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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHARLES ANYADIKE et al., Defendants and Appellants.	B226853 (Los Angeles County Super. Ct. No. YA074576)

APPEAL from judgments of the Superior Court of Los Angeles County. James R. Brandlin, Judge. Remanded for resentencing and sentence modifications. Otherwise affirmed.

Landra E. Rosenthal, under appointment by the Court of Appeal, for Defendant and Appellant Charles Anyadike.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Lipsey.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

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Separate juries convicted defendants and appellants Charles Anyadike and Anthony Lipsey of first degree murder (Pen. Code, § 187, subd. (a), count 1)[1] and second degree robbery (§ 211, count 2). Anyadike contends that there was insufficient evidence to support the gang allegation (§ 186.22, subd. (b)(1)(C)) and that the 25-year-to-life sentence imposed pursuant to section 12022.53, subdivisions (d) and (e)(1) should be stricken. Lipsey joins in Anyadike's challenge to the gang allegation. Lipsey also contends that (1) the trial court erred by failing to grant a mistrial; (2) there was prosecutorial misconduct; (3) the trial court failed to exercise discretion in imposing a sentence of life without parole; and (4) the gang enhancement sentences should be stricken rather than stayed.

We find merit in appellants' sentencing contentions and order the judgments modified by striking the gang enhancements. As to appellant Lipsey, we remand the matter to enable the trial court to exercise its discretion in sentencing. In all other respects, the judgments are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Robbery and Shooting

On March 29, 2007, Jesus Mendoza Nava was working at a meat market located in the City of Inglewood. Santiago Bernabe was working there as a butcher and cashier. Shortly after 8:00 p.m., Nava saw two men inside the store near the counter area. He saw that one of the men had a gun and was pointing it at Bernabe. One of the men said something loudly to Bernabe but Nava who does not speak English, could not understand what he said. Nava ran to the back of the store. When he returned he found Bernabe had been shot and was lying on the floor. Bernabe was pronounced dead later that night at the UCLA Medical Center. An autopsy determined the cause of death to be a single gunshot wound to the abdomen. On April 2, 2007, police showed Nava a photographic

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[1] All further statutory references are to the Penal Code unless otherwise specified.

lineup on which he circled and identified Lipsey as the person with the gun. He also identified Lipsey at trial.

Gary Johnson lived near the meat market and frequently walked there to shop. At approximately 8:00 p.m. on the night of the shooting, as he was walking from the market he saw Lipsey and two other men walking towards the market. Johnson recognized Lipsey as someone he had seen at the school where he used to work. About 10 minutes later he heard the sound of emergency vehicles at the store and went outside. Lipsey and the other two men he had seen earlier ran past him on the same side of the street. The following day Johnson selected Lipsey's picture from a photographic lineup as one of the three individuals he saw near the meat market, and he identified Lipsey at trial.

Mystique Ford was Lipsey's girlfriend in March 2007. Lipsey and Anyadike arrived at Ford's apartment at 8:30 or 9:00 p.m. on March 29, 2007. Lipsey told her that if anyone asked about him, she should tell them that he was at her apartment between 7:00 and 9:00 p.m. that night.

On March 30, 2007, at approximately 1:30 p.m. Detective Marya Parente of the Inglewood Police Department was on patrol. She observed Lipsey, Anyadike, and two other individuals jaywalking. Lipsey carried no identification and was detained and subsequently arrested. Lipsey was searched and $32 was recovered from him. He was 17 years old at the time of the arrest.

Later that same day, Detective Will Salmon of the Inglewood Police Department conducted a search of Lipsey's residence and recovered a .22-caliber rifle from a closet in the bedroom. The stock of the rifle had been cut down and there was a slight bend to the barrel. A ballistics expert testified that the bullet the deputy medical examiner recovered during the autopsy was consistent with having been discharged from the rifle recovered from Lipsey's bedroom. He was unable to arrive at a positive conclusion because the bullet was mutilated which could have been caused by the bend in the barrel of the rifle or by the bullet striking the victim or a wall.

Detective Mark Campbell of the Inglewood Police Department interviewed Ford on March 30, 2007. Ford said that in the past, she had seen Lipsey carry a big gun in his coat while walking down the street. She also said that Lipsey usually "hangs out with people from his hood" and "by the Inglewood swap meet a lot." She told Detective Campbell that Lipsey had come to her apartment on the night of March 29, 2007 with Anyadike.

Anyadike was arrested on March 31, 2007. He was 18 years old.

On October 11, 2007, Los Angeles County Central Juvenile Hall Detention Services Officer Shenice Burroughs overheard a conversation in which Lipsey told another inmate, "I killed on one day, and got arrested on the next." He then told the other inmate "I wanted to see what it felt like."

Evidence Offered Only Against Anyadike

After waiving his constitutional rights, Anyadike answered questions during a recorded interview with Detective Campbell on April 1, 2007. Initially, Anyadike said that he had been watching a movie at Lipsey's house and then he and Lipsey went to Ford's apartment on the night of March 29, 2007. He said he heard from a friend that a member of the Inglewood Family[2] gang had robbed the store and shot somebody. Later, he told Detective Campbell that he and Lipsey went into the store together and Lipsey "needed some money or whatever. So he went in there and did what he had to do."

Anyadike stated that he had spent the day with Lipsey and Lipsey had discussed robbing a store, and robbing that meat market in particular. As they walked to the market Anyadike saw that Lipsey had a gun with a wooden stock. Anyadike had seen the gun the previous day and Lipsey had allowed him to remove the clip and take the gun apart. When shown the rifle recovered from Lipsey's bedroom he confirmed it was the one Lipsey had on the night of March 29, 2007. Anyadike and Lipsey walked into the market

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2 Sometimes referred to as the Inglewood Family Gangster Bloods gang.

and their friend Ross Tillet[3] stayed outside. Lipsey pointed the gun at the cashier and said "Give me the money." The cashier handed over the money and Lipsey shot him. Anyadike saw another person run towards the back of the store as he and Lipsey ran out.

Anyadike, Lipsey, and Tillet ran towards a nearby apartment complex around the corner from the market. Lipsey told them they had to change clothes to avoid recognition. All three wore basketball shorts and shirts and put their outer clothing in Anyadike's backpack. They hid the backpack and gun in an apartment garage. Tillet left and Anyadike and Lipsey went to Ford's apartment. Lipsey had taken approximately $117 from the market and gave $50 to Anyadike. Anyadike used the money to buy doughnuts and ice cream and purchased a cigar from the liquor store. After the interview, Anyadike showed detectives Campbell and Salmon, the route he and Lipsey took to the market and back on the night of the shooting.

Gang Evidence Presented to the Trial Court

Appellants waived their right to a jury trial and agreed to a court trial as to the gang allegations.

Inglewood Police Officer Kerry Tripp, a member of the Gang Intelligence Unit, testified at the preliminary hearing as the prosecution's gang expert. Officer Tripp had been a police officer for 23 years and had been in the gang unit for approximately 10 years. He had had thousands of contacts with gang members in both custodial and non-custodial situations. He processed all field identification cards and read all police reports in the City of Inglewood for gang intelligence and since 2001 taught all Inglewood police officers gang culture, awareness, and investigation.

Officer Tripp was familiar with the Inglewood Family gang, a known Blood gang. He opined that there were 400 to 500 active members in 2007 and their primary activities included murder, robbery, assaults with firearms, and drug possession. The gang is

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[3] Tillet is not a party to this appeal.

associated with the color red because they are a Blood gang and use the letter "F" for "Family" as gang and hand signs.

Officer Tripp testified that Lipsey was a member of the Inglewood Family gang based on the nature of this crime and his review of the field identification cards in which appellant admitted membership. Further support was provided by the discovery of gang graffiti in Lipsey's house. When arrested Lipsey wore a belt buckle in the shape of the letter "F" and he was photographed throwing a gang sign representing the Inglewood Family gang.

Officer Tripp testified that Anyadike was a member of the Inglewood Family Gangster Bloods gang based on information he found on field identification cards. Furthermore, Anyadike associated with gang members at a location where it was known that Inglewood Family gang members gathered, and he committed these crimes with a known Inglewood Family gang member.

Responding to a hypothetical based on the facts of this case, Officer Tripp opined that the robbery and subsequent shooting and killing of Bernabe were committed for the benefit of and in association with the Inglewood Family Gangster Bloods gang. The gang benefits because the community is fearful and intimidated by these crimes. He explained that the robbery and murder were crimes that bring prestige to the perpetrators and the gang. Other gang members want to imitate this crime because killing someone is "the ultimate for a gang member."

Trial and Sentencing

Appellants were charged with first degree murder (§ 187, subd. (a)) and second degree robbery (§ 211). Lipsey was charged with the special circumstance that the murder was committed in the course of a robbery (§ 190.2, subd. (a)(17)), and personal use of a firearm within the meaning of section 12022.53, subdivisions (b) through (d). The information also alleged that in the commission of both counts, a principal personally and intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivisions (d) and (e)(1); that a principal used a firearm

within the meaning of section 12022.53, subdivisions (b) through (e); and that the crimes were committed for the benefit and direction of and in association with a criminal street gang under section 186.22, subdivision (b)(1)(C). Appellants pled not guilty and denied the special allegations.

A single trial before separate juries commenced in March 2010. The juries found appellants guilty on both counts. Lipsey's jury also found true the special circumstance that the murder was committed while appellants were engaged in the commission of a robbery (§ 190.2, subd. (a)(17)) and that he personally discharged a firearm causing death (§ 12022.53, subd. (d)). The trial court found in a bifurcated proceeding that the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)) and as to Anyadike that a principal personally, intentionally discharged a firearm during the commission of the offenses (§ 12022.53, subd. (d)).

Anyadike was sentenced to 25 years to life for the murder, plus a consecutive term of 25 years to life for the firearm allegation. An additional 10-year term for the gang enhancement on count 1 was stayed pursuant to section 654. Lipsey was sentenced to life without parole for the murder plus 25 years to life for the firearm allegation, and the 10-year term for gang enhancement was stayed on count 1. As to count 2, the court imposed and stayed a term of 5 years for the robbery, plus 25 years to life for the firearm enhancement, plus 10 years for the gang enhancement on both appellants.

DISCUSSION

I. Substantial Evidence Supported the Gang Enhancement Allegation

A. Appellants' Contentions

Both Anyadike and Lipsey contend that the evidence, other than Officer Tripp's opinions, was insufficient to support the trial court's finding that the crimes were committed to benefit a criminal street gang. Specifically appellants contend that there was insufficient evidence to show that Anyadike was a member of the Inglewood Family Gangster Bloods gang and therefore, the evidence was insufficient to show that Lipsey

acted in association with another gang member. Appellants further contend that Officer Tripp's speculative opinion was based on a flawed hypothetical and was insufficient to show that the crime was committed for the benefit of a gang as opposed to being committed for personal pecuniary motives.

B. Relevant Authority

A gang enhancement finding is reviewed under the substantial evidence standard. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 (*Ochoa*).) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317–320.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*Ibid.*)

To establish a gang enhancement, the prosecution must prove two elements: (1) that the crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang," and (2) that the defendant had "the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) The crime must be "'gang related.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 622, 625, fn. 12; *People v. Castaneda* (2000) 23 Cal.4th 743, 745 [gang enhancement statute "increases the punishment for some gang-related crimes"]; *People v. Mendez* (2010) 188 Cal.App.4th 47, 56 [gang enhancement statute "applies when a crime is gang related"].) A defendant's mere membership in the gang does not suffice to establish the gang enhancement. (*People v. Gardeley*, *supra*, at pp. 623–624.) Rather,

‘“[t]he crime itself must have some connection with the activities of a gang.’” (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199.) “[T]o prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs. [Citation.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047–1048.)

C. First Element: For the Benefit of and in Association with a Gang

The first element of the gang enhancement may be satisfied by showing any one of the following—the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1).) In this case, sufficient evidence supported two of those three requirements.

1. For the Benefit of the Inglewood Family Gang

There was evidence to support the finding that the crimes were committed for the benefit of the Inglewood Family gang. Officer Tripp testified that these particular violent crimes enhanced the reputation of not only the gang members who did the shooting, but the gang as a whole. Violent crimes instill fear and intimidation into the community as a whole and make people afraid to carry out their normal activities. The recognition and respect earned by the perpetrators of these crimes encouraged other members to try to emulate them which in turn strengthens the gang. It also instills fear in rival gangs and shows that the Inglewood Family gang controls their territory.

Appellants’ arguments to the contrary are not persuasive. Appellants contend that the failure to wear gang colors, shout gang slogans, or throw gang signs while committing the crimes precludes a finding that the crimes were committed for the benefit of the Inglewood Family gang. We disagree. As Officer Tripp explained, the perpetrators of these types of crimes are proud of what they did and want the respect that they have earned from having committed these crimes. The community would learn soon enough that these were gang related because the perpetrators themselves will tell others.

We find no merit to appellants’ contention that Officer Tripp’s expert opinion was “mere speculation” and not based on facts. Officer Tripp is a well-seasoned gang expert

with 23 years experience as a police officer, the last 21 in the City of Inglewood where the Inglewood Family gang were active. He had been assigned to the gang unit for approximately 10 years during which he had thousands of contacts with gang members. The prosecutor's hypothetical question was rooted in the facts shown by the evidence and was not based on '"assumptions of fact without evidentiary support.'" (*People v. Richardson* (2008) 43 Cal.4th 959, 1008.) "A gang expert may render an opinion that facts assumed to be true in a hypothetical question present a 'classic' example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence." (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4.) Officer Tripp, an expert on gang culture in general and the Inglewood Family gang in particular, was qualified to explain how criminal conduct could enhance the gang's reputation or benefit the gang. (*People v. Ward* (2005) 36 Cal.4th 186, 209–210.)

2. In Association with a Gang

Evidence establishing that the crime was committed with another gang member will support a finding that it was committed in association with a gang. (*Ochoa*, *supra*, 179 Cal.App.4th at p. 661.) The facts are undisputed that Lipsey was a documented self-admitted member of the Inglewood Family Gangster Bloods gang. He wore gang symbols, flashed gang signs, and had gang graffiti in his house. Contrary to appellants' contention, sufficient evidence supports a finding that Anyadike was also a member of the Inglewood Family Gangster Bloods gang.

Expert testimony and Anyadike's statements to Detective Campbell established that Anyadike was an active participant in the Inglewood Family Gangster Bloods gang. Anyadike repeatedly associated with other gang members such as Lipsey and Tillet, including during the commission of these crimes. Officer Tripp testified that he personally saw Anyadike with Inglewood Family and other Blood gang members at the Inglewood swap meet, a known gang hangout from which Officer Tripp had recovered weapons and had personally assisted officers arresting Inglewood Family gang members on 15 to 20 occasions. The swap meet was known to be unsafe for members of gangs

that opposed the Bloods gangs. Ford told Detective Campbell that Anyadike's friend Lipsey, "usually hangs out by the Inglewood Swap Meet, a lot," "with people from his hood."

Anyadike told Detective Campbell that on the day prior to the incident at the meat market he had spent time at a house owned by one of Lipsey's friends. He guessed that Lipsey's friend "bangs or whatever" and while there Anyadike removed the magazine and took apart the .22 caliber rifle Lipsey used to shoot Bernabe. Active participation is defined as "involvement with a criminal street gang that is more than nominal or passive." (*People v. Castaneda, supra,* 23 Cal.4th at p. 747.) It does not require that "a person devot[e] 'all, or a substantial part of his time and efforts' to the gang. [Citation.]" (*Id.* at p. 752.)

Anyadike described Tillet, another Inglewood Family gang member who accompanied him and Lipsey throughout the crime spree, as "my friend" who "lives right down the street." Anyadike told Detective Campbell that he heard Lipsey discuss his plans to rob various stores on many occasions. Anyadike accompanied Lipsey to Ford's apartment after the crimes were completed, and he was arrested the next day in the company of Lipsey.

It is well-settled that the credibility and weight of expert testimony is for the trier of fact to determine (see *People v. Mercer* (1999) 70 Cal.App.4th 463, 466–467). "The reviewing court does not perform the function of reweighing the evidence; instead, the court must draw all inferences in support of the verdict that can reasonably be deduced from the evidence." (*People v. Culver* (1973) 10 Cal.3d 542, 548.)

D. Second Element: Specific Intent

Sufficient evidence established that appellants acted with "the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) Because substantial evidence supports a finding that the crimes benefitted the gang, reversal cannot be justified by the possibility that the evidence might have been reconciled with a

finding that appellants acted only for personal reasons. (See *People v. Albillar, supra,* 51 Cal.4th at p. 60.)

Even if appellants were correct that the evidence was insufficient to show that the market robbery and shooting of Bernabe benefitted the gang, their contention fails. "There is no further requirement that the defendant act with the specific intent to promote, further, or assist a *gang*; the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members*." (*People v. Albillar, supra,* 51 Cal.4th at p. 67.) Lipsey discussed his plans to rob the store and Anyadike was aware that Lipsey was armed with a gun. They walked into the market together and Lipsey demanded the money and then shot Bernabe. These facts combined with Officer Tripp's opinion that appellants were gang members, support the trial court's finding that appellants associated with each other and assisted in the criminal activity.

Appellants' reliance on *Ochoa, supra,* 179 Cal.App.4th 650, *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*), and *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*) is misplaced.

Ochoa, supra, 179 Cal.App.4th 650, in which the Court of Appeal reversed true findings on gang allegations in connection with the defendant's conviction for carjacking and being a felon in possession of a firearm, is factually distinguishable. The defendant there acted alone. (*Id.* at p. 662.) Appellants cite two other cases that are similarly inapposite. In *In re Frank S., supra,* 141 Cal.App.4th 1192, the prosecution presented no evidence that the defendant had gang members with him when he was arrested while carrying a concealed dirk or dagger. (*Id.* at p. 1199.) And in *People v. Martinez* (2004) 116 Cal.App.4th 753, the defendant was accused of burglary which was not a gang-related crime and his accomplice was not a gang member. (*Id.* at p. 762.)

In *Ramon, supra,* 175 Cal.App.4th 843, the defendant was convicted of receiving a stolen vehicle and possession of a firearm by a felon. The court found the evidence insufficient to support the gang enhancement. (*Id.* at p. 852.) The *Ramon* court noted that its analysis might be different if the expert's opinion had included "'possessing

stolen vehicles'" as one of the gang's activities. (*Id.* at p. 853.) Here, Officer Tripp testified that murder and robbery were among the Inglewood Family gangs' activities.

Reliance on *Ramon* is also misplaced because that court stated that the gang enhancement required the jury to find "that the crime was committed for the benefit of a criminal street gang and with the specific intent to promote the criminal street gang." (*Ramon, supra,* 175 Cal.App.4th at p. 849.) But the requirement to promote the criminal street gang was rejected in *People v. Albillar, supra,* 51 Cal.4th at p. 67 in which the court stated there was no further requirement that the defendant act with the specific intent to promote the gang because the first prong of the enhancement already requires proof that the defendant committed a gang-related crime. (*Ibid*.)

Albarran, supra, 149 Cal.App.4th 214, does not help appellants because the court did not consider the sufficiency issue because the trial court had granted the defendant's motion for a new trial on the allegations. (*Id.* at p. 217.) Rather, the court determined that the admission of prejudicial gang evidence was not relevant to the underlying charges. (*Id*. at p. 222–223.)

Anyadike relies on two federal opinions, *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 and *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, which were repudiated by our Supreme Court in *People v. Albillar, supra,* 51 Cal.4th at pages 65 to 66.

In *Garcia v. Carey, supra,* 395 F.3d at page 1101 and *Briceno v. Scribner, supra,* 555 F.3d at page 1079, divided panels of the Ninth Circuit held section 186.22, subdivision (b)(1) requires evidence that a defendant had the specific intent to further or facilitate *other* criminal conduct, i.e., "other criminal activity of the gang apart" from the offenses for which the defendant was convicted.

In *People v. Albillar, supra,* 51 Cal.4th at page 66, the court rejected this interpretation of the statute by the Ninth Circuit and adopted the one set forth by the majority of appellate courts in the state. "[T]he scienter requirement in section 186.22, [subdivision] (b)(1)—i.e., 'the specific intent to promote, further or assist in any criminal conduct by gang members'—is unambiguous and applies to *any* criminal conduct,

without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*Ibid.*)

II. Substantial Evidence Supported Anyadike's Firearm Enhancement

Anyadike contends that there is insufficient evidence to support the gang enhancement and because it provides the foundation required for the firearm enhancement imposed under section 12022.53, subdivisions (d) and (e)(1), the firearm enhancement must be stricken.

Based on the findings Anyadike committed the crime of first degree murder for the benefit of a criminal street gang and a principal in the commission of the crime personally and intentionally discharged a firearm causing the death of Santiago Bernabe, the trial court enhanced Anyadike's sentence by a consecutive term of 25 years to life under section 12022.53, subdivision (e)(1). This enhancement applies to an aider and abettor if the aider and abettor commits the crime for the benefit of a criminal street gang and any principal in the crime personally used or discharged a firearm in its commission.

Section 12022.53 applies to certain serious felonies including murder.[4] Subdivision (d) of the statute requires a sentence enhancement of 25 years to life for "any person who, in the commission of a [predicate felony] personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death[.]" In the predicate felonies which are gang-related section 12022.53, subdivision (e)(1) provides: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision . . . (d)."

The trial court properly imposed the 25-years-to-life enhancement on Anyadike because as an aider and abettor he was a principal in the commission of murder, he

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[4] Section 12022.53, subdivision (a)(1).

violated section 186.22, subdivision (b), the criminal street gang law and Lipsey, a principal in the murder, personally and intentionally discharged a firearm killing Bernabe.

III. The Trial Court Properly Denied Lipsey's Motion for a Mistrial

Lipsey contends the trial court erred in denying his motion for mistrial made after a prosecution witness used the term "gang monikers" when testifying. Lipsey contends the prejudice could not be cured by an admonition and violated his due process rights. Lipsey further contends the prosecutor committed misconduct by failing to properly counsel the witness. We find no error.

A. Background

In a pretrial ruling the court bifurcated the gang allegations from the other charges. During the prosecution's case Juvenile Hall Detention Services Officer Shenice Burroughs testified that she overheard Lipsey tell another inmate "I killed on one day, and got arrested on the next." Lipsey also said, "I wanted to see what it felt like." During cross-examination, Burroughs testified in response to defense counsel's questions that she did not recall the date when Lipsey said the crime occurred but that it took place "inside of a store" and that he and others "collected valuables." Burroughs was asked "So, did he say how many other people were collecting valuables?" She replied, "He used gang monikers. And—[.]" Defense counsel interrupted her at that point and a discussion was held at sidebar.

Defense counsel moved for a mistrial based on Burroughs' use of the words "gang monikers." Both counsel for Lipsey and Anyadike stated that prior to Burroughs taking the stand they had a discussion with the prosecutor concerning the limitations of her testimony. The prosecutor opposed the motion for mistrial and explained that he told Burroughs "several times not to mention anything about gangs." Burroughs was questioned and she acknowledged that the prosecutor had cautioned her about gang allegations. The trial court denied the motion for mistrial and ordered Burroughs not to

use the word "gang" or "moniker" in her testimony. The trial court admonished the jurors as follows: "I'm going to strike the last answer of the witness. The jurors are not to consider it. And I'll permit counsel to reframe the question so that the question is clear to the witness."

B. Relevant Authority

"We review the denial of a motion for mistrial under the deferential abuse of discretion standard. [Citations.] 'A motion for mistrial is directed to the sound discretion of the trial court. [The Supreme Court has] explained that "[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'" [Citations.]" (*People v. Cox* (2003) 30 Cal.4th 916, 953, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) "'It is not an abuse of discretion when a trial court denies a motion for mistrial after being satisfied that no injustice has resulted or will result from the occurrences of which complaint is made . . . .' [Citation.]" (*People v. Gray* (1998) 66 Cal.App.4th 973, 986.) The appellate court must examine the record to determine if the trial court abused its discretion. (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 708.)

Although a witness's volunteered statement can provide the basis for a finding of prejudice (*People v. Wharton* (1991) 53 Cal.3d 522, 565), it is "only in the exceptional case," that the trial court's admonition will not cure the effect of improper prejudicial evidence. (*People v. Allen* (1978) 77 Cal.App.3d 924, 935 (*Allen*).)

C. No Abuse of Discretion

The trial court did not abuse its discretion in denying the mistrial motion because the defendant was not prejudiced by Burroughs' use of the term "gang monikers."

In *People v. Avila* (2006) 38 Cal.4th 491, the Supreme Court held that the trial court did not abuse its discretion in denying a mistrial motion after a prosecution witness testified regarding defendant's release from prison having been previously admonished

not to refer to defendant's criminal convictions. (*Id.* at p. 571.) The statement about prison was stricken, and the jury was admonished not to consider it for any purpose. (*Id.* at pp. 572–573.) The reviewing court found no abuse of discretion and concluded: "As for the portion of [the witness's] testimony referring to defendant recently having been in prison, the court admonished the jury not to consider it for any purpose. . . . We presume the jury followed the court's instructions." (*Id.* at p. 574.)

The same presumption is warranted in this case. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) Although evidence of *gang membership* is potentially prejudicial in cases not involving gang enhancements (*People v. Hernandez, supra,* 33 Cal.4th at p. 1049), the single and fleeting reference to gang monikers in the instant case was not incurably prejudicial. The proceedings were immediately halted and a discussion held at sidebar. When the testimony resumed, the court ordered the statement stricken and instructed the jury to disregard it. Jury instructions included CALCRIM No. 222 which again ordered the jurors to disregard any testimony stricken from the record. We presume the jury followed this instruction. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

While there is a real danger that a jury will improperly infer that a defendant who is a gang member has a criminal disposition and is necessarily guilty of the charged crime (*People v. Williams* (1997) 16 Cal.4th 153, 193), Burroughs' comment was the only reference of its kind and taken on its face established that Lipsey knew other individuals by their "gang monikers" but did not directly suggest that Lipsey himself was a gang member.

Appellant argues that Burroughs' remark was incurably prejudicial and relies on *Allen, supra,* 77 Cal.App.3d 924 where the appellate court reversed the trial court's denial of a motion for mistrial after a witness volunteered information that the defendant was on parole. The *Allen* court determined that the witness's reference to parole necessitated a mistrial because "[a]n examination of the record reveals an extremely close case in which the jury had to make its fact determination based upon the credibility of the

[defendant] and his witnesses and on the credibility of the prosecution's witnesses. In the light of these facts, it is reasonably probable that a result more favorable to [the defendant] would have been reached had the prejudicial information of [the defendant's] parole status not been divulged to the jury." (*Id*. at p. 935.)

But the *Allen* court stated that the exceptional circumstances needed to overcome the general rule that the court's admonition will cure the effect of improper prejudicial evidence, depends upon the facts of each case. (*Allen, supra*, 77 Cal.App.3d at p. 935.) "'An improper reference to a prior conviction may be grounds for reversal in itself [citations] but is nonprejudicial "in the light of a record which points convincingly to guilt . . . ."'" (*Ibid.*)

Contrary to Lipsey's contention, an examination of the record does not reveal an extremely close case. Other evidence strongly established his guilt. Jesus Nava identified him as the shooter. Gary Johnson saw him walking towards the market before the shooting which occurred around 8:00 p.m. and running away from the market minutes after the shooting. On the night the crimes were committed Lipsey asked Ford to provide an alibi for the time period from 7:00 to 9:00 p.m. The bullet recovered from Bernabe was consistent with having been discharged from the rifle that Ford had seen him carry in the past and which was recovered from Lipsey's bedroom. And, there was damaging evidence from Burroughs that Lipsey stated that he "killed on one day, and got arrested the next,"[5] and that he killed because he "wanted to see what it felt like."

Citing a number of cases in which the California Supreme Court suggested that lengthy deliberations may indicate the jury found the case difficult to decide, Lipsey contends that the length of deliberations here and the questions asked by the jury show that the reference to "gang monikers" was inflammatory and cannot be deemed harmless.

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5 The crimes occurred on March 29, 2007 and Lipsey was arrested the following day.

The jury deliberated for a total of six hours.[6] The jury first asked the court "Had Jesus Nava seen Mr. Lipsey before the murder?"[7] The jury later asked to review Nava's testimony. On the second day of deliberations the jury asked to review Johnson's testimony. The jury's deliberation over the course of two days speaks only for its diligence. Its requests for the reading of certain testimony does not necessarily indicate that this was a close case as Lipsey argues. To conclude that this was a close case in light of the jury's actions "in the absence of more concrete evidence would amount to sheer speculation on our part. Instead we find that the length of the deliberations could as easily be reconciled with the jury's conscientious performance of its civic duty, rather than its difficulty in reaching a decision." (*People v. Walker* (1995) 31 Cal.App.4th 432, 439.)

D. No Prosecutorial Misconduct

Lipsey contends the prosecutor committed misconduct by failing to sufficiently ensure that Burroughs did not mention gangs in her testimony.

Lipsey's claims of prosecutorial misconduct are contradicted by the evidence. The prosecutor informed the trial court and defense counsel at sidebar that he told Burroughs "several times not to mention anything about gangs." This was confirmed by Burroughs under questioning by the trial court. The prosecutor's questions were carefully tailored to avoid eliciting any prohibited information and Burroughs' "gang monikers" remark was in response to a question on cross-examination. There is no evidence in the record to indicate that the prosecutor was attempting to use a deceptive or reprehensible method to persuade the jury that Lipsey was guilty.

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6 The jury deliberated on March 5, 2010 from 11:16 a.m. until noon, and again from 1:30 p.m. to 4:45 p.m. On March 8, 2010, the jury deliberated from 9:30 a.m. to 11:30 a.m.

7 The court responded that it could not answer questions which asked what evidence was received at trial.

IV. The Trial Court Failed to Exercise Discretion in Sentencing Lipsey to Life Without the Possibility of Parole

Appellant contends the trial court abused its discretion in sentencing him to life without parole, because the court did not understand that pursuant to section 190.5, subdivision (b), it had the option of sentencing him to 25 years to life in state prison. The People argue that Lipsey has forfeited this issue because he did not object to the sentence at trial.

The sentencing court stated, "As to count 1, violation of Penal Code section 187(a), first-degree murder with the special circumstance allegation found true, the court imposes the *mandatory* sentence of life without parole."

As noted above, Lipsey was 17 years old at the time of the murder and robbery. Section 190.5, subdivision (b) provides, in relevant part, that "[t]he penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in section 190.2 . . . has been found to be true . . . , who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." Section 190.2, subdivision (a)(17)(A) specifies as one such special circumstance when "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [¶] (A) Robbery in violation of Section 211 or 212.5."

Section 190.5, subdivision (b) expresses a presumptive sentence of LWOP for youthful offenders convicted of first-degree special-circumstance murder. (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1145.) "[S]ection 190.5 means . . . that 16- or 17-year-olds who commit special circumstance murder *must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life." (*Id*. at p. 1141.) Even so, section 190.5, subdivision (b) requires "a

proper exercise of discretion in choosing whether to grant leniency and impose the lesser penalty of 25 years to life . . . ." (*People v. Guinn, supra*, at p. 1149.) In exercising that discretion, the trial court should consider the aggravating and mitigating factors set forth, respectively, in California Rules of Court, rules 4.421 and 4.423, as well as the factors set forth in section 190.3. (*People v. Guinn, supra*, at p. 1142–1143.)

In *In re Sean W.* (2005) 127 Cal.App.4th 1177 the appellate court held that the claim that the juvenile court had failed to exercise its statutory discretion in setting the maximum term of physical confinement for a minor committed to the California Youth Authority was not forfeited by failing to raise the claim below. The court stated: """Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]" [Citation.]"" (*Id*. at p. 1182.)

Lipsey contends this case is controlled by *People v. Ybarra* (2008) 166 Cal.App.4th 1069 (*Ybarra*). There the court stated: "Even 'discretionary decisionmaking' is subject to 'some level of review, however deferential.' [Citation.] Since the record explicitly shows a lack of meaningful argument by counsel about the facts and the law and implicitly shows a belief by the court and counsel alike that an LWOP term was mandatory if the special circumstance were not stricken, our deferential review shows that a remand for resentencing in light of the factors in section 190.3 and the circumstances in aggravation and mitigation in rules 4.421 and 4.423, respectively, is imperative. So we will vacate the sentence and remand to the trial court with directions. [Citation.]" (*Id*. at pp. 1093–1094, fn. omitted.)

Lipsey accurately points out that that there is no mention of section 190.5, subdivision (b) in connection with the sentencing proceedings in this case. The court ordered a probation report but it did not mention section 190.5 , subdivision (b). The trial court made no reference to Lipsey's age during the sentencing hearing or to the probation report, and did not state on the record its reasons for imposing a sentence of life without parole. The record does not reflect any weighing of aggravating and mitigating factors.

The People concede *Ybarra* would "seemingly compel a remand for resentencing" in the absence of any reference by the trial court or counsel to the court's ability to reduce the sentence from life without parole to 25 years to life. But the People argue that Lipsey forfeited this issue because "all 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' raised for the first time on appeal are not subject to review." (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

It is well established that even when a party has forfeited a right to appellate review by failing to preserve a claim in the trial court, an appellate court may still review the claim as an exercise of its discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984 ["'[T]he fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an appellate court is precluded from considering the issue,'" italics omitted].) Even if the forfeiture rule applies here, we would, in the exercise of our discretion and as we have done here, address appellant's claim on the merits.

The People agree that the trial court did not exercise discretion and that is evident from the sentencing proceedings. But the court's sentencing choice here was based on an erroneous understanding of the law because the court stated on the record that a life without parole sentence was mandatory. The trial court had a duty to determine which punishment, 25 years to life, or life without the possibility of parole was appropriate, and we remand for an informed determination. (*People v. Sherrick* (1993) 19 Cal.App.4th 657, 661.)

V. Sentencing Error

Lipsey contends the trial court improperly imposed and stayed a 10-year gang enhancement under section 186.22, subdivision (b)(1). The People agree the provision is inapplicable because Lipsey was sentenced to life in prison without the possibility of parole for the crime of murder and a consecutive prison sentence of 25 years to life for

the firearm enhancement. We also agree. The judgment must be modified to strike the 10-year enhancement.

In *People v. Lopez* (2005) 34 Cal.4th 1002, the Supreme Court explained that under the "plain language of [Penal Code] section 186.22[, subdivision] (b)(5)," a first degree murder committed for the benefit of a gang is not subject to the 10-year enhancement in Penal Code section 186.22, subdivision (b)(1)(C); instead, such a murder falls within that subdivision's excepting clause and is governed by the 15-year minimum parole eligibility term in Penal Code section 186.22, subdivision (b)(5). (*People v. Lopez, supra,* at p. 1011.) For the reasons stated in *People v. Lopez*, the 10-year gang enhancement relating to counts 1 and 2 must be stricken. Only the 15-year parole eligibility minimum of subdivision (b)(5) applies.

On remand, if the court exercises discretion and sentences Lipsey to a 25-years-to-life term instead of life without parole, the 10-year enhancement cannot be applied and must be stricken.

The same error occurred in Anyadike's sentence and that judgment must also be modified to strike the 10-year enhancement.

DISPOSITION

The judgment as to Anthony Lipsey is affirmed but the matter is remanded to the trial court for resentencing pursuant to section 190.5, subdivision (b) on the special circumstances murder and to modify the sentence to delete the 10-year gang enhancements on counts 1 and 2 imposed under section 186.22, subdivision (b)(1)(C).

The judgment as to Charles Anyadike is affirmed but the sentence must be modified to delete the 10-year gang enhancements on counts 1 and 2 imposed under section 186.22, subdivision (b)(1)(C).

The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting these modifications and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

The judgments are affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
DOI TODD

We concur:

_____, J.
ASHMANN-GERST

_____, J.
CHAVEZ