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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MALIK KEYS, Defendant and Appellant.	B270754 (Los Angeles County Super. Ct. No. TA134413)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Shultz, Judge. Affirmed in part and reversed in part, with directions.

Matthew Alger, 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, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Kathy S. Pomerantz, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Malik Keys of the following offenses: count 1— first degree murder of William Gist (Pen. Code, § 187, subd. (a))[1]; counts 2 and 3—willful, deliberate, and premeditated attempted murder respectively of Di Andrew Garcia and Eddie Gomez (§§ 664/187, subd. (a)); count 4—second degree robbery of Launey Lawson (§ 211); count 5—felony vandalism (§ 594, subd. (a)); count 6—attempted second degree robbery of Abraham Gomez (§§ 664/211); and count 8—assault with a deadly weapon on Abraham Gomez (§ 245, subd. (a)(1)). The jury found that defendant personally used a deadly or dangerous weapon in counts 1–4 and 6 (§ 12022, subd. (b)(1)), and that the offenses in counts 1–6 and 8 were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

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[1] Statutory references are to the Penal Code unless otherwise stated.

The trial court sentenced defendant to state prison for a total of 41 years to life as follows: count 1—25 years to life for first degree murder plus 1 year for use of a weapon; count 2—a consecutive term of 15 years to life for attempted murder[2]; count 3—a concurrent sentence of 15 years to life[3] plus 1 year for use of a weapon; count 4—a concurrent term of 16 years, composed of the upper term of 5 years, enhanced by 10 years for the gang finding, and 1 year for the use of a weapon; count 5—a concurrent term of 7 years, consisting of the upper term of 3 years, enhanced by 4 years for the gang finding; count 6—a concurrent term of 14 years, with an upper term of 3 years, enhanced by 10 years for the gang finding and 1 year for use of a weapon; and count 8—a stayed term of 9 years under section 654, based on the upper term of 4 years enhanced by 5 years for the gang finding.

Defendant raises the following issues on appeal: (1) the prosecutor committed misconduct by misstating the law of self-defense; (2) the evidence is insufficient to support the conviction in count 2 of attempted murder of Garcia and the finding defendant used a deadly or dangerous weapon; and (3) the trial court improperly imposed a 10-year gang enhancement on the attempted robbery conviction in count

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[2] The court imposed but stayed the weapon use finding in count 2, and dismissed the gang finding under section 1385.

[3] The court imposed but stayed punishment for use of a weapon.

6. The Attorney General concedes the deadly or dangerous weapon finding in count 2 is not supported by substantial evidence, and also that the 10-year gang enhancement in count 6 should have instead been 5 years. We accept the Attorney General's concessions, find no other reversible errors, and order the judgment affirmed as modified.

FACTS

Overview of Prosecution Evidence

Viewed in the light most favorable to the judgment, the evidence established that defendant was an active member of the tagging crew known as WD, which stands for "Wanted Dead" or "We Don't Care." Defendant aspired to join the Varrio Keystone 13 gang (Keystone). Over the course of July 21–23, 2014,[4] defendant and others associated with him, who were members of various tagging crews or gangs, engaged in a course of intimidation and attacks for the purpose of claiming the territory where Veterans Park in Carson was located. There was a group of non-gang members who frequented the park for the purpose of skateboarding and playing football and basketball. The park was in territory claimed by the SW tagging crew (sometimes referred to as S-Dub) and the Carson 13 street gang.

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[4] All dates hereafter are 2014 unless otherwise stated.

The prosecution case consisted of the testimony of a number of eyewitnesses and victims to the various events, text messages sent by defendant both before and after the charged offenses, acts of graffiti by defendant, expert testimony on gangs and defendant's graffiti, and defendant's statements while in jail after his arrest. We summarize the evidence in light of the issues presented on appeal.

July 21 offenses

On the evening of July 21, defendant arrived at Veterans Park—a location claimed by SW—as part of a group of up to 10 males. Four or five of defendant's group were holding bats. Victor Reed, a member of a tagging crew called BTS, was part of defendant's group, and had a moniker of "Relos." They approached a group of people who normally hung out at the park, including Launey Lawson,[5] Di Andrew Garcia, Angelica Viado (Angel), Abraham Gomez (Abraham),[6] and others. Lawson knew defendant was a member of WD, with a moniker of "Risk."

Defendant's group approached to within six feet of Lawson. Defendant stood in front of Lawson, holding a bat.

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[5] Lawson was in a tagging crew called TAF, which stands for "Taking All Fades" or "Taking All Fights."

[6] Abraham and Eddie Gomez share the same surname. We refer to them by their first names for clarity.

Garcia saw defendant with a bat and a pocket knife. Defendant and another person with him asked, "Where you guys from?" Lawson understood this as asking for gang affiliations. Viado heard defendant say, "Who fucks with S Dub? This is S Dub Killa. Dub D, ho."[7] Defendant was looking at Viado when he said, "I know that you fuck with S Dub, bitch."[8] Garcia started laughing. Defendant said, "Do you think this is funny, nigga? . . . Why you trippin? . . . Do you wanna see this bitch get knocked over?"

Lawson testified that defendant told him and the others to empty their pockets. Garcia did not turn over his property. Lawson surrendered his glasses and lighter because he felt he had no choice. At the same time he heard Abraham say, "No." Lawson did not see what happened, but after defendant and his group left, Lawson saw Abraham unconscious, with a wound to his cheek. Viado saw someone rush Abraham, pushing him into a bench. She saw defendant punch Abraham in the cheek, and although she did not see anything in defendant's hand at the time of the punch, Abraham suffered a stab wound and was unconscious for two minutes.

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[7] Viado testified she was not a member of SW, nor were the others with her.

[8] Viado knew defendant as Risk.

July 22

Estefania Aguirre, the girlfriend of murder victim William Gist, regularly hung out with Gist at Veterans Park in 2014. In July there were problems between WD and SW. Aguirre was at the park on July 21 when a boy named Hydro was sitting down on the benches. Some guys came up and hit him in the face and kicked him. Hydro said he was jumped by WD.

Lawson was concerned after hearing that on July 22 defendant and others "beat up some little kid" in the park. Lawson went to the park on July 22 to skate and hang out. He saw a tan or champagne colored Suburban SUV (hereafter the SUV) he had seen the day before at the robbery. It did not stop at the park, but drove by twice. Garcia also was at the park on July 22. He saw the SUV drive by the park twice, once during the day and later in the evening. Defendant was in the front passenger seat.

July 23 offenses

Lawson went back to the Veterans Park on July 23, where he met up with others, including Gist, Eddie Gomez (Eddie), Angel, and Garcia. Gist told Garcia that their friend had been jumped at the park by the same group the day before. Garcia saw the SUV, with defendant inside, drive by the park numerous times. Lawson, Garcia, and Eddie saw defendant exit the SUV from the right front passenger door

and proceed to tag three areas of the park with graffiti, and then return to the SUV, which drove away.

Lawson left the park with Gist, Garcia, Eddie, and two others at 9:30 p.m., walking toward a nearby Taco Bell. Lawson and his friends received a call that the SUV was at the Taco Bell. They went there to fight. Lawson testified he was "rep'ing TAF." Gist and Eddie were on skateboards; both had a bat and were ready to defend themselves. Lawson was angry that defendant's group kept coming back. If they did not defend themselves defendant's group would have picked on them every day. He wanted to confront defendant to make it stop.

The group walked on 223rd Street, heading toward Main Street. Lawson and Garcia saw the SUV. Lawson and Garcia recognized defendant in the front passenger seat and Louis Perez in the rear passenger seat. People in the SUV were yelling "Fuck S Dub." The SUV swerved across several lanes in the direction of Lawson and his group, causing them to jump out of the way to avoid being struck. The group responded by throwing bats and a tire iron at the vehicle. Garcia hit the SUV with his skateboard.

The group, including Gist, Garcia, Eddie, and Lawson returned to the park for safety. Lawson was on foot, but the others were on skateboards. Lawson lost sight of his three friends, who were ahead of him. Garcia saw the SUV on 224th Street, where it reversed and started in the direction of 225th Street. Defendant and a group of about six others exited the SUV.

Garcia saw the SUV parked. Gist was in front of him. Garcia saw Gist by the car, surrounded by more than three males, including defendant. Defendant, who was the closest of the group to Gist, charged at him. Garcia headed toward Gist because he was in danger. Garcia saw fists flying, and someone swung a bat at him. Garcia tried to deflect the blows with the bat, but he was struck on the eyebrow and on the left side of his head. He threw down his skateboard and started fighting back. Garcia eventually went to check on Gist. The SUV had pulled away quickly, and Garcia heard, "Fuck S Dub." Gist stumbled to the ground, bleeding and losing consciousness. Garcia received stitches to close the injury to his eyebrow and staples on his other head wound.

Eddie also testified to the events on the night of July 23. Gist was his best friend. They hung out at the park, but were not in a tagging crew. Eddie heard what had happened two days earlier at the park, and posted on social media that they were "thick"[9] at "Vets," waiting "for these fuck boyz," and WD was not going to get somebody. Eddie described the SUV trying to run them over and seeing Garcia hit the SUV with his skateboard. After they headed back to the park, Gist took off and Eddie followed. Eddie saw Gist stop. Four or five guys got out of the SUV and came toward Gist. One or two punched Gist. Eddie did not see a knife. Eddie swung his skateboard at Gist's attackers. After chasing

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[9] Eddie testified that "thick" meant "with a couple friends."

them off, he came back to Gist. The next thing he knew blood was coming from his lower back, where he had been stabbed. He testified that he did not see who stabbed him, but he told officers it was the same guy who stabbed Gist. Eddie did not have any weapons, and Gist may have had a bat, but he did not use it.

Delano Nichols (Delano), who worked at Veterans Park, was warned by his boss on July 23 to watch out for the SUV. He saw it circle the park "a good handful" of times. He knew Gist and considered himself Gist's mentor. Nichols saw three or four people exit the SUV, one with a bat. Gist did not have a weapon. Delano did not observe the assault on Gist.

Daron Nichols (Daron) was good friends with Gist. He had seen the SUV multiple times around Veterans Park. Daron was on his way home on July 23 when he saw the back of the SUV. He told the police he saw three people in the back of the SUV, three in the middle, and three in the front. He saw the person who had been fighting Garcia running toward Carson High School. Daron saw blood gushing from Garcia's face. Gist was on the ground, with his shirt full of blood. He had nothing in his hands.

An autopsy revealed that Gist suffered a stab wound to the neck, another to the chest, and a fatal stab wound that pierced his lung and heart. Gist had no wounds on his hands.

Gang evidence, graffiti, text messages, and jail statements

Defendant was a member of WD, a tagging crew affiliated with Keystone, a criminal street gang. Keystone's primary activities included vandalism, robbery, attempted robbery, and shootings that were non-fatal and fatal. WD also aligned with BTS ("Born to Smash"), another tagging crew. Gangs attempt to control territory by instilling fear and intimidation on the community. Veterans Park in Carson was outside the territory of Keystone. Defendant in text messages professed his intent to take control of Veterans Park on behalf of WD. The park is in an area claimed by the SW ("So What") tagging crew, which is affiliated with the Carson 13 street gang. Both groups are rivals of Keystone. Court records were introduced to prove commission by Keystone members of the predicate offenses required under section 186.22.

Defendant and his associate, Victor Reed (a BTS member), produced a significant amount of graffiti before and after the charged offenses.[10] The graffiti marked

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[10] The prosecution presented testimony from a witness who works for a company hired by municipalities to track graffiti. The expert detailed the graffiti related to defendant in the Carson area. Given the overwhelming nature of the evidence of gang membership and motivation, we do not set forth the witness's testimony in detail.

territory for WD, showed an affiliation with Keystone, and threatened SW.

Defendant was arrested on July 28. A search warrant was obtained for the contents of defendant's cell phone. Sixty-eight items were downloaded from the phone. Text messages reflected defendant recruiting members for WD. He discussed going to Veterans Park for the purpose of jumping members of SW, and claiming Keystone. He mentioned putting in work. A text message explicitly referred to killing members of SW. He texted that he was going to jump Hydro, and later bragged, "I just beat up hydro."

Text messages after the July 23 offenses included that defendant "LMAO" (laugh my ass off) after Gist was stabbed. The next day he sent messages urging others not to talk about what happened. He requested that messages be deleted. He searched the internet for stories about the stabbing. Defendant expressed concern in text messages that someone had talked about what happened.

One month after the charged offenses, defendant was seen in an online video, flashing WD signs with his hands. References to WD and Keystone were found in searches following the crimes at locations with others associated with defendant.

There is a hierarchy within gangs, with shot callers at the top of each structure. Younger gang members put in work on behalf of the gang, earning respect commensurate with their criminal conduct. After defendant was arrested

and placed in the county jail, he made a phone call, which was recorded, to a shot caller for Keystone. In the call, the shot caller gave defendant permission to represent Keystone in the jail, and said Keystone would back him up. Defendant, who had WD tattoos at the time of his arrest, added four Keystone tattoos after he was jailed, including one to his face. The prosecution gang expert testified that it would be a sign of disrespect, with consequences, if someone had a gang tattoo without being a member of the gang.

The gang expert was presented with a hypothetical question tracking the facts in the case. He expressed the opinion that the charged offenses were committed for the benefit of Keystone. Getting gang tattoos after a crime would represent the gang through its connection to the offense. Gang membership could be the reward for committing a crime for the gang's benefit.

Defense Evidence

Defendant testified on his own behalf. He admitted being a member of WD, denied membership in Keystone, and took credit for being the leader of the attacks at Veterans Park on July 21. He acted in self-defense when he stabbed Gist to death. A text message he sent on July 23 that he was in Keystone and going to "kill those fools" did not refer to the group that hung out at Veterans Park, but instead referenced a different group.

As to the July 21 incident, defendant admitted his involvement in the robbery and possessing a bat, but denied hitting anyone. The robbery was committed for the benefit of WD and not Keystone.

Regarding the July 23 offenses, defendant had to get out of the SUV before Gist was killed because he was responsible for the others in the car since he was the oldest. He did not have anything in his hands when he went to confront Gist. Gist hit him with a bat and Eddie joined in the fight. He fell to the ground and assumed a fetal position for protection. He removed brass knuckles from his pocket, opened the blade of an attached knife, and stabbed Gist once. He chased after the SUV, which was leaving, when Eddie hit him and he tripped over the center divider in the street. Defendant stabbed Eddie and ran to the SUV. He felt horrible that Gist died, but he only acted in self-defense. His arm was injured in the altercation.

Defendant admitted texting warnings after the incident about not telling anyone what happened because he did not want to go to jail. Although the K tattoo on his face stood for Keystone, he got it only for protection and he was not a Keystone member. He merely arranged for protection on the phone call to the Keystone shot caller.

Defendant testified that he lied to the police after his arrest when he said he did not have a weapon during the July 23 incident. He admitted recruiting for WD, and although he was present when Hydro was beaten, he was not involved.

DISCUSSION

Alleged Prosecutorial Misconduct

Defendant argues the prosecutor committed misconduct in argument to the jury by misstating the law of self-defense. Defendant recognizes that his trial counsel objected only on the ground the prosecutor misstated the law, but did not object that the argument was misconduct or request that the jury be admonished to disregard the argument. Defendant contends the need for a specific objection was futile because the trial court overruled the objection that the argument misstated the law, and it would have therefore also overruled an objection based on misconduct. We conclude the issue is forfeited, the prosecutor did not misstate the law, there was no misconduct, and defendant cannot show prejudice.

Background

Prior to the arguments of counsel, the trial court instructed that the jurors "[m]ust follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." (CALCRIM No. 200.) The court instructed the jury on the concept of the right to self-defense during mutual combat. (CALCRIM No. 3471.) The jury was further instructed that the right to self-

defense cannot be contrived: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." (CALCRIM No. 3472.) The jury was also instructed that the right to self-defense no longer exists once the danger no longer exists or when the attacker is disabled. (CALCRIM No. 3474.)

In her argument, the prosecutor explained the People's view of the choices made by defendant that lead to Gist's murder. Those choices included defendant's gang involvement, tagging, the attacks at Veterans Park on the two days prior to the murder, and his provocative conduct on the night Gist was stabbed to death. The prosecutor turned to the issue of self-defense: "You were given this instruction, right to self-defense cannot be contrived. It can't be created, ladies and gentlemen. A person does not have a right to self-defense if they provoke a fight or quarrel with the intent to use force. That's their intent, to wanna respond with force. [¶] Self-defense should be reserved for people that are minding their own business, and when doing so --"

At this point, defense counsel objected that the argument "misstates the law." The court overruled the objection, and the prosecutor finished her thought: "-- violence finds them, violence seeks them out, not a person who goes around looking for violence, who is looking to scare people into submission, who is the aggressor for days on end. That person should not deserve self-defense."

Forfeiture

The Attorney General contends defendant forfeited the prosecutorial misconduct contention by failing to raise the issue in the trial court. We agree.

An allegation of prosecutorial misconduct must be made in the trial court in order to be preserved for appeal. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 893–894 [objection that prosecutor misstated the law in argument does not preserve claim of misconduct]; *People v. Friend* (2009) 47 Cal.4th 1, 29.) An objection on a different ground is not sufficient to preserve a claim of misconduct. (*People v. Dykes* (2009) 46 Cal.4th 731, 766 [claim of misconduct forfeited where only objection was on relevancy grounds].) " 'The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice.' (*People v. Williams* (1997) 16 Cal.4th 153, 254.)" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.) The obligation to object is excused "when the 'misconduct [is] pervasive, defense counsel [has] repeatedly but vainly objected to try to curb the misconduct, and the courtroom atmosphere was so poisonous that further objections would have been futile.' (*People v. Hillhouse* (2002) 27 Cal.4th 469, 501–502, citing *People v. Hill* (1998) 17 Cal.4th 800, 821, 836.)" (*People v. Friend*, *supra*, at p. 29.)

Defendant's objection that the prosecutor misstated the law did not preserve a claim of prosecutorial misconduct. We see nothing in the record to suggest it would have been futile to object to prosecutorial misconduct.[11] This is not a case infected by pervasive misconduct or the court's inability to control matters, such as *People v. Hill*, *supra*, 17 Cal.4th 800. To the contrary, defendant makes no argument that the prosecutor engaged in any other form of misconduct. Our review of the record reveals the trial court patiently considered all objections throughout the trial, sustaining objections on both sides where appropriate, and there is no reason to believe the court would not have entertained an objection on the ground of misconduct in the same manner it considered all other objections. Futility has not been shown.

There was no misconduct

Assuming the issue had been preserved, the claim of prosecutorial misconduct is entirely devoid of merit. "A criminal prosecutor has much latitude when making a

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[11] Defendant's failure to object on the ground of prosecutorial misconduct deprived the prosecutor of the opportunity to defend herself from the allegation. We explicitly reject the attack on the prosecutor's argument, which defendant describes (without proof) as improperly appealing to the jurors' emotions, motivating the jurors to act on their distaste for defendant's prior conduct, and intending to lessen the prosecution's burden of proof with "a deceptive and reprehensible means of persuading the jury."

closing argument. Her argument may be strongly worded and vigorous so long as it fairly comments on the evidence admitted at trial or asks the jury to draw reasonable inferences and deductions from that evidence." (*People v. Seumanu*, *supra*, 61 Cal.4th at p. 1330.)

At no point did the prosecutor suggest the jury ignore the language of CALCRIM No. 3472 in her argument.[12] To the contrary, she reminded the jury that it had been instructed that self-defense cannot be contrived by an aggressor. Having acknowledged that principle expressed in CALCRIM No. 3472, she fairly reflected on the evidence, stressing why self-defense was not available to defendant. The evidence reasonably supported the proposition that Gist and his friends were content to hang out at Veterans Park, where they rode skateboards and played basketball or football. In contrast, defendant and his associates engaged in a pattern of predatory conduct. Defendant expressed his intent to harm members of SW, and take over the park, while furthering the interests of WD and Keystone. In the context of the factual record in this case, we see nothing wrong with an argument that the jury should find that self-defense was inapplicable considering defendant's conduct. (*People v. Cortez* (2016) 63 Cal.4th 101, 130 [prosecutor's argument is not objectionable when viewed in context, if the comment would not be understood by a juror as harmful].)

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[12] Certainly the prosecutor's argument did not echo the words of the instructions verbatim, but defendant recites no authority requiring her to do so.

Harmless error

Assuming the prosecutor's argument was improper, any error was harmless regardless of the standard of review. Defendant makes no argument that the jury was improperly instructed on the law of self-defense. The court specifically instructed the jury pursuant to CALCRIM No. 200 that it must follow the court's instructions, and if the comments of the attorneys conflicted with the instructions, the jury was required to follow the court's instructions. "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' (*People v. Clair* [(1992)] 2 Cal.4th [629,] 663, fn. 8.)" (*People v. Osband* (1996) 13 Cal.4th 622, 717; *People v. Coffman* (2004) 34 Cal.4th 1, 93–94; *People v. Frye* (1998) 18 Cal.4th 894, 970, overruled in part on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 417–422.)

Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence in two respects. First, he argues the evidence is insufficient to support his conviction of the attempted willful, deliberate, premeditated murder of Garcia in count 2. Second, he argues the jury's finding that defendant personally used a

bat in the commission of the attempted murder is not supported by the evidence. The Attorney General concedes the latter point, and because we agree, we reverse the weapon finding in count 2 and order the judgment modified accordingly. However, we hold substantial evidence otherwise supports the conviction in count 2.

Standard of review

We 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. Casares* (2016) 62 Cal.4th 808, 823; *People v. Clark* (2011) 52 Cal.4th 856, 942–943; see *Jackson v. Virginia* (1979) 443 U.S. 307, 321 [federal due process requires proof "sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt"].) " 'The standard of appellate review is the same in cases in which the People rely primarily on circumstantial evidence.' (*People v. Bean* (1988) 46 Cal.3d 919, 932.) 'Although a jury must acquit if it finds the evidence susceptible of a reasonable interpretation favoring innocence, it is the jury rather than the reviewing court that weighs the evidence, resolves conflicting inferences and determines whether the People have established guilt beyond a reasonable doubt.' (*People v.*

Yeoman (2003) 31 Cal.4th 93, 128.)" (*People v. Casares*, *supra*, at p. 823.)

Aiding and abetting

The jury was instructed on both direct aiding and abetting and the natural and probable consequences doctrine. We begin with direct aiding and abetting. "Penal Code section 31, which governs aider and abettor liability, provides in relevant part, 'All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed.' " (*People v. Chiu* (2014) 59 Cal.4th 155, 161, fn. omitted.) "A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime. (*People v. Beeman* [(1984)] 35 Cal.3d 547, 561.)" (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.)

Aiding and abetting liability under section 31 under the natural and probable consequences doctrine is based on the following reasoning: " 'A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a

natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. (*People v. Prettyman* [(1996)] 14 Cal.4th [248,] 260–262.)' (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133.) Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.)" (*People v. Medina* (2009) 46 Cal.4th 913, 920.) "To establish aiding and abetting liability under the natural and probable consequence doctrine, the prosecution must prove the nontarget offense was reasonably foreseeable; it need not *additionally* prove the nontarget offense was not committed for a reason independent of the common plan to commit the target offense." (*People v. Smith* (2014) 60 Cal.4th 603, 614.)

Analysis

Defendant's contention that his conviction in count 2 was based on the "mere possibility" that he intended to encourage or facilitate the attack is incorrect. We conclude there is substantial evidence of defendant's guilt of attempted murder in count 2 based on both theories of aiding and abetting.

Under direct aiding and abetting, there is abundant evidence that defendant instigated and facilitated the attack on Garcia. Defendant engaged in a pervasive pattern of gang-related activity with his associates throughout the time period of events in this case. Defendant boasted in his testimony that he was the leader of the group that targeted Gist's group in the July 21 attack, and he explained how he was responsible for the others in the SUV on July 23 when the offense charged in count 2 was committed. In text messages dating back to July 15, defendant demonstrated his commitment to gang activity through solicitation of others to join WD and declaring his intent to assert gang domination in Carson. Specifically, on July 15, defendant texted another asking if he wanted to be in WD, and emphasized "it's serious." On July 17, he encouraged a person to join WD rather than another group. On July 20, defendant texted that he was in Keystone. He texted on July 21, "Let's go jump SMALL WINNIES," referring to SW, and on July 22, he texted that "we gonna catch them Stupid Weirdos (referring to SW)," "WDup" and that he and Relos were going to jump Hydro. Defendant texted that "I'm in keystone now ima kill those foos" and that "I just beat up hydro."

Defendant and his cohorts (who were members of various gangs and tagging crews) arrived together at Veterans Park on July 21, armed with bats, and as members of the group committed robbery, attempted robbery, and assault. They all left together. Over the course of the next

few days defendant and others beat a young boy named Hydro at Veterans Park. The tan SUV owned by the mother of an associate of defendant drove by the park on numerous occasions, both scouting the location for potential victims and provoking fear. Defendant was identified as sitting in the right front seat each time the vehicle was observed, and on multiple occasions he was quick to exit the vehicle and confront the group from Veterans Park. He brazenly tagged the park with gang-related graffiti. Defendant admitted that bats were in the SUV on the night of July 23.

Given this evidence of ongoing gang-related activity by defendant and his associates, a rational trier of fact could conclude defendant knew of the wrongful purpose of the person who attacked Garcia with a bat, defendant had the intent of facilitating or encouraging commission of the crime to enhance his own gang status, and he promoted, encouraged, and instigated the attack. Nothing more was required to establish direct aiding and abetting.

Based on these same facts, we also conclude there is substantial evidence to support the attempted murder conviction in count 2 under the natural and probable consequences doctrine.

A rational trier of fact could find that defendant intended to aid and abet the assault with a deadly weapon (a bat) on Garcia, and that attempted murder committed by twice striking Garcia in the head with the bat was a natural and probable consequence of assault with a deadly weapon. "[A] reasonable person in the defendant's position would

have or should have known that the [attempted murder] was a reasonably foreseeable consequence of the [assault with a deadly weapon] aided and abetted.' [Citation]" (*People v. Medina*, *supra*, 46 Cal.4th at p. 920.)

Defendant's second sufficiency of the evidence contention is that there is no evidence to support the jury's finding that he personally used a bat (§ 12022, subd. (b)(1)) in the commission of the attempted murder in count 2. We agree with the parties that there is no evidence defendant personally used a bat in the commission of the attempted murder in count 2. That finding must be reversed.

Excessive Gang Enhancement

The trial court enhanced defendant's attempted robbery sentence in count 6 by 10 years based on the jury's finding defendant committed the offense for the benefit of a criminal street gang. The 10-year enhancement under section 186.22, subdivision (b)(1)(C), applies where a defendant has been convicted of a violent felony as defined in section 667.5, subdivision (c). Because attempted robbery is not a violent felony, but is instead a serious felony as defined in section 1192.7, subdivision (c), defendant argues he was only subject to the five-year enhancement under section 186.22, subdivision (b)(1)(B).

The Attorney General concedes the point. We agree. The judgment must be modified accordingly.

DISPOSITION

The finding in count 2 that defendant personally used a deadly or dangerous weapon pursuant to section 12022, subdivision (b)(1), is reversed. The 10-year enhancement in count 6 is reversed, and the trial court is ordered to instead impose a 5-year enhancement pursuant to section 186.22, subdivision (b)(1)(B). In all other respects, the judgment is affirmed. The trial court is to prepare and send an amended abstract of judgment to the Department of Corrections and Rehabilitation.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

KIN, 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.