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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. REMBERTO PRECIADO, Defendant and Appellant.	B256045 (Los Angeles County Super. Ct. No. BA388599)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappé, Judge. Affirmed in part and reversed in part.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In the course of a week, defendant Remberto Preciado shot two people in two separate incidents, killing a 17-year-old young man and seriously injuring an 84-year-old woman. When defendant was arrested a week after the second incident, he had on him the gun used in both shootings and four bags of methamphetamine.

A jury convicted defendant of first degree murder for the first shooting; assault with a semiautomatic firearm and attempted voluntary manslaughter for the second shooting; and possession of a controlled substance while armed with a firearm and unlawful possession of a firearm for the crimes he committed on the day of the arrest. The jury also found true several allegations, including the gang allegation for all the crimes. The trial court sentenced defendant to 75 years to life on the murder count plus an additional determinate term of 53 years on the other counts.

On appeal, defendant contends that the trial court erred in responding to a jury's request for information, that the evidence is insufficient to support the gang enhancements on the non-murder charges, and that the imposition of the upper term for his conviction for assault with a semiautomatic firearm violated the dual use proscription. We affirm the judgment, except we reverse the gang enhancements on the non-murder charges.

FACTUAL AND PROCEDURAL BACKGROUND

A. THE TWO SHOOTINGS

1. *The Murder of Jesus Lopez on July 16, 2011*

On July 16, 2011, defendant, a Clover gang member, went to a party at a house in Los Angeles. Other Clover gang members also attended the party, including Victor Vasquez. Defendant, Vasquez, and other Clover gang members left the party to go tagging (i.e., draw graffiti) in the neighborhood. Defendant had a gun with him.

Jesus Lopez, a 17-year-old young man, was riding his bicycle near where defendant and his fellow gang members had been tagging that evening. Lopez lived in the neighborhood. Though a member of a tagging crew, he was not a gang member. After the Clover gang members finished tagging, they headed back to the party. As

Vasquez was walking back, he heard three gunshots after hearing defendant say, "Where you from?" Vasquez turned around and saw two other Clover gang members on the sidewalk. He did not see defendant or anyone with a gun.

A surveillance video partially depicted the incident. The video showed two people walking while another person was riding a bicycle. When one of the pedestrians stepped off the sidewalk, the bicyclist changed course to avoid the pedestrian. The pedestrian walked toward the bicyclist, who rode out of the camera's view. The pedestrian raised his hand and appeared to be holding a gun at 8:27 p.m., according to the time stamp on the video. Because of the video's poor quality, the persons appearing in it could not be identified.

At about 8:35 p.m., a police officer responded to the scene. He saw a bicycle and a trail of blood leading away from it. He followed the trail and found Lopez hunched over a staircase. Lopez was bleeding heavily and having difficulty breathing. Lopez said that he had been shot, and that three people were involved. An ambulance arrived minutes later, and Lopez was taken to the hospital. Lopez died from two gunshot wounds to his back: one bullet pierced his lung and perforated his internal jugular vein; the second bullet perforated his intestine.

Upon investigating the murder, the police spoke with Victoria Castro in a recorded interview played to the jury. Castro, a member of a Clover gang clique, said that she attended the party on the night of the murder. While there, a group of men left to go tagging, including defendant, who she believed had a gun. Castro remained at the party and later heard gunshots. After the gunshots, the group of taggers ran back to the house. Castro then saw defendant and a gang member nicknamed "Risky" leave in a truck.

After the shooting, defendant told Castro that he was at a motel in Highland Park with Risky and bragged that he "dropped a leva." "Leva" is a derogatory term that the Clover gang uses to refer to a rival gang member from the Lincoln Heights gang. At the time, Castro did not know that Lopez, one of her friends, was the murder victim. When she later learned that Lopez was the victim, she confronted defendant, who apologized.

Defendant told her that he had "banged on" Lopez (i.e., asked Lopez where he was from), but Lopez did not respond.

Castro later testified at the preliminary hearing in the case and repeated her recorded statement to the police—including that defendant had told her that he killed a "leva" and that he had "fucked up." At trial, however, Castro recanted her prior statements. She testified that defendant never told her that he had killed someone, and that the only truthful part of her prior statements was that she attended the party on the day of the murder. In explaining her prior inconsistent statements, Castro claimed that the police fed her the information about defendant and threatened to take her child away and charge her with murder if she did not cooperate.

In response to Castro's trial testimony, the prosecution introduced evidence corroborating her prior statements, including cell phone records for Castro's phone and for a phone that undisputedly belonged to defendant. The content of the text messages between these phones was consistent with Castro's pretrial statements. Castro previously stated that defendant had told her that he went to a Highland Park motel with Risky after the shooting. A text message sent from defendant's to Castro's phone after the murder stated: "Just here with Risky at another motel, the H-L-P." Another text message sent from defendant's phone several hours later stated: "It was a tagger." The records also confirmed that defendant and Castro had spoken by phone after the murder just as Castro had told the police. In addition, defendant's phone was within a mile-and-a-half radius of the location of the murder when Lopez was shot and was later used to download a news article about Lopez's murder.

The police also obtained registration records from the Highland Park Deluxe Inn. A registration card from that motel showed that defendant checked in for an overnight stay on July 16, 2011, the day of the murder, as Castro had stated.[1]

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[1] At trial, defendant called a witness who lived in the neighborhood where the party took place. The witness heard gunshots outside her house that evening and then saw three young men running. Defendant was not one of them.

2. *The Second Shooting on July 23, 2011*

On July 23, 2011, Victor Soto Contreras witnessed an altercation between two men outside a store in Lincoln Heights. One man wore a black shirt; the other wore a white shirt. The man in white swung at the man in black. At that point, according to Contreras, the man in black pulled out a handgun and fired at the man in white, who ran away. The man in black ran to a nearby street and entered an apartment building. Contreras called the police and reported what had occurred. He later identified defendant as the shooter, stating that he was 80 percent certain.

Vanesa Flores also was in the area of the shooting that morning. While she was in her car with her baby at a red light, she saw defendant cross the street in front of her with a gun wrapped in a white tee shirt. He stretched out his hand as he approached a parked car and pointed the gun at the driver's side of the car. Flores turned her attention to her crying baby,[2] when she heard three or four popping sounds. When she looked up, she saw defendant run away and enter the driveway of an apartment building. She drove away and called the police.

The police arrived at the scene soon after the shooting. The responding officers observed blood on the sidewalk that led them to Maria Rosas, an 84-year-old woman who happened to be in the area at the time of the shooting. Though she survived, she was bleeding profusely from gunshot wounds to her feet caused by the shooting. The officers also discovered four nine-millimeter shell casings in the area. The police did not find the man in white (John Doe). However, the police did locate defendant in the apartment building that he was seen entering and took him into custody. Defendant did not have a gun in his possession.

At the police station, Contreras and Flores identified defendant as the gunman. The police also did a gun residue test of defendant's hands and clothing to see if he

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[2] The prosecutor attributed the discrepancy in the two eyewitness accounts of the shooting to Flores being distracted.

recently had fired a gun. The test results were inconclusive, and the police released defendant.

B. THE ARREST OF DEFENDANT ON JULY 30, 2011

On July 30, 2011, police officers responded to a report that two men were drinking and smoking narcotics in Lincoln Heights Park. As the officers approached the park, defendant took off running, but stopped when ordered to do so. Defendant told the officers that he was carrying a gun. One of the officers removed a loaded nine-millimeter handgun from a holster inside defendant's waistband and four nine-millimeter bullets from one of defendant's pockets. The officer also found four plastic bags containing .42 grams of methamphetamine in defendant's pocket.

The gun found on defendant when he was arrested was used to murder Lopez and to shoot at John Doe and hit Rosas. According to subsequent ballistic testing, the shell casings found at the scenes of both shootings were discharged from that handgun.

C. THE CONVICTION AND SENTENCE

Following a jury trial, defendant was convicted on the following counts (as numbered in the information): (1) assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)[3]); (2) attempted voluntary manslaughter (§§ 192, subd. (a), 664 (a lesser included offense to attempted murder)); (3) possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a)); (4) possession of a firearm by a felon (§ 12021, subd. (a)(1)); and (5) first degree murder (§ 187, subd. (a)).

The jury found true the gang allegation for all crimes (§ 186.22, subds. (b)(1)(C) (for counts 1-3), (b)(1)(A) (for counts 4-5)). The jury also found true that: defendant, in committing the assault with a semiautomatic firearm, personally used a firearm (§ 12022.5) and personally inflicted great bodily injury on an elderly victim (§ 12022.7, subd. (c)); and defendant, in committing the murder, personally used a firearm and

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[3] Unless otherwise stated, all further statutory references are to the Penal Code.

personally and intentionally discharged a firearm, causing death (§ 12022.53, subds. (b), (c) & (d)).

In a bifurcated proceeding, the trial court found true the allegation that defendant was previously convicted of a violent felony within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The court selected count 1 as the base term and imposed the upper term of nine years, doubled as a second strike to 18 years, plus 25 years for the enhancements (10 years for the gang, 10 years for the firearm, and 5 years for the great bodily injury enhancements), for a total of 43 years for count 1. The court imposed one-third consecutive second strike terms for counts 2, 3 and 4 as follows: two years on count 2, plus five years for the gang enhancement, for seven years total; two years on count 3, plus one year for the gang enhancement for a total of three years; 16 months on count 4, plus one year for the gang enhancement for a total term of 28 months, which was stayed under section 654. The total determinate sentence imposed on counts 1 through 4 was 53 years. On count 5, the trial court sentenced defendant to 25 years to life, doubled as a second strike, plus 25 years to life for the firearm enhancement, for a total sentence on that count of 75 years to life.

DISCUSSION

A. THE TRIAL COURT'S RESPONSE TO THE JURY'S REQUEST

1. *The Trial Court Proceedings*

During deliberations, the jury advised the court that it could not find certain evidence it was attempting to locate and asked for the court's assistance, stating: "We are looking for a specific series of text messages saying 'I think I fucked up' and 'I think I got a leva' . . . but [we] can't exactly find it."

The court prepared a proposed response that there were no text messages with those statements, but that there was testimony about, and exhibits containing, those statements. The proposed language stated: "The court has conferred with counsel and we all agree that there are no text messages stating either 'I fucked up' or 'I think I got a

leva.' However, we all agree there was testimony about those statements. In addition, we all agree there were exhibits containing such statements."[4]

Defense counsel initially stated that he had no objection to the proposed response. The prosecutor then complained that the second part of the response was vague and asked the court to direct the jury to where the statements specifically could be found in the evidence. Defense counsel objected to the prosecutor's suggestion, stating that the first sentence fully responded to the jury's question and that the rest was "surplusage." The court then asked defense counsel whether he would agree that the proposed language tracked his approach to these statements at trial—namely, that Castro made these statements but fabricated them under duress. Defense counsel responded: "My instincts have always served me well and I'll just say that I'll object to this particular sentence because I think that it's answering more than what was specifically asked." He added: "However, we all agree there was testimony about those statements."

The court ultimately decided to give the response as originally proposed. The court explained that it usually responded to a question or request without elaboration, but that more was required here. The court was concerned that if it simply denied the existence of the texts, the jury might draw a "negative inference" that there was no evidence at all about the statements. The court explained that its proposed response to the jury would not prejudice the defense, as the jury appeared to be seeking "corroboration" of Castro's statements to the police. By informing the jury that the evidence does not exist in text form, the jury would know that the incriminating statements were not written by defendant but rather were reported by Castro. This would take the jury "back to a credibility call on Miss Castro[]" and whether to believe her trial testimony or her statements prior to trial—"which is the way . . . both [counsel] tried [the case]."

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[4] The exhibits were intended to refer to the transcript of the recorded statement that Castro made to the police and the videotape of that statement.

2. *Legal Analysis*

A trial court has a statutory obligation to respond to a jury's question about the applicable law or a disagreement about the evidence. (§ 1138; see *People v. Ross* (2007) 155 Cal.App.4th 1033, 1047 ["section 1138 casts upon the court a '"mandatory duty"' to 'clear up' the jury's understanding") A trial court also has a constitutional right to comment on the evidence when it believes it "is necessary for the proper determination of the cause." (Cal. Const. art. VI, § 10.) When discharging its statutory duty or exercising its constitutional authority, a trial court must be careful to be "accurate, responsive, and balanced" and must avoid even the appearance of partiality. (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331; accord, *People v. Monterroso* (2004) 34 Cal.4th 743, 780.)

Defendant contends the trial court violated these principles by going beyond the narrow response required here. By stating that "we all agree" there was evidence about the statements—without mentioning the dispute about whether defendant actually made those statements—the trial court "took sides," argues defendant, and impliedly told the jury not to "worry that they're not in the texts." (Italics omitted.) When reviewing the effect of a challenged instruction, we determine whether a reasonable jury would have interpreted the instruction as suggested by the defendant. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) This requires us to examine the "specific language under challenge and, if necessary, the charge in its entirety." (*People v. Warren* (1988) 45 Cal.3d 471, 487.)

In performing this analysis, we do not believe that the jury would have construed the trial court's response as endorsing the prosecution's view of the evidence and directing the jury to believe the truth of Castro's prior statements about defendant's admissions. In context, the trial court's response did not convey any view of the evidence. The jury heard evidence during Castro's testimony that defendant made statements that he "dropped a leva" and that he had "fucked up." The jury was mistaken, however, in recalling how those purported statements were made, erroneously believing that they were communicated in text messages. In its request, the jury was seeking the trial court's assistance in locating this evidence in the record. The trial court's response

corrected the jury's misunderstanding about the location of the statements, informing the jury that the statements they heard at trial could be found in testimony and exhibits.

In challenging this interpretation, defendant seizes on the introductory phrase used by the trial court. Defendant argues that by telling the jury that "we all agree" there was evidence of those statements elsewhere, the court erroneously suggested that everyone agreed that he actually made the statements. This argument, however, is not supported by the language that the court used. The court stated that there was "testimony about those statements" and "exhibits containing such statements." This does not translate into saying that Castro's statements to the police, as shown in the videotaped recording, is more credible than her trial testimony.

Moreover, the trial court did not respond to the jury's request in a vacuum. The jury heard the evidence, and the court's response came on the heels of closing arguments. In that context, the jury reasonably could not have understood the trial court to announce uniform agreement that defendant had made the incriminating statements when this was a hotly contested issue at trial. Indeed, defense counsel discussed at length Castro's testimony and videotaped police interview in his closing argument. He argued that the police "were totally turning the screws on her," coercing her to say that defendant made the incriminating statements. He explained that "there was nothing in those text messages . . . that said that he did it," and that Castro recanted her prior statements about the alleged admissions. He then told the jury: "It's for you to decide [whether Castro was credible when she testified that she was coerced] because you . . . are the fact-finders." Against this background, it is not surprising that defendant's trial counsel only objected that the additional language in the court's response was "surplusage," and not that it wholly undermined a key part of the defense.

Defendant's contention also cannot be squared with the other instructions that the trial court gave to the jury. The court instructed the jury that they were "the judges of the facts," and that they "alone must judge the credibility or believability of the witnesses." The court also explained that its own limited role did not extend to fact finding, and that the jury should not take anything the trial court may have said or done to indicate

otherwise. We presume the jury understood and followed these instructions (*People v. Holt* (1997) 15 Cal.4th 619, 662), and we find nothing in the trial court's response to the jury's request that would have undermined them.

In short, the trial court's response to the jury's request for assistance did not endorse the view that defendant had made the incriminating statements. Rather, the response corrected the jury's misunderstanding and accurately told them that the statements they heard at trial were mentioned in testimony and exhibits. Thus, the trial court did not abuse its discretion when it responded to the jury's request. (*People v. Moore*, *supra*, 44 Cal.App.4th at p. 1331.)

B. SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE GANG ENHANCEMENTS

The jury found that the prosecution had proved the gang allegation beyond a reasonable doubt as to all counts. Defendant does not challenge that finding with respect to the Lopez murder (i.e., count 5). He does contend, however, that the evidence did not support the gang allegation as it applies to the John Doe shooting or his subsequent possession of a firearm and narcotics (i.e., counts 1-4).

Section 186.22, subdivision (b)(1), provides for enhanced criminal penalties for any 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." In determining the sufficiency of the gang evidence, we review the record in the light most favorable to the prosecution. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) This requires us to "presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence" and precludes us from reweighing the evidence. (*Id*. at p. 60.) When applying this standard of review, we find insufficient evidence to uphold the gang allegation as to counts 1 to 4.

1. *The John Doe Shooting*

The prosecution presented most of its gang evidence through an expert. The expert described the Clover gang's territory, various cliques, rival gangs (e.g., Lincoln Heights gang), and primary activities (e.g., firearm and narcotics possession). The expert

testified that defendant is a Clover gang member, as indicated by his gang tattoos, and that all the crimes charged in this case occurred within Clover gang territory.

In addressing the John Doe shooting, the expert stated that it was done for the benefit of the Clover gang. He explained that the prior physical altercation "could be seen as a form of disrespect," and defendant could not back down without harming his reputation within the gang. By responding violently, defendant would enhance his own reputation and would further benefit the gang by spreading fear in the community so that citizens would be reluctant to cooperate with the police in gang-related affairs.

Even if the evidence would support an inference that the shooting benefitted the Clover gang (*People v. Albillar*, *supra*, 51 Cal.4th at p. 63), too little is known about the altercation to support a finding that the shooting was done with the specific intent to promote, further, or assist criminal conduct by Clover gang members. The jury knew nothing about John Doe (e.g., whether he was a stranger, a visitor to the community, or a gang member). The jury knew nothing about the cause of the altercation (e.g., whether it was a personal squabble, a chance encounter on the street, or a gang dispute). The jury knew nothing about what was said during the altercation (e.g., whether there were personal insults, threats, or a gang challenge). For all that was known, the altercation could have been a personal dispute between two high school enemies, an encounter with a stranger who threatened and assaulted defendant, or something else.

Although we review the record favorably to the prosecution, we cannot sustain the imposition of a gang enhancement absent substantial evidence supporting the allegation. The record must contain evidence—not speculation. (*People v. Ramon* (2009) 175 Cal.App.4th 843, 851.) Absent any meaningful information about the altercation, the jury could only speculate among various possibilities. "Speculation is not substantial evidence." (*Ibid*.) The jury heard that two men bumped into each other, the victim swung at defendant, and defendant shot at the victim in gang territory. Beyond that, the jury knew only that defendant was a gang member who previously had used the gun to shoot Lopez. The fact that defendant is a gang member who committed prior gang crimes does not constitute substantial evidence. The record must contain more than "the

defendant's record of prior offenses and past gang activities or personal affiliations" (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762), as the gang enhancement "does not criminalize mere gang membership" (*People v. Gardeley* (1996) 14 Cal.4th 605, 623).

This left the jury, then, with the expert's views. The prosecution, however, may not fill an evidentiary void with expert opinion. A jury may rely on expert testimony about gang culture and habits (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930), but an expert's opinion, without more, will not do (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657). The expert testimony must be accompanied by "some substantive factual evidentiary basis" (*id.* at p. 661) "from which the jury could reasonably infer the crime was gang related" within the meaning of section 186.22, subdivision (b)(1). (*Ferraez, supra*, at p. 931). There was no factual basis of that kind here.

2. *Possession of a Firearm and Narcotics*

The same flaw is found when examining the gang allegation as applied to the possession counts.

When defendant was arrested in the park, he had a firearm and methamphetamine concealed in his clothing. The prosecution's gang expert opined that defendant possessed the firearm and methamphetamine in association with and for the benefit of the gang. He testified that the crimes were committed in association with the gang because defendant was with another gang member when he was arrested with the contraband. The crimes benefited the gang, he added, because defendant's possession of a gun creates fear in the community.

The expert's opinion is insufficient to sustain the gang allegation. While defendant was "in the presence of" another gang member (as the parties stipulated), there was no evidence that the two men "came together as *gang members*" to possess drugs and a firearm. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 62.) The arresting officer testified that when he arrived on the scene, two other officers were already speaking to defendant and his fellow gang member. The arresting officer did not see how these two men came together, did not know why they were together, and did not observe them doing anything

together (other than speaking to the police).[5] There was no evidence that defendant was using or selling methamphetamine in the park, that he used or displayed the gun, or that he did something that would contribute to an atmosphere of fear in the community.

On this record, the gang allegation cannot be sustained because there is insufficient evidence that the crimes were committed with the specific intent to promote or assist criminal conduct by Clover gang members. (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1361 [insufficient evidence to support an inference that the defendant committed the robbery with the requisite specific intent, absent evidence of concerted action among the gang members present]; *People v. Ochoa*, *supra*, 179 Cal.App.4th at pp. 661-662 [insufficient evidence that a gang member's carjacking was gang, not personally, motivated]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 227 & fn. 9 [insufficient evidence that shooting into a house during a birthday party had "any specific gang motive" merely because the defendant was a gang member and the party occurred in a gang area]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1195-1196 [insufficient evidence that a gang member's illegal possession of a knife, though admittedly carried for protection, was specifically intended to aid criminal conduct by gang members].)[6]

C. THE IMPOSITION OF THE UPPER TERM ON COUNT 1

In sentencing defendant for assault with a semiautomatic firearm, the trial court selected the upper base term of nine years. The court stated that the upper term was appropriate because "defendant was on parole [for a 2009 robbery conviction] at the time

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[5] The arresting officer did testify, without objection, that he went to the park after receiving a radio call that two young men were possibly drinking alcohol and smoking narcotics there. But there was no competent evidence that defendant and his fellow gang member were the two men who were the subject of the radio call.

[6] When courts have upheld the imposition of a gang enhancement, they have done so in cases with substantial evidence not present here. (See, e.g., *People v. Williams* (2009) 170 Cal.App.4th 587, 625 [drugs and firearm found in a house with numerous gang members and evidence of drugs sales]; *People v. Leon* (2008) 161 Cal.App.4th 149, 163 [gang member carried and fired the gun in the course of a gang-related burglary].)

of this offense." The court then doubled the nine-year term under the Three Strikes law based on that 2009 robbery conviction.

Defendant contends that the trial court's use of his parole status to impose the upper term constituted an impermissible dual use of facts. Defendant forfeited this issue by failing to raise it in the trial court. *People v. Scott* (1994) 9 Cal.4th 331, 353 [waiver doctrine applies to claims of error in making discretionary sentencing choices such as "double-count[ing] a particular sentencing factor"]. This contention, moreover, lacks merit. It is true, as a general proposition, that a sentencing court may not select the upper term based on a fact underlying an enhancement for which punishment is imposed. (Cal. Rules of Court, rule 4.420(c).) But this general rule does not apply here because the Three Strikes law is an alternative sentencing scheme, not an enhancement subject to the dual use proscription. (*People v. Cressy* (1996) 47 Cal.App.4th 981, 991.) Thus, there was no impermissible dual use of defendant's prior conviction. (See also *People v. Yim* (2007) 152 Cal.App.4th 366, 369 ["Parole status and performance on parole are distinct aggravating factors. Each is distinct from the aggravating factors of having numerous prior convictions and having served prior prison terms."].)

DISPOSITION

The judgment is modified to strike the gang enhancements on counts 1 through 4, so that the aggregate determinate sentence on counts 1 through 4 is 37 years, rather than 53 years, to be served prior to the consecutive indeterminate sentence of 75 years to life on count 5. As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

BLUMENFELD, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.