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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN VENEGAS et al., Defendants and Appellants.	B233131 (Los Angeles County Super. Ct. No. BA362787)

APPEAL from a judgment of the Superior Court of Los Angeles County. Anne H. Egerton, Judge. Affirmed.

Richard L. Rubin, under appointment by the Court of Appeal, for Defendant and Appellant Christian Venegas.

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

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

A jury convicted appellants Christian Venegas and Jason Romero of first degree murder. The jury also found true allegations that a principal personally discharged a firearm causing great bodily injury or death, and that appellants committed the crime for the benefit of a gang. A third codefendant, Hernaldo Ramos, was acquitted of all charges. On appeal, Romero contends: (1) the trial court erred in failing to adequately define "provocation" in the jury instructions; (2) the trial court's jury instructions relating to aiding and abetting, the natural and probable consequences doctrine, and murder, did not demand an adequate finding on deliberation; and (3) there was insufficient evidence to support a true finding on the "primary activities" element of the gang enhancement. Venegas joins two of Romero's arguments and further contends: (1) the trial court prejudicially erred in refusing to allow Venegas to impeach codefendant Ramos with evidence of an arrest; (2) the consecutive firearm use enhancement of Penal Code section 12022.53, subdivision (d) violates the Eighth Amendment's prohibition on cruel and unusual punishment; and (3) cumulative errors require reversal. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On August 7, 2009, Jose Romero, Pedro Romero, and Miguel Ramirez were on a street in East Los Angeles. Defendants Jason Romero and Christian Venegas approached the group.[2] Romero was a known member of the Laguna Park Vikings gang. Venegas was an affiliate of the gang. Romero asked: "Where are you from?" Jose responded that he was from "Westside 18," indicating he was a member of the 18th Street gang. Pedro was also an 18th Street gang member. Jose and Romero engaged in a fistfight. Jose knocked Romero to the ground. Romero stood and ran away, along with Venegas.

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1 We summarize the facts in accordance with the usual rules on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263 (*Virgil*).)

2 To avoid confusion, we will refer to Jose and Pedro Romero by their first names, and to defendant Jason Romero by his last name, or collectively with Venegas as "appellants."

Romero went to the home of Hernaldo Ramos. Ramos was not a gang member, but he had known Romero since Romero was a child. Romero woke Ramos up. Romero told Ramos he had been in a fight on the corner and he needed a ride. The two men got into Ramos's car. As Ramos drove, he and Romero saw Venegas running. Venegas got into the back seat of the car. As Ramos drove past Jose, Pedro, and Ramirez, either Romero or Venegas said, "slow down." Venegas then fired a gun from the back seat window of the car. Jose was shot and killed.

The People charged Romero, Venegas, and Ramos each with one count of first degree murder (Pen. Code, § 187, subd. (a));[3] and two counts of attempted, willful, deliberate, and premeditated murder (§§ 187, subd. (a), 664, subd. (a)). As to the murder charge, the People alleged a principal personally and intentionally discharged a firearm, causing great bodily injury and death (§ 12022.53, subds. (d), (e)(1)). On all counts, the People alleged a principal personally and intentionally used and discharged a firearm (§ 12022.53, subds. (b), (c), (e)(1)). The People also alleged the defendants committed the charged crimes for the benefit of, at the direction of, and in association with a criminal street gang with the intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)).

The three defendants were tried jointly. Ramos was the only defendant to testify at trial. The jury acquitted Ramos of all charges. The jury acquitted Romero and Venegas on the attempted murder charges. However, the jury found Romero and Venegas guilty of first degree murder, and found all of the charged allegations true. The trial court sentenced Romero and Venegas to prison terms of 50 years to life.

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3 All further section references are to the Penal Code unless otherwise specified.

DISCUSSION

I. There Was No Instructional Error

A. The Trial Court Did Not Err in Failing to Define "Provocation" in the Jury Instructions (Romero and Venegas)

Appellants contend the trial court should have explicitly defined the word "provocation" in the jury instructions. We find no error.

i. Background

When discussing proposed jury instructions, Venegas's counsel requested CALCRIM Nos. 571 and 603—instructions on voluntary manslaughter. The trial court rejected the request, concluding in part there was no substantial evidence to support a theory that provocation reduced the crime to voluntary manslaughter. However, the court indicated it would instruct the jury with CALCRIM No. 522, on the theory that provocation insufficient to reduce murder to manslaughter might still be sufficient to reduce a murder from first to second degree. Thus, after instructing the jury with CALCRIM Nos. 520 and 521 on murder, the court continued: "Provocation may reduce a murder from first degree to second degree. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder, but was provoked, consider the provocation in deciding whether the crime was first or second-degree murder."[4]

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[4] The trial court gave CALCRIM Nos. 520 and 521, including a portion regarding the degrees of murder, as follows: "If you decide the defendant has committed murder, you must decide whether it is murder of the first or second-degree. The defendant has been prosecuted for first degree murder under two theories: (1), The murder was willful, deliberate and premeditated; and (2), the murder was committed by shooting a firearm from a motor vehicle. [¶] Each theory of first-degree murder has different requirements and I will instruct you on both. [¶] You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder, but all of you do not need to agree on the same theory. The defendant is guilty of first-degree murder if the People have proved that he acted willfully, deliberately and with premeditation. [¶] The defendant acted willfully if he intended to kill. [¶] The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. [¶] The defendant acted with

ii. Discussion

Appellants now contend the trial court gave prejudicially misleading instructions by failing to define provocation. They argue that by failing to define provocation, the court allowed the jury to reason that only provocation eliciting a homicidal response would be sufficient to reduce the degree of murder. We disagree.[5]

In *Hernandez, supra*, 183 Cal.App.4th 1327, the Court of Appeal considered arguments similar to those of appellants in this case. In *Hernandez*, the defendant requested an instruction on provocation that reduces murder from first to second degree.

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premeditation if he decided to kill before committing the act that caused death. The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. [¶] A decision to kill made rashly, impulsively or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] Here's the second theory. The defendant is also guilty of first degree murder if the People have proved that the defendant murdered by shooting a firearm from a motor vehicle. The defendant committed this kind of murder if, one, he shot a firearm from a motor vehicle, two, he intentionally shot at a person who was outside the vehicle, and three, he intended to kill that person. [¶] . . . [¶] All other murders are of the second degree. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden you must find the defendant not guilty of first degree murder."

[5] The People contend appellants forfeited this argument by failing to request an instruction defining provocation. When the trial court's instructions are correct, the trial court is "under no obligation to amplify or explain in the absence of a request that it do so." (*People v. Mayfield* (1997) 14 Cal.4th 668, 778.) In such cases, a defendant cannot complain on appeal that the instruction was incomplete or ambiguous if he or she did not request a supplemental or clarifying instruction. (*Id.* at pp. 778-779.) However, appellants here do not concede that the provocation instruction was correct but incomplete in this case. They at least nominally assert the instruction given was misleading and incorrect. A misleading jury instruction may affect a defendant's substantial rights, and may be addressed on appeal despite a failure to object in the trial court. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1331, fn. 2 (*Hernandez*); *People v. Lewis* (2009) 46 Cal.4th 1255, 1315, fn. 43.) We therefore consider appellants' argument.

As in this case, the court gave CALCRIM No. 522. The defendant did not request modifications or additions to CALCRIM No. 522. Yet, on appeal, the defendant argued CALCRIM No. 522 was incomplete and misleading because it did not specify that provocation can negate premeditation and deliberation, and because it did not explicitly instruct the jury that provocation insufficient for manslaughter may be sufficient for second degree murder. (*Hernandez*, at p. 1331.)

The Court of Appeal rejected these arguments. The court first noted that "an instruction on provocation for second degree murder is a pinpoint instruction that need not be given sua sponte by the trial court." (*Hernandez*, *supra*, 183 Cal.App.4th at p. 1333, citing *People v. Rogers* (2006) 39 Cal.4th 826, 878-879.) That such an instruction is not required at all supports the conclusion that "it is not misleading to instruct on provocation without explicitly stating that provocation can negate premeditation and deliberation." (*Hernandez*, at pp. 1333-1334.) The court reasoned that when given with CALCRIM No. 521, which defines first and second degree murder, "there is no reasonable likelihood the jury did not understand this concept. [T]he jury was instructed that unless the defendant acted with premeditation and deliberation, he is guilty of second, not first, degree murder, and that a rash, impulsive decision to kill is not deliberate and premeditated." (*Hernandez*, at p. 1334.)

The *Hernandez* court further reasoned:

> "In this context, provocation was not used in a technical sense peculiar to the law, and we assume the jurors were aware of the common meaning of the term. (See *People v. Rowland* (1992) 4 Cal.4th 238, 270-271.) Provocation means 'something that provokes, arouses, or stimulates'; provoke means 'to arouse to a feeling or action[;] . . . to incite to anger.' (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 938; see *People v. Ward* (2005) 36 Cal.4th 186, 215 ['provocation . . . is the defendant's emotional reaction to the conduct of another, which emotion may negate a requisite mental state'].) Considering CALCRIM Nos. 521 and 522 together, the jurors would have understood that provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation. [¶] We are satisfied that, even without express instruction, the jurors understood that the existence of provocation can support the absence of premeditation and deliberation. Thus, without a

> request for further instruction, the trial court was not required to amplify the instructions to explain this point. (Cf. *People v. Cole* (2004) 33 Cal.4th 1158, 1211-1212 [trial court has no sua sponte duty to give amplified instruction stating that provocation can negate intent to torture for murder by torture].)" (*Hernandez, supra,* 183 Cal.App.4th at p. 1334.)

This reasoning is applicable here. The trial court's instruction on provocation was not misleading because it did not include a definition of "provocation." We also disagree with appellants' contention that without a definition, the jury was likely to conclude provocation would only reduce a murder from first to second degree if the defendant was provoked to have a "homicidal reaction." The instructions on murder and provocation did not suggest the jury should focus on whether the defendant responded reasonably to provocation. Instead, the instructions as a whole informed the jury that first degree murder requires premeditation and deliberation, all other murders are second degree murders, and the jury could consider whether the defendant was provoked in determining the degree of any murder. (*People v. Carrington* (2009) 47 Cal.4th 145, 192 (*Carrington*) [correctness of a jury instruction determined from the entire charge of the court].) As in *Hernandez*, we are satisfied the jurors would have understood that provocation might negate premeditation or deliberation elements, and that their role was to determine whether any provocation supported the absence of premeditation and deliberation in this case.

People v. Najera (2006) 138 Cal.App.4th 212, is inapposite. In *Najera*, the prosecutor misstated the law when describing the level of provocation needed to negate malice. (*Id.* at p. 222.) In closing argument, the prosecutor also asked the jury to focus on how the defendant responded to provocation and the reasonableness of the response, rather than whether the defendant's "reason was obscured by a ' "provocation" ' sufficient to cause an ordinary person of average disposition to act rashly and without deliberation." (*Id.* at p. 223.) On appeal, the court concluded the prosecutor's statements mixed correct and incorrect statements of law and created confusion, evidenced by questions from the jury. This is not a prosecutorial misconduct case. The jury instruction

on provocation accurately stated the law and no party misstated the law on provocation. The reasoning of *Najera* does not apply to this case.

B. The Trial Court's Instructions on Aiding and Abetting Liability Were Proper (Romero)

Romero contends the trial court's instructions on aiding and abetting liability were improper because they did not require the jury to find the aider and abettor personally deliberated before concluding he was also guilty of first degree murder. Romero also argues the instructions should have explicitly stated the defendant could only be guilty of first degree murder under the natural and probable consequences doctrine if first degree murder was a reasonably foreseeable consequence of the target crime. We find no prejudicial error.

i. Background

At trial, the prosecution argued Venegas was the shooter in the incident, and Romero was liable on an aiding and abetting theory. The trial court instructed the jury with CALCRIM Nos. 400, 401, and 403 on aiding and abetting and the natural and probable consequences doctrine. As mentioned above, the trial court also gave CALCRIM Nos. 520 and 521 to instruct the jury on murder.

1. "Straight" Aiding and Abetting

Romero first contends the instructions on aiding and abetting liability were misleading because they did not require the jury to find the aider and abettor personally deliberated, and this was necessary for the jury to conclude he was guilty of first degree murder. The People contend Romero forfeited this argument by failing to request a clarifying instruction, and the instructions were not misleading.

We agree that Romero forfeited this argument. CALCRIM No. 400 was a correct statement of the law. To the extent Romero believed the instruction was inaccurate when applied to the facts of the case, he was required to object or request a modification or clarifying instruction at trial. (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 849.)

Even so, we note the trial court's instructions were not misleading or inaccurate, either in general or as applied to this case. Romero relies on *People v. Nero* (2010) 181 Cal.App.4th 504 and *People v. Samaniego* (2009) 172 Cal.App.4th 1148, to support his argument. In both cases, the court concluded the version of CALCRIM No. 400 used was potentially misleading. But, in both cases, the then version of CALCRIM No. 400 stated a person was "equally guilty" of the crime committed by the perpetrator, whether he or she personally committed it or aided and abetted the perpetrator. In *Nero* and *Samaniego*, the respective courts concluded the instruction could be misleading because an aider and abettor's criminal liability depends on his own mental state. An aider and abettor's guilt could therefore be different than the perpetrator's if he had a more or less culpable mental state. (*Samaniego,* at p. 1164; *Nero*, at p. 518.) The current version of CALCRIM No. 400, and the one used at the trial in this case, instructs that "[a] person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator." The instruction does not use the phrase "equally guilty." As such, it does not carry the same potential to mislead as the former version. Instead, the instruction accurately states that an aider and abettor is guilty when he or she aids and abets a crime, without suggesting that the jury need not consider the aider and abettor's relevant mental state.

Even had Romero preserved his argument, we would find no prejudicial error for another reason. As noted above, when considering a claim that an instruction was subject to an incorrect interpretation, we look at the instructions as a whole to determine whether it is reasonably likely they caused the jury to misapply the law. (*Carrington, supra,* 47 Cal.4th at p. 192; *People v. Solomon* (2010) 49 Cal.4th 792, 822.) The trial court not only instructed the jury with CALCRIM No. 400, but also CALCRIM Nos. 401, 520, and 521. CALCRIM No. 401 explained that to find a defendant guilty of a crime as an aider and abettor, the People were required to prove the defendant "knew that the perpetrator intended to commit the crime," and "[b]efore or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime." The instruction also informed the jury "[s]omeone *aids and abets* a crime if he or she knows

of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." CALCRIM No. 520 explained that to prove the defendant was guilty of murder, the People were required to show the defendant committed an act that caused the death of another person, and the defendant acted with malice aforethought. CALCRIM No. 521, stated in part that the defendant is guilty of first degree murder "if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before committing the act that caused death." The instruction stated that if the People had not met their burden of establishing the elements of first degree murder beyond a reasonable doubt, the jury was required to find the defendant not guilty of first degree murder.

Taken together, the instructions ensured that the jury would only find Romero guilty of first degree murder, even as an aider and abettor, if it concluded he acted willfully and with intent to kill. (*Lopez, supra,* 198 Cal.App.4th at pp. 1119-1120.) We assume the jury followed the instructions rather than disregarding them. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) It is not reasonably likely the trial court's instructions caused the jury to misapply the law on "straight" aiding and abetting.

2. Natural and Probable Consequences

Similarly, Romero argues the instruction on natural and probable consequences was incomplete or misleading because it allowed the jury to conclude "murder," rather than first degree murder, was a natural and probable consequence of the target crime, in this case, assault. The People assert the natural and probable consequences theory applied only to Ramos, and the evidence showed nothing less than that Romero acted with deliberation and premeditation.

Even if we assume Romero did not forfeit his argument by failing to request a modified instruction, we would find no error. As an initial matter, we agree with the People that the record indicates the natural and probable consequences theory was only

argued as to Ramos, not Romero. The prosecutor contended Romero was guilty of directly aiding and abetting murder.[6]

However, even were this not the case, we would find no prejudicial error. Romero relies on *People v. Hart* (2009) 176 Cal.App.4th 662 (*Hart*), for the proposition that the trial court should have instructed the jury it could convict Romero of first degree murder under the natural and probable consequences doctrine only if it concluded premeditated and deliberate murder was the reasonably foreseeable consequence of assault. However, *Hart* concerned attempted premeditated murder, and the California Supreme Court recently rejected the *Hart* analysis in *People v. Favor* (2012) 54 Cal.4th 868, 876-880 (*Favor*).[7] *Hart* is not good authority for Romero's argument here.

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[6] For example, after describing the law of aiding and abetting in his closing statement, the prosecutor argued: "How do you have it in this case? Obviously, we've got to talk about Jason Romero and Hernaldo Ramos. Let's take Jason Romero first. . . . [H]e obviously goes and arranges for the ride. . . . [¶] . . . Obviously the two of them, Venegas and Romero, have already talked about, you go wait around the corner, we'll go pick you up. . . . [¶] So, Romero, he arranges for the ride. He gets the wheels for this operation. [¶] . . . [¶] Ramos is the guy who actually gets them there . . . . [¶] Romero is the one who's there, who instigates the thing, gets the ride, let's go. [¶] Natural and probable consequences, why is it important? . . . . [¶] Even if you believe that he truly only thought—and I'm talking about Ramos right now—that it was going to be an assault, it was going to be some type of a fight, even if you believe that . . . . [¶] . . . [L]et's say you just believe Ramos only thought it was going to be a fight, that's it. Under the natural and probable consequences theory the law basically says even if it was just going to be that . . . under all the circumstances a reasonable person, and in the defendant Ramos position, would have known that the commission of murder or attempted murder was a natural and probable consequence of the assault."

[7] In *Favor*, our high court concluded: "Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation." (*Favor, supra*, 54 Cal.4th at p. 880.) This was an explicit rejection of the conclusion in *Hart*.

We note that *Hart* relied extensively on *People v. Woods* (1992) 8 Cal.App.4th 1570 (*Woods*). The court in *Woods* found the trial court erred when it told the jury it could not find the aider and abettor guilty of murder in the second degree if it determined the perpetrator was guilty of first degree murder. (*Woods*, at p. 1579.) The *Favor* court rejected *Hart* in part because it relied on *Woods*, which involved "murder—not attempted murder—where there are different degrees of the offense." (*Favor*, *supra*, 54 Cal.4th at p. 877.) *Favor* did not otherwise address the analysis in *Woods.* Yet, even if *Woods* remains good law, it does not require a reversal in this case. In *Woods*, the court explained: "[T]he trial court need not instruct on a particular necessarily included offense if the evidence is such that the aider and abettor, if guilty at all, is guilty of something beyond that lesser offense, i.e., if the evidence establishes that a greater offense was a reasonably foreseeable consequence of the criminal act originally contemplated, and no evidence suggests otherwise." (*Woods,* at p. 1593.)

Here, the evidence established that as to Romero, first degree murder was a reasonably foreseeable consequence of the target assault, and no evidence suggested otherwise. The jury did not receive incorrect information as the *Woods* jury did. Instead, the jury was properly instructed on the elements and definitions to be considered in determining whether Romero was guilty of first or second degree murder. In addition, the court specifically instructed the jury that should it find the defendant guilty of murder, it would separately need to determine the degree. We thus conclude the trial court's instructions were proper. (See *People v. Cummins* (2005) 127 Cal.App.4th 667, 680-681 [natural and probable consequences instructions proper in attempted premeditated murder case where defendant was an active participant in all steps that led to the attempt and his conduct made him no less blameworthy than perpetrator].)

Finally, even if the trial court should have explicitly instructed the jury that first degree murder, not just murder, must have been a reasonably foreseeable consequence of the assault, we would find any error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Prieto* (2003) 30 Cal.4th 226, 256.) The evidence was overwhelming that if Romero was guilty at all, he was guilty of a

deliberate, premeditated murder. Appellants instigated a conflict with the victims, by approaching them and issuing a gang challenge. When Romero was beaten in the fistfight, he and Venegas left the scene of the conflict, secured a ride, located a weapon, returned to find the victims, and Venegas shot at Jose from the back seat of the car. The evidence offered no indication that the murder was anything other than willful, deliberate, and premeditated. (See *People v. Canizalez, supra,* 197 Cal.App.4th at p. 853.)

Indeed, during its deliberations, the jury asked whether it could find Romero guilty of first degree murder as an aider and abettor, even if it concluded Venegas was not the perpetrator. This question suggested that while the jurors may have had some doubt that Venegas was the shooter, they had no doubt Romero was guilty of first degree murder. Even had the trial court instructed that Romero could be guilty of a lesser degree of murder than Venegas, or that first degree murder, not just murder, had to be the natural and probable consequence of the target assault, it is clear the jury would still have found Romero guilty of first degree murder.

II. Sufficient Evidence Supported the Jury's Finding on the Gang Enhancement (Romero and Venegas)

Appellants argue there was no substantial evidence to support the "primary activities" element of the gang enhancement. The record does not support their contention.

A. Background

At trial, the People offered testimony from gang expert Edmundo Torres. Torres was a gang detective in East Los Angeles for five years. He also worked with the Compton gang task force for one year, and in East Los Angeles on patrol for six years. When Torres worked patrol in East Los Angeles, he came into contact with gang members on a daily basis. The Laguna Park Vikings were one of the three largest gangs in the area. As a gang detective, Torres investigated gang-related crimes and targeted the most active gangs in East Los Angeles. Torres also worked in the county jail system and interviewed over 1,000 inmates who were primarily Hispanic gang members. He additionally received training in classes or conferences about gangs.

Torres testified he was familiar with the Laguna Park Vikings. He described the gang's territory, hand signs, and tattoos. The prosecutor asked: "What are the major activities of the gang?" Torres answered: "I would say assaults on rival gang members, narcotics sales, vandalism, meaning graffiti." Torres later clarified that when using the term "assaults," he meant assaults with firearms. Torres testified he was familiar with Alexander Marquez, a Laguna Park Vikings gang member. Torres described a crime in which Marquez assaulted a peace officer with a semi-automatic firearm. Torres became familiar with the crime by speaking with the police officers involved. Torres also testified he was familiar with Miguel Angel Reynoso, a Laguna Park Vikings gang member, and a crime in which Reynoso committed a voluntary manslaughter. Torres assisted Los Angeles Police Department homicide detectives in investigating the crime.

The trial court instructed the jury with CALCRIM No. 1401, as follows, in relevant part, "A criminal street gang is any ongoing organization, association or group of three or more persons, whether formal or informal: [¶] (1) That has a common name or common identifying sign or symbol; [¶] (2) That has, as one or more of [its] primary activities, the commission of assault with a firearm or sale of controlled substances; [¶] AND (3) Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity. [¶] In order to qualify as a primary activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happened to be members of the group. . . . [¶] . . . [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

B. Discussion

"To trigger the gang statute's sentence-enhancement provision (§ 186.22, subd. (b)), the trier of fact must find that one of the alleged criminal street gang's primary activities is the commission of one or more of certain crimes listed in the gang statute." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322 (*Sengpadychith*).) The requirement may be satisfied by the testimony of a police gang expert who opines that the primary activities of the gang are statutorily listed crimes, including crimes reflecting past conduct by members of the gang. (*Ibid.*; *People v. Gardeley* (1996) 14 Cal.4th 605, 611, 620.)

Appellants contend Torres's testimony failed to provide sufficient evidence to support the primary activities element of the enhancement because he did not explicitly testify about the gang's "primary" activities. Instead, the prosecutor asked Torres about the gang's "major" activities, and Torres responded he "would say" the gang's major activities were assaults with firearms, narcotics sales, and vandalism.[8] Appellants assert "major" could have meant important, or serious, without describing the frequency of the activities. We disagree with this interpretation.

People v. Margarejo (2008) 162 Cal.App.4th 102, is instructive. In *Margarejo*, the prosecutor asked a police gang expert about the gang's primary activities. In response, the expert referred only to "activities," but did not use "primary" in his answer. The court rejected the defendant's argument that the testimony was not sufficient evidence to support a true finding on the primary activities element. The court explained "the jury had ample reason to infer that [the expert's] answer implicitly incorporated the word 'primary' from the question. Ordinary human communication often is flowing and contextual. [The defendant's] objection here calls for an unreasonably restrictive

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[8] Although Torres included vandalism in this list, the trial court deliberately omitted vandalism from the jury instruction on the primary activities element. Thus, the jury was instructed to consider only whether the People had proved the Laguna Park Vikings had assault with a firearm or sale of controlled substances as one or more of its primary activities. Both crimes are enumerated in the gang statute. (§ 186.22, subd. (e)(1), (4).)

interpretation of [the expert's] answer, which we respectfully decline." (*Id.* at p. 107.) Similarly, in this case, while "major" is not always a synonym of "primary," the jury could reasonably infer Torres was offering an opinion about the gang's chief or principal activities, rather than simply the most serious, but only occasional ones. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464, citing *Sengpadychith, supra,* 26 Cal.4th at p. 323.) Torres had significant experience investigating gang crimes in East Los Angeles, including those of the Laguna Park Vikings. His testimony describing his experience and training was sufficient to establish a foundation for his opinion on the activities of the gang. There was substantial evidence to support a jury finding that the Laguna Park Vikings is a criminal street gang. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330.)

Appellants' reliance on *In re Alexander L.* (2007) 149 Cal.App.4th 605, is misplaced. In *Alexander L.*, when asked about the gang's primary activities, the gang expert testified "he knew" the gang had committed "quite a few" enumerated crimes. No information establishing the reliability of his opinion was elicited. On cross-examination, the expert testified that the majority of the cases connected to the gang that he had run across were graffiti related. (*Id.* at pp. 611-612.) In contrast, Torres's opinion was based on his several years of experience investigating gang crimes, and his work with other law enforcement officials investigating specific crimes committed by gang members. Torres was unequivocal that the "major" activities of the gang included assaults with firearms and narcotics sales. The court's analysis in *Alexander L.* is not persuasive here. (*People v. Martinez, supra,* 158 Cal.App.4th at p. 1330.)

III. The Trial Court Did Not Err in Refusing to Allow Impeachment of Ramos With Evidence of an Unrelated Arrest (Venegas)

Venegas contends the trial court erred when it refused to allow him to impeach Ramos with evidence of his arrest for possession of marijuana for sale and illegal firearm possession. We find no error.

A. Background

After determining he would testify on his own behalf, Ramos moved to preclude the other parties from impeaching him with evidence of a September 2009 arrest he suffered (the Maywood arrest).[9] The trial court reviewed a police report relating to the arrest and summarized the following details: "[T]he two fellows who were running this [auto dealership/]repo place . . . were sort of the main perpetrators, for lack of a better word. [¶] Mr. Ramos worked there. There's not a lot of discussion of Mr. Ramos' role . . . . [¶] The police did find, upon execution of the search warrant at the Repo Depot, a lot of dope and a number of guns – a loaded semi-auto, an uzi, three handguns, loaded – and a hidden compartment in one of the vehicles with a kilo of cocaine and more guns. [¶] . . . [¶] Then it just says Ramos was also in possession of marijuana." The court asked defense counsel what their theory was on Ramos's role in the alleged crimes. Romero's counsel argued that in an interview with police, Ramos repeatedly raised the issue of the Maywood arrest, and his concern about that incident tended to show a bias or motive to lie to law enforcement.

After reviewing the transcript of the police interview with Ramos, the court granted the motion to preclude impeachment based on the Maywood arrest. The court explained:

> "Number one, while possession of marijuana for sale is a crime of moral turpitude, not only was there no conviction, the People didn't even file it. It was a D.A. reject. And while conduct is admissible, arguably, it's much more problematic when there's been no conviction and in fact no filing, both in terms of the merits of the charge and undue consumption of time where we do not just have a certified docket of conviction. [¶] Number two, to the extent that the argument of Mr. Romero is that somehow Mr. Ramos may have been making up things about defendants Venegas and Romero in the hopes of getting some kind of consideration on his Maywood arrest, there's just nothing in the transcript—no disrespect to anybody—to support that theory. [¶] While Mr. Ramos expresses, obviously, a lot of concern and in fact fear, it seems pretty clear that what he's talking about is this case. [¶] . . . He realizes he's

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[9] Appellants' trial counsel both indicated they wished to impeach Ramos with evidence of the arrest.

> in very deep hot water. Certainly [the Sergeant conducting the interview] never says anything to suggest that if [Ramos] provides information about the murder investigation that he'll somehow get some consideration on the Maywood case. [¶] I think the probative value is between zero and very small and in terms of undue consumption of time, it's great."

Ramos testified on his own behalf at trial. On cross-examination, he admitted that he had a drug abuse problem when he was younger and was going to a drug court program, drug counseling, and narcotics anonymous meetings. He further admitted he was infamous in his neighborhood for "[g]etting high." After the jury returned its verdicts, Romero filed a motion for a new trial, arguing the trial court should have allowed him to impeach Ramos with evidence of the Maywood arrest. Romero contended the trial court's ruling violated his Sixth Amendment right to confrontation, and his right to effective cross-examination. Venegas sought to join in the motion.[10] After argument, the trial court denied the new trial motion.

B. Discussion

Venegas asserts the trial court erred in refusing to allow him to impeach Ramos with evidence of the Maywood arrest, thereby violating his rights under the California Constitution, and the Sixth and Fourteenth Amendments. Venegas contends he was denied the ability to effectively cross-examine Ramos to show his bias and impeach his credibility. We disagree.[11]

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[10] The court noted that to join in Romero's motion, Venegas should have filed a written joinder and served it on the People 10 days before the hearing. However, the court allowed Venegas's counsel to argue at the hearing. The argument addressed a separate cross-examination issue.

[11] The People contend Venegas forfeited these arguments by failing to raise them below. Although Venegas objected to Ramos's motion to preclude impeachment with evidence of the Maywood arrest, he did not specifically reference the state or federal Constitution as the basis of an argument. However, Venegas's appellate arguments are the same as those advanced in the trial court, namely that the trial court would, and did err in failing to admit evidence of Ramos's prior arrest because it denied him the opportunity to cross-examine Ramos to demonstrate bias and lack of credibility. To the extent "new arguments do not invoke facts or legal standards different from those the trial

Criminal defendants have the right to cross-examine a witness regarding credibility and bias. (*Virgil, supra,* 51 Cal.4th at p. 1251.) However, judges " 'retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' " (*People v. Sully* (1991) 53 Cal.3d 1195, 1219, quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) Similarly, while article I, section 28, subdivision (d) of the California Constitution "generally provides that 'relevant evidence shall not be excluded in any criminal proceeding' . . . that constitutional provision also expressly 'preserve[s] the trial court's discretion to exclude evidence whose probative value is substantially outweighed by its potential for prejudice, confusion, or undue consumption of time. (Evid. Code, § 352.)' [Citation.] Accordingly, that provision does not affect the general policy against admitting this kind of evidence, based on the principles of Evidence Code section 352." (*People v. Chatman* (2006) 38 Cal.4th 344, 376.)

The trial court here did not abuse its discretion under Evidence Code section 352 in concluding the potential for undue consumption of time far outweighed the probative value of evidence of the Maywood arrest. (*People v. Mills* (2010) 48 Cal.4th 158, 195-196 (*Mills*).) The police report did not clearly indicate that Ramos was connected to the illegal weapons discovered at the time of the arrest. And, as the trial court reasoned, the value of the arrest for possession of marijuana for sale was minimal even for impeachment purposes, in light of the fact that no criminal charges were ever filed. The court noted there were potential problems of proof since there was no conviction and no filed charges. (*People v. Wheeler* (1992) 4 Cal.4th 284, 296-297.) The transcript of the

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court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as erroneous for the reasons actually presented to the court, had the additional legal consequence of violating the federal [and state Constitutions]," the constitutional arguments are not forfeited on appeal. (*People v. Cowan* (2010) 50 Cal.4th 401, 464, fn. 20; *People v. Partida* (2005) 37 Cal.4th 428, 436-439.)

police interview of Ramos did not support defense counsel's argument that Ramos was excessively worried about the Maywood arrest and therefore had a reason to lie about the shooting. There was no indication law enforcement suggested Ramos might receive leniency with respect to the Maywood incident if he cooperated on the shooting. Thus, the trial court did not err in excluding the impeachment evidence under section 352.

"[I]n the absence of any error under Evidence Code section 352, we also reject [Venegas's] various constitutional claims. The routine and proper application of state evidentiary law does not impinge on a defendant's due process rights. [Citation.] Additionally, 'reliance on Evidence Code section 352 to exclude evidence of marginal impeachment value . . . generally does not contravene a defendant's constitutional rights to confrontation and cross-examination.' [Citation.] 'Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citation.]" (*People v. Riccardi* (2012) 54 Cal.4th 758, 809-810; *Mills, supra,* 48 Cal.4th at p. 196.)

Moreover, any possible error was harmless under any standard. Ramos's motivation to lie and his bias were obvious and unavoidable since he was implicated in the shooting and was being tried as a codefendant. Ramos admitted he did not voluntarily go to the police after the shooting, and that he got rid of his car immediately after. His bias as a codefendant in the murder case was far more significant than any bias he may have had because of an arrest for a drug charge, or a weapons charge that may not have even involved him. The court allowed cross-examination in other areas, and Venegas's counsel successfully elicited testimony that Ramos had a drug problem and had been in drug court. The jury had ample reason to question Ramos's credibility without evidence of the Maywood arrest. (See also *Virgil, supra,* 51 Cal.4th at p. 1251 [no Sixth Amendment violation unless defendant shows prohibited cross-examination would have produced significantly different impression of witness's credibility].)

IV. No Cumulative Error (Venegas)

We have concluded the court did not err in its rulings. Thus, we reject Venegas's contention that cumulative error mandates reversal. (*People v. Burney* (2009) 47 Cal.4th 203, 256.)

V. The Imposition of a 25-years-to-life Consecutive Term Under Section 12022.53 Is Not Cruel and Unusual Punishment (Venegas)

Venegas argues section 12022.53, subdivision (d), on its face violates the Eighth Amendment prohibition against cruel and unusual punishment. Venegas contends the statute "does not recognize significant gradations of culpability depending on the severity of the current offense, fails to take mitigating factors into consideration, and arbitrarily imposes severe punishment in cases involving criminal use of a gun as compared to the use of other dangerous or deadly weapons." Venegas does not argue section 12022.53, subdivision (d) was cruel and unusual as applied to his case in particular.

We agree with the other Courts of Appeal that have considered and rejected the arguments Venegas makes here. For example, in *People v. Martinez* (1999) 76 Cal.App.4th 489 (*Martinez*), the Court of Appeal considered the argument that section 12022.53, subdivision (d) does not adequately recognize gradations of culpability depending on the severity of the offense or mitigating factors. The court explained that this was not a "fair description of the statute," which "as a whole represents a careful gradation by the Legislature of the consequences of gun use in the commission of serious crimes. The section is limited, in the first place, to convictions of certain very serious felonies. The statute then sets forth three gradations of punishment based on increasingly serious types and consequences of firearm use in the commission of the designated felonies: 10 years if the defendant merely used a firearm, 20 years if the defendant personally and intentionally discharged it, and 25 years to life if the defendant's intentional discharge of the firearm proximately caused great bodily injury. Furthermore, the provision in question is an enhancement to the base term for the underlying conviction; a trial court retains flexibility as to fixing the underlying base term for [the

underlying crime]." (*Martinez*, at p. 495, fn. omitted; see also *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1214-1215 (*Zepeda*).)

In response to the contention that the statute does not allow consideration of variations in the degree of a great bodily injury inflicted, the *Martinez* court reasoned this did not render the statute unconstitutionally excessive. "Lines must be drawn somewhere, and the Legislature has reasonably drawn the line at great bodily injury. The fact that [section 12022.53,] subdivision (d) leaves no additional room for trial court discretion based on different gradations of great bodily injury does not render the punishment cruel or unusual." (*Martinez, supra,* 76 Cal.App.4th at p. 495, citing *Harmelin v. Michigan* (1991) 501 U.S. 957, 1007-1008 (conc. opn. of Kennedy, J.).)

The *Martinez* court likewise rejected the argument that the statute is unconstitutional because it imposes a more severe punishment for an offense committed with a firearm than the same offense committed with a knife or another deadly weapon. The court found the argument "unpersuasive . . . . [S]ection 12022.53 is limited to designated felonies of a very serious type. . . . [T]he Legislature determined in enacting section 12022.53 that the use of firearms in commission of the designated felonies is such a danger that, 'substantially longer prison sentences must be imposed . . . in order to protect our citizens and to deter violent crime.' The ease with which a victim of one of the enumerated felonies could be killed or injured if a firearm is involved clearly supports a legislative distinction treating firearm offenses more harshly than the same crimes committed by other means, in order to deter the use of firearms and save lives. . . . That is this law's purpose. . . . The distinction drawn by appellant does not render section 12022.53 cruel or unusual punishment." (*Martinez, supra,* 76 Cal.App.4th at pp. 497-498, citations omitted; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 18-19.)

We agree with this analysis. It is not arbitrary for the Legislature to draw a distinction between firearm offenses and the same crimes committed by other means. (*People v. Aguilar* (1973) 32 Cal.App.3d 478, 486; *Zepeda, supra,* 87 Cal.App.4th at p. 1215.) "[A] sentence enhancement of 25 years to life is not disproportionate to a violation of . . . section 12022.53; the Legislature has determined that a significant

increase in punishment is necessary and appropriate to protect citizens and deter violent crime." (*People v. Em* (2009) 171 Cal.App.4th 964, 973.) Venegas acknowledges that other courts have rejected his arguments, but he does not specifically address the reasoning of these previous decisions other than to assert in a footnote that they were incorrectly decided. He has not even attempted to argue that the statutory penalty in this case was disproportionate to his individual culpability. (*People v. Dillon* (1983) 34 Cal.3d 441, 480.) We adopt the conclusion of *Martinez*, *Zepeda*, and other courts, that the imposition of a 25-year term under section 12022.53 does not constitute cruel and unusual punishment.

DISPOSITION

The trial court judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J