means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of [selected] criminal acts enumerated” in section 186.22, subdivision (e). (§ 186.22, subd. (f).)

Defendants claim there is insufficient evidence to uphold their street terrorism convictions and street gang enhancements. In particular, they point to the lack of substantial evidence that the 17th Street organization to which defendants were linked had “as one of its primary activities the commission of” statutorily enumerated criminal acts. (§ 186.22, subd. (f).)² The jury was instructed in relevant part: “A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] . . . [¶] 2. That has, as one or more of its primary activities, the commission of illegal possession of firearms”

The Attorney General concedes defendants’ contention that the jury instruction was prejudicially erroneous, requiring a new trial as to count 5 and the criminal street gang enhancements. This concession is made because “illegal possession of firearms” in general is not one of the offenses enumerated in section 186.22, subdivision (e). Instead, four separate qualifying firearm possession offenses are listed in the statute. (§ 186.22, subd. (e)(23), (31), (32), (33) [possession of a concealable firearm, possession of a firearm by a felon or drug addict, carrying a concealed firearm, carrying a loaded firearm].) The Attorney General notes that “the list of enumerated criminal acts involving illegal possession of firearms does not include all of the possible ways that one might illegally possess a firearm. Because not all types of illegal weapons possession are relevant for purposes of the primary activities requirement, the instruction to the jury on this point was overbroad and legally inadequate.” The parties agree that, at a minimum, retrial is necessary on count 5 and the criminal street gang enhancements. (See *People v. Perez* (2005) 35 Cal.4th 1219, 1233.)

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Defendants do not contest the sufficiency of the evidence to prove the other elements of the street terrorism count or criminal street gang enhancements.

We must still, however, review the sufficiency of the evidence. If there was insufficient evidence to support a conclusion that 17th Street was a criminal street gang, retrial on count 5 and the street gang enhancements would not be allowed under double jeopardy principles. Retrial is permitted, however, if substantial evidence supports the verdicts had proper jury instructions been given. (*People v. Hallock* (1989) 208 Cal.App.3d 595, 605-610 [jury instructed on theory of § 136.1 witness intimidation not supported by the evidence, but substantial evidence supported conviction on different theory of witness intimidation so retrial was allowed]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 254-260 [reversing rape conviction because substantial evidence supported only one of two possible legal theories and jury was not instructed as to which theory applied, but authorizing new trial because substantial evidence supported finding of rape under one theory].) “[W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.” (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

There are two common ways of proving a gang’s primary activities: (1) by presenting examples of qualifying conduct; and/or (2) by presenting expert opinion testimony. “Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group’s primary activities.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) “Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute.” (*Id.* at p. 324.) “Also sufficient [to prove an alleged criminal street gang’s primary activities] might be expert testimony” (*Ibid.*; see *People v. Gardeley* (1996) 14 Cal.4th 605, 620 [endorsing sufficiency of expert opinion

testimony that gang's primary activity was sale of narcotics based on "conversations with the defendants and with other [gang] members, his personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies".)

We turn now to the record in this case. The prosecution relied on the expert testimony of Detective Charles Loffler in its attempt to prove that 17th Street was a criminal street gang. Loffler had worked as a gang suppression officer and gang detective for the five years preceding his testimony. One of the gangs in which Loffler took a particular interest was 17th Street. Loffler testified about a variety of concepts necessary to the understanding of gang culture. He did so based on his years of experience, including conversations with "hundreds, if not thousands" of gang members.

Asked what the primary activities of 17th Street were at the time of the charged offenses (i.e., January 2012), Loffler responded, "Unlawful possession of a firearm and assault with a deadly weapon." On direct examination, Loffler was not asked to provide a specific basis for this statement (beyond his earlier testimony about his work history and his familiarity with 17th Street). Defense counsel tried to pin down the basis for this opinion during cross-examination. Loffler opined that there was anywhere from four to 100 active participants in 17th Street during the two years preceding the crimes at issue here. Loffler counted five arrests of 17th Street members for illegal possession of weapons in this same time period. Loffler did not explain the specific circumstances of these arrests (i.e., what statutory offense would have been applicable). In the same time period, there were zero arrests or convictions of 17th Street members for assault with a deadly weapon. Loffler explained, "yes, these people are engaging in lots of other things. But I do not base my opinion on arrests. I base my opinion on incidents where this particular gang was implicated. That's [where] a report was taken, there's an investigation, maybe some things were thrown out that implicates this particular gang, but it doesn't ultimately mean that someone was actually arrested. That's what I base my

opinion on, sir.” Loffler was not asked to provide, and did not in fact provide, a count of the number of incidents in which 17th Street was identified (in police reports or otherwise) as perpetrating unlawful possession or assault with a deadly weapon incidents. Defense counsel did not move to strike Loffler’s opinion testimony concerning 17 Street’s primary activities.

Loffler referenced additional foundational evidence in response to other questions. When asked about incidents involving 17th Street and Darkside (a rival gang of which attempted murder victim Brandon R. was a member), Loffler cited four “shootings” since 2007, three within the past three years. Loffler did not explain whether these shootings were perpetrated by 17th Street or Darkside (or both), or whether any charges were filed as a result of these shootings.

In the context of addressing Ayala’s membership in 17th Street, Loffler discussed exhibit 26, which included documents demonstrating that Ayala admitted allegations in a juvenile delinquency petition pertaining to a July 2010 incident, including the offense of possessing a firearm capable of being concealed on his person (former § 12101, subd. (a); see § 29610), an enumerated primary activity offense (§ 186.22, subd. (e)(23)). In the context of addressing Garcia’s membership in 17th Street, Loffler discussed exhibit 27, which included documents demonstrating that Garcia, in connection with a December 2010 incident, pleaded guilty to criminal threats (§ 422), an enumerated primary activity offense (§ 186.22, subd. (e)(24)).

Loffler also opined that certain hypothetical crimes bearing an uncanny resemblance to the offenses with which defendants were charged in this case would be done for the benefit of or at the direction of 17th Street. Several of the charged offenses in this case qualify as enumerated offenses for purposes of defining a criminal street gang. (§ 186.22, subd. (e)(2), (3), (8) [robbery, attempted murder, dissuading a witness]; see *People v. Vy* (2004) 122 Cal.App.4th 1209, 1226-1228 [attempted murder qualifies].) The jury found defendants guilty of these offenses and concluded these crimes were

committed for the benefit of, at the direction of, or in association with 17th Street.

Though not charged, one might also infer from the instant offenses that at least one of the defendants unlawfully possessed a firearm on the night in question.

In sum, the following evidence of 17th Street's primary activities can be marshaled in support of the jury's verdicts: (1) Loffler's opinion (based on his experience and research) that 17th Street's primary activities were illegal possession of firearms and assault with deadly weapons; (2) Loffler's additional reference to his knowledge of four shootings since 2007 involving 17th Street and Darkside members; (3) Ayala's 2010 conviction for carrying a concealed weapon; (4) Garcia's 2010 criminal threats conviction; and (5) the three qualifying charged offenses (robbery, attempted murder, and dissuading a witness), and an additional inference that one or more defendants illegally possessed a firearm on the night of the charged offenses.

As with the jury instructions, there are problems with Loffler's opinion pertaining to illegal possession of firearms. Loffler did not explicitly identify which kinds of illegal possession he was referring to, leaving it up in the air as to whether his conclusion that illegal possession of firearms was a primary activity referred only to offenses enumerated in section 186.22, subdivision (e), or to other, nonenumerated offenses.

But the remaining evidence amounts to substantial evidence capable of supporting the jury's verdicts had appropriate jury instructions been utilized. There is evidence of at least five specific enumerated offenses over a two-year period leading to convictions. Arguably, this is enough by itself to support the judgment. (See *People v. Vy, supra*, 122 Cal.App.4th at p. 1225 [“three serious, violent crimes by YA gang members that took place over a period of less than three months” was enough to show primary activities].) There was more anecdotal evidence here than in cases holding that a few enumerated offenses are insufficient to show consistent and repeated commission of enumerated offenses. (*People v. Perez* (2004) 118 Cal.App.4th 151, 160 [three shootings

in one week, including charged offense, plus beating six years earlier, not enough to show gang's primary activities]; *In re Jorge G.* (2004) 117 Cal.App.4th 931, 945 [“evidence sufficient to show only *one* offense is not enough”].)

Even if the specific enumerated offenses are not enough, there is also Loffler's testimony that assault with a deadly weapon (an enumerated offense under § 186.22, subd. (e)) was a primary activity of 17th Street. The jury would have been justified in concluding that this testimony was flawed because Loffler was unable to cite arrests or convictions for assault with a deadly weapon in the two years prior to the crimes at issue.³ On the other hand, the jury also could have accepted the assault with a deadly weapon opinion notwithstanding the cross-examination, based on the notion that not every assault with a deadly weapon can be attributed to a specific gang member for purposes of arresting a suspect or proved beyond a reasonable doubt for purposes of obtaining a conviction. Under *People v. Gardeley, supra*, 14 Cal.4th at page 620, juries are entitled to credit expert opinions that are formed based on the expert's experience investigating the gang, interviewing gang members, and reviewing information gathered by law enforcement agencies. Of course, unsupported, conclusory testimony by an expert is not enough to support a judgment. (See *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611-614 [expert testimony was insubstantial because expert did not clearly opine that enumerated offenses actually were primary activities, rather than events the gang had committed, and for lack of sufficient foundation supporting opinions related

³ Indeed, the prosecutor tried to take the jury's focus off this opinion during closing argument: “[F]orget the assault with a deadly weapon because . . . Detective Loffler didn't have any [examples of this crime] in the two years prior [to this offense]. There was a specific pinpoint question asked by [defense counsel], ‘How many assault with deadly weapons did he have two years prior to this?’ [¶] He didn't have any. But what we do have is . . . weapons violations. That's what 17th [Street] is all about.” We disagree with defendants that this comment, made when the prosecutor mistakenly thought the firearm possession theory could support a conviction, should preclude retrial on an estoppel theory.

to primary activities].) But here, Loffler’s opinion was supported by his experience investigating 17th Street in general, his review of official records pertaining to 17th Street in preparing for his testimony, his knowledge of four gun battles involving 17th Street and Darkside, and his knowledge about the charged offenses in this case (which involved the firing of a weapon).

Clearly, we cannot affirm defendants’ convictions on count 5 and the criminal street gang enhancements because of the prejudicial error in jury instructions conceded by the Attorney General. Defendants go further and contend retrial is not allowed in this case because the substantial evidence supporting the primary activities finding set forth above does not fit the jury instructions and theory of the case presented to the jury by the prosecutor. But the case law cited by defendants for this proposition actually states that a criminal conviction cannot be upheld on appeal based on a different theory than that presented to the jury, not that retrial cannot occur. (See, e.g., *McCormick v. United States* (1991) 500 U.S. 257, 269-270 [appellate court wrongly “affirmed the conviction on legal and factual grounds that were never submitted to the jury”; correct remedy was to order a new trial]; *People v. Beaver* (2010) 186 Cal.App.4th 107, 119-125 [substantial evidence of theft by false pretenses but wrong theory of theft presented to jury; reverses grand theft conviction]; *id.* at p. 126 [providing further analysis on enhancements “for the benefit of the parties in the event of retrial”].)

Thus, the street terrorism conviction (count 5) and gang enhancement findings (attaching to counts 1, 2, and 4) are reversed based on instructional error. Because substantial evidence was introduced that would have supported a street terrorism conviction and gang enhancement findings with proper jury instructions, defendants may be retried at the discretion of the prosecutor.⁴

⁴ We need not address in depth two other related issues raised in defendants’ appeals. First, defendants assert the court prejudicially erred by admitting testimony by Loffler concerning the facts undergirding his expert opinions. If this matter is retried,

Firearm Discharge Enhancement on Robbery Count

Defendants assert both instructional error and a lack of substantial evidence with regard to the jury's finding that defendants vicariously discharged a firearm during the commission of the robbery as charged in count 2. Recall that defendants robbed victim Brian M. in front of the school. Brian ran home and returned with family members. Brian and his family members found defendants on the grounds of the school near the spot Brian was robbed (i.e., a few hundred feet away or half a block away). Defendants argue the ensuing discharge of the firearm did not occur during the commission of the robbery because they had reached an area of temporary safety. (See *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [firearm is used in the commission of a crime so long as it used before robbers have reached a place of temporary safety].)

Before addressing defendants' contentions, we must first make clear that reversal of the count 2 firearm enhancements is made necessary by the reversal of the criminal street gang enhancements in the preceding section. In convicting defendants of robbery, the jury found true the allegation that defendants *vicariously* discharged a firearm. (§ 12022.53, subds. (c) ["any person who, in the commission of a [robbery], personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years"], (e)(1) [enhancements apply "to any person who is a principal in the commission of an offense" — not just to those personally discharging the firearm — if jury also finds criminal street gang enhancement allegations attaching to the same substantive offense to be true].) The jury was not asked to decide whether either defendant personally discharged the firearm. In

defendants can squarely present this issue for determination based on the specific testimony proffered at retrial, perhaps with the benefit of a decision from our Supreme Court addressing this issue. (See *People v. Sanchez*, review granted May 14, 2014, S216681 [question presented per court's Web site: "Was defendant's Sixth Amendment right to confrontation violated by the gang expert's reliance on testimonial hearsay"].) Second, as conceded by the Attorney General, the court erred at sentencing by not staying count 5 pursuant to section 654. (See *People v. Mesa* (2012) 54 Cal.4th 191, 198-200.)

other words, *vicarious* enhancement liability was imposed on defendants because they were also found to have been principals in the commission of the robbery for the benefit of, at the direction of, or in association with 17th Street. Because we must reverse the criminal street gang enhancements, we must also reverse the firearm discharge enhancement in count 2.

As for the jury instructions, the standard instructions on temporary safety were properly given. We quote these instructions in relevant part. “A perpetrator has reached a place of temporary safety with the property if he or she has successfully escaped from the scene, is no longer being pursued, and has unchallenged possession of the property.” (CALCRIM No. 1603.) “The perpetrators (have) reached a place of temporary safety if: [¶] (They) (have) successfully escaped from the scene; [¶] (They) (are) not or (are) no longer being chased; [¶] (They) (have) unchallenged possession of the property (and) [¶] (They) (are) no longer in continuous physical control of the person who is the target of the robbery.” (CALCRIM No. 3261.) Defendants claim for the first time on appeal that these instructions improperly imply that an escape must be permanent and cannot be momentary. But this argument is belied by the very use of the words “temporary safety” in the instructions.

Relatedly, we conclude it was a question for the jury as to whether defendants reached a place of temporary safety before Brian and his family found them. (See *People v. Young* (2005) 34 Cal.4th 1149, 1177 [jury could conclude moving 120 to 150 feet away from robbery site was not place of temporary safety].) Defendants moved a short distance from the precise scene of the crime, but they were still near the school. Brian ran home in three minutes, but he immediately returned with his family by car. The firearm was discharged shortly after the arrival of Brian and his family. Substantial evidence supported the conclusion that the firearm was discharged in connection with the robbery.

Sufficiency of Evidence that Gun was Discharged in a School Zone

Defendants were convicted of count 4, discharging a firearm in a gun-free school zone. “[I]t shall be unlawful for any person, with reckless disregard for the safety of another, to discharge, or attempt to discharge, a firearm in a school zone.” (§ 626.9, subd. (d).) “‘School zone’ means an area in, or on the grounds of, a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, or within a distance of 1,000 feet from the grounds of the public or private school.” (§ 626.9, subd. (e)(1).) The jury was instructed with a special instruction mirroring the statute.

Defendants posit that insufficient evidence establishes that the discharge occurred in a school zone. Defendants do not contest the sufficiency of the evidence to establish that they discharged a firearm or that they were standing on the grounds of a facility referred to as a school when the firearm was discharged. But defendants point to the lack of evidence concerning instruction provided in kindergarten or grades 1 to 12 at Rosita Elementary School at the time of the crimes at issue here. We disagree with defendants’ interpretation of section 626.9. Brian testified he was familiar with Rosita Elementary School. Brian, as well as one of his relatives, testified that defendants were inside school property when he returned to the school with family members. The same relative also testified about driving back to the scene of the robbery, “it’s a school area so you got to drive slower. You can’t be driving more.” This evidence was sufficient for the jury to conclude that the facility was a “school providing instruction in kindergarten or grades 1 to 12” (§ 626.9, subd. (e)(1).) The statute does not require proof (e.g., from a principal, teacher, or student currently attending the school) that instruction is actually being provided as of the day of the crime. Instead, it requires proof that the school is an elementary school, middle school, junior high, or high school (and not a college or other adult education facility).

The street gang enhancement attaching to count 4 has already been reversed on other grounds. But we note there was insufficient evidence as to a particular factual issue related to the count 4 enhancement. [¶] The jury was instructed in relevant part on the count 4 enhancement: “You must also decide whether the crime charged in Count 4 (was) committed on the grounds of or within 1,000 feet of a public or private elementary or junior high or middle school open to or being used by minors for classes or school-related programs at the time.” (See § 186.22, subd. (b)(2) [identifying a finding on this issue as a “circumstance in aggravation” for purposes of street gang enhancement sentencing].) It appears as if this portion should not have been included with the CALCRIM No. 1401 instruction. The jury was not actually asked to make this factual determination on the verdict forms. As conceded by the Attorney General, there was no evidence in the record that Rosita Elementary was being used by minors for classes or school-related programs at the time of the firearm discharge.

Jury Instruction on Flight

The jury was instructed with a modified version of CALCRIM No. 372 as follows: “If the defendants fled (immediately after the crimes they are charged with were committed), that conduct may show that they were *aware of their guilt*. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself.” (Italics added.)⁵

⁵ The flight instruction is based on section 1127c, which provides: “In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.”

Defendants contend that, under the circumstances of this case, CALCRIM No. 372 unconstitutionally permits the jury to infer guilt from flight. In particular, they point to the phrase “aware of their guilt” as problematic.

This precise contention has been rejected in an appellate opinion. (*People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1157-1159.) Defendants disagree with *Hernandez Rios*, but we find this case to be persuasive and follow it. Our Supreme Court squarely rejected a challenge to the predecessor of CALCRIM No. 372, CALJIC No. 2.52. (*People v. Mendoza* (2000) 24 Cal.4th 130, 179-181.) *Hernandez Rios* found no significant difference between the phrasing of the two instructions and held that CALCRIM No. 372 passes “constitutional muster.” (*Hernandez Rios*, at pp. 1158-1159.)

Imposition of Indeterminate Term on Count 3

Both defendants’ sentences included indeterminate (i.e., life) sentences on count 3, dissuading a witness in violation of section 136.1, subdivision (b). For each defendant, the court imposed an indeterminate term of 7 years to life pursuant to section 186.22, subdivision (b)(4)(C). But, as the Attorney General concedes, this was error because the life sentence provision within section 186.22, subdivision (b)(4)(C), applies only with regard to convictions pursuant to section 136.1, subdivision (c). (See *People v. Anaya* (2013) 221 Cal.App.4th 252, 269-271; *People v. Lopez* (2012) 208 Cal.App.4th 1049, 1065.) The prosecutor pleaded and proved violations of section 136.1, subdivision (b), and defendants should be sentenced accordingly.

DISPOSITION

The judgments are affirmed in part and reversed in part. The defendants’ convictions on count 5 are reversed. The criminal street gang enhancements (§ 186.22, subd. (b)) attaching to counts 1, 2, and 4 are reversed. The firearm discharge

enhancements (§ 12022.53, subs. (c), (e)) attaching to count 2 are reversed. The sentence imposed on count 3 is reversed. The judgments are otherwise affirmed. The matter is remanded for resentencing consistent with this opinion and, at the discretion of the People, retrial of count 5 and the reversed enhancements.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.