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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GEOVANNY ANTONIO VARGAS et al., Defendants and Appellants.	B234354 (Los Angeles County Super. Ct. No. BA336486)

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

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant Geovanny Antonio Vargas.

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

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

Appellants Geovanny Antonio Vargas and Lester Manuel Galdamez challenge their judgments of conviction for murder, contending that there is insufficient evidence to support the judgments, that the trial court engaged in evidentiary and instructional error, that there was prosecutorial misconduct, and that they were sentenced under a constitutionally infirm statute. We reject these contentions and affirm.

RELEVANT PROCEDURAL HISTORY

On August 31, 2010, an amended information was filed charging appellants with the murder of Gerardo Canenguez (Pen. Code, § 187, subd. (a)).[1] The information alleged that the offense was committed for the benefit of a criminal street gang (§ 186.22, subds. (b)(1)(C), (b)(4)), that a principal had used a firearm, causing great bodily injury and death (§12022.53, subds. (b), (c), (d), (e)(1)), and that Galdamez had personally used a firearm, causing great bodily injury and death (§12022.53, subds. (b), (c), (d), (e)).

A jury found appellants guilty as charged, and also found the gun use and gang allegations against them to be true. The trial court sentenced each appellant to a total term of 50 years to life.

FACTS

A. *Prosecution Evidence*

1. *Background*

In 2008, appellants belonged to the St. Andrews Boys 13 gang (St. Andrews gang). Another member of the St. Andrews gang was Edward Chang, whose

girlfriend was Liliana Yoon. Gerardo Canenguez belonged to a rival gang called the "Mara Salvatrucha 13" or "M.S.," or an associated group called the "Junior Mara Krew."

Los Angeles Police Department (LAPD) Officer Lazaro Ortega, a gang expert, testified that members of the St. Andrews gang use common signs and symbols, and engage in murder, attempted murder, assault with deadly weapons, gun possession, narcotics possession, and felony vandalism. In 2008, there were approximately 40 documented members.

According to Ortega, the St. Andrews gang claims territory that encompasses the intersection of Clinton Street and Wilton Place. To assert a claim, gang members mark the territory with their gang's distinctive graffiti. In 2008, the St. Andrews gang was at war with the M.S. gang because they claimed overlapping territories. As a result, the St. Andrews gang often used graffiti containing death threats against the M.S. gang. Ortega opined that St. Andrews gang members who learned that a rival gang member had been "crossing . . . out" graffiti were likely to confront their rival with "extreme violence."

2. *Murder of Canenguez*

At approximately 11:25 a.m. on February 14, 2008, Juan Diaz and his employee were working on the third floor of a building near the intersection of Clinton Street and Wilton Place. In or near the intersection was Canenguez, who was on a bicycle.

After hearing noises from the streets below, the employee called Diaz to a balcony. As Diaz walked to the balcony, he heard a gunshot. When Diaz arrived,

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1 All further statutory references are to the Penal Code, unless otherwise indicated.

he saw two men standing next to a van. Across the intersection, a boy was seated on the bicycle near another person. One of the men adjacent to the van fired three shots at the cyclist, who fell down. As the cyclist collapsed, the person near him ducked behind a car and pulled a gun from his waistband. When the shooter and his companion retreated from the intersection, there was an exchange of gunfire between the person behind the car and the shooter. After the exchange, the person behind the car looked at the fallen cyclist, shook his head, and walked away.

Sandra Copeland was in a vehicle close to the intersection of Clinton Street and Wilton Place when she noticed a boy riding a bicycle. She heard three gunshots and saw the cyclist fall. After Copeland's car stopped, she discovered that the cyclist was bleeding and made a 911 call.[2] Upon making the call, she saw an individual nearby point a gun at the sky and then run away.

Richard Slozak was in his pickup truck parked on Clinton Street when he heard gunfire and saw two men walking briskly across the street toward him. One turned and fired gunshots while the pair moved along the sidewalk. Slozak hid from them as they passed his truck.

While driving near the intersection of Clinton Street and Wilton Place, Rodolfo Castanon heard several gunshots. As he approached the intersection, he saw a body on the street and two men running away. He followed the men to a building on Norton Avenue, and described them in a 911 call.[3]

At approximately noon, Yoon left her work place to meet Chang. As she drove, Chang asked her by phone to pick up someone behind an apartment building on Van Ness Avenue. When Yoon arrived at the rear of the building, appellant

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[2] An audio recording of Copeland's 911 call was played for the jury.

[3] An audio recording of Castanon's 911 call was played for the jury.

Galdamez climbed out of a trash dumpster and hid in the trunk of Yoon's car. As Yoon drove out of the building's rear driveway, she saw Chang driving a car, which Yoon followed. When Chang stopped his car, Yoon parked nearby and Galdamez emerged from the trunk of her car. Yoon overheard Galdamez tell Chang that he "caught" two members of the M.S. gang, one of whom had been riding a bike and the other walking. Yoon also heard Galdamez use the word "blast."

3. *Investigation*

When LAPD officers arrived at the intersection of Clinton Street and Wilton Place, they found Canenguez, who was bleeding from the head and fatally wounded. Nearby were a bicycle and several bullet casings. Responding officers also noticed that St. Andrews gang graffiti close to the shooting had been freshly crossed out with black spray paint graffiti. When Canenguez was transported to a hospital, medical personnel found that he had a black spray paint can and a pocket knife.

In response to Castanon's 911 call, LAPD officers went to the Norton Avenue building, where they detained appellant Vargas. Castanon and Slozak identified Vargas as one of the men they saw running from the scene of the shooting. After obtaining a search warrant, the officers found a semiautomatic handgun inside Vargas's residence within the building.

Investigating officers also initially detained Javier Plascencia, a member of

the St. Andrews gang found on Norton Avenue shortly after the shooting.[4] Vargas and Plascencia were taken to a police station, where they were placed together in an interview room. While no officers were present in the room, Vargas and Plascencia engaged in a conversation, a video recording of which was played for the jury. During the conversation, Plascencia stated that he had nothing to do with the shooting, and inquired, "What happened?" Vargas referred to a phone call from a neighbor and said, "We fucking seen 'em riding bikes . . . ." When Plascencia asked, "One fool got dropped?," Vargas replied, ". . . It's done, fool. Got hit in the head." Vargas also identified the shooter as "Lester."

In December 2008, investigating officers interviewed Yoon, who described her encounter with Chang and Galdamez on the date of the murder. In February 2009, Galdamez was arrested. The gun found in Vargas's residence was determined to have fired the bullet casings found at the scene of the shooting, and Galdamez was identified as a possible contributor of DNA found on the gun.

B. *Galdamez's Defense Evidence*

Galdamez testified that although he belonged to the St. Andrews gang, he did not "put in work" for the gang. According to Galdamez, on the date of the shooting, Vargas was visiting him when a friend invited him by phone to go skateboarding. Galdamez accepted the invitation and decided to carry a gun for self-protection. As he and Vargas walked to the friend's house, two people began shooting at them. Galdamez returned fire while he and Vargas fled to Vargas's

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[4] In field showups, Castanon and Slozak identified Plascencia as Vargas's companion. In addition, Slozak believed that Plascencia was the man he saw firing the gun.

residence. As they ran, Galdamez gave his gun to Vargas. After arriving at Vargas's residence, Galdamez continued running and eventually climbed into a dumpster. Later, Yoon found him. He hid in the trunk of her car to avoid being arrested.

C. *Vargas's Defense Evidence*

Vargas testified that he had belonged to a tagging crew that formed the St. Andrews gang in 2004 or 2005. In 2007, he moved out of the area and left the gang. On the date of the shooting, he spent the morning at Galdamez's residence in order to shorten the commute to his employment, which began at 2:00 p.m. After arriving at Galdamez's residence, he fell asleep. When Galdamez woke him and said that he was going to a friend's house to skateboard, Vargas accompanied Galdamez. Vargas was unaware that Galdamez was carrying a gun. While they walked to the friend's house, a cyclist dismounted from his bicycle and charged toward them with a gun. Vargas heard gunshots as he fled to a residence that he characterized as his mother's house. As he ran, Galdamez gave him a gun, which he hid in the house. Vargas denied that he then lived with his mother.

D. *Rebuttal*

LAPD Detective Christopher Mayberry testified that he interviewed Vargas twice shortly after his arrest. During the first interview, Vargas stated that he was staying with his mother in the Norton Avenue building. He denied any involvement in the shooting, and said that he was in his mother's house when it occurred. During the second interview, Vargas stated that he was present during the shooting, but denied that he fired a gun.

DISCUSSION

Appellants contend that there is insufficient evidence to support the gang enhancement, that the trial court erred in admitting expert testimony, and that there was prosecutorial misconduct. In addition, Vargas contends the trial court improperly denied an instruction related to his defense, and that the gun use enhancement charged against him is constitutionally infirm.[5]

A. *Gang Enhancement*

Appellants contend the gang enhancements fail for want of sufficient evidence. Generally, subdivision (b)(1) of section 186.22 "imposes additional punishment when a defendant commits a felony for the benefit of, at the direction of, or in association with a criminal street gang. To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]" (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) Appellants maintain the prosecution made an inadequate showing regarding the St. Andrews gang's "primary activities." As explained below, we reject this

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[5] To the extent Galdamez seeks to join in these contentions, they are inapplicable to him. The contentions concern Vargas's request for an instruction on being an accessory after the fact to murder and his sentencing under section 12022.53, subdivisions (d) and (e)(1), as an aider and abettor. Because the evidence at trial unequivocally demonstrated that Galdamez was the shooter, the contentions are not relevant to the judgment against him.

contention.[6]

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*).) Among the crimes enumerated in the statute are murder, attempted murder, assault with deadly weapons or force likely to produce great bodily injury, robbery, gun possession, narcotics possession, and felony vandalism. (§ 186.22, subds. (e)(1), (e)(2), (e)(3), (e)(4), (e)(20), (e)(23), (e)(31); see *People v. Vy* (2004) 122 Cal.App.4th 1209, 1226 [attempted commission of enumerated crimes also fall under gang statute].) Evidence that a gang's members have "consistently and repeatedly" committed criminal activity enumerated in the gang statute is sufficient to establish the gang's primary activities. (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324, italics omitted.) In contrast, evidence of the "occasional" commission of such crimes is insufficient. (*Id.* at p. 323.) To make the required showing, the prosecution may rely on evidence of the crimes charged against the defendant, evidence of crimes

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[6] "'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

committed by other gang members, and expert testimony regarding the gang's activities. (*Id*. at pp. 323-324.)

Here, the key evidence regarding the St. Andrews gang's "primary activities" was provided by Officer Ortega, who had worked in a unit investigating the gang. He testified that it was formed in 2005 by three tagging crews involved in criminal activities typical of a gang, including carrying guns, shootings, robberies, and "things of that nature." Because the St. Andrews gang claimed territory within M.S. gang territory, the St. Andrews gang immediately fell into a war with the M.S. gang, which is a large and violent gang engaged in murders, drug sales, and robberies. As a result, there was considerable gun-related violence between the two gangs. According to Ortega, "[t]hey were constantly at war with each other, so there were always shooting investigations, murder investigations, [and] gun possession investigations."

In addition, Ortega testified as follows regarding the St. Andrews gang's "primary activities":

> "[Prosecutor:] [B]ack in 2008, what would you say were the primary activities of . . . the St. Andrews gang? What kind of activities were they involved in?
>
> "[Ortega:] At that time they were involved in assaults with deadly weapons, several gun possessions, attempted murders, murders, narcotics possession, felony vandalism. . . .
>
> "[Prosecutor:] Assaults with firearms?
>
> "[Ortega:] Firearms or hands and fists, beatings."

Furthermore, Ortega identified three gang members who had been convicted of unlawful possession of a firearm, possession of a firearm by a felon, and robbery.

Although Ortega expressly stated that the St. Andrews gang committed

crimes listed in the gang statute, appellants contend his testimony was insufficient to establish the gang's primary activities, for purposes of the gang statute. They argue that the prosecutor undermined his initial question regarding the gang's primary activities by adding the second question, which inquired simply regarding the gang's "kind of activities." We disagree. Ortega's answers to the prosecutor's questions referred to multiple instances of each type of crime, thereby raising the reasonable inference that the crimes were not "occasional" (*Sengpadychith, supra*, 26 Cal.4th at p. 323). Furthermore, Ortega's testimony, viewed as a whole, discloses ample evidence to support the inference that the gang "consistently and repeatedly" committed offenses enumerated in the gang statute, in view of the gang's violent history and constant warfare against the M.S. gang (*id.* at p. 324).

Appellants' reliance on *People v. Perez* (2004) 118 Cal.App.4th 151 is misplaced. There, a gang expert testified only that a gang had committed several shootings within a period of less than a week and a beating six years earlier. (*Id*. at p. 160.) The appellate court concluded this evidence was insufficient to show that the gang's members had consistently and repeatedly committed the crimes enumerated in the gang statute. That is not the case here, as Ortega's testimony established that St. Andrews gang members engaged in the enumerated crimes numerous times over a lengthy period. In sum, there was sufficient evidence to support the gang enhancement.

B. *Expert Testimony*

Appellants contend the trial court erred in permitting the prosecutor to ask Officer Ortega a hypothetical question that assumed facts lacking evidentiary support. They argue that Ortega was improperly permitted to answer a hypothetical question that required him to assume that before the shooting,

appellants were notified that someone had been crossing out St. Andrews gang graffiti. As explained below, we discern no error.[7]

Generally, expert testimony is admissible to establish the culture and habits of criminal street gangs. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) A gang expert may render an opinion on the basis of a hypothetical question that asks the expert to assume the truth of specified facts, provided the hypothetical is "rooted in facts shown by the evidence" (*id*. at p. 618) and is "not . . . unfair or misleading" (*People v. Castillo* (1935) 5 Cal.App.2d 194, 198). The admission of expert testimony on gangs is reviewed for an abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

During the preliminary hearing on the offense charged against Vargas, Detective Mayberry testified that during the recorded conversation between Vargas and Plascencia, Vargas said that he was at Galdamez's residence when a neighbor told Galdamez by phone that someone was "crossing out." According to Mayberry, Vargas also said that after the phone call, Galdamez grabbed his "shit" -- that is, a gun -- and they confronted someone riding a bike.

Prior to appellants' trial, Vargas's counsel filed a motion in limine to dismiss or bifurcate the gang allegation, contending that Mayberry's testimony regarding the phone call was inadmissible. In denying the motion, the trial court ruled that Mayberry could not testify regarding Vargas's recorded remarks, and that the recording itself would be presented to the jury so that it could determine what Vargas had said.

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[7] Although Galdamez seeks to unite with Vargas in asserting this contention, before the trial court Galdamez neither joined in Vargas's objection to Ortega's testimony nor raised his own objection. Accordingly, he has forfeited the contention. (*People v. Wilson* (2008) 44 Cal.4th 758, 792-793.)

Later, Vargas's counsel asserted a motion in limine to limit the prosecutor's reference to the recording during his opening statement, arguing that the recording contained no reference to a phone call regarding the purported "crossing out." The prosecutor replied that Vargas could be heard to refer to a phone call he received before he and Galdamez confronted Canenguez. The prosecutor further stated that he planned to note the phone call during his opening statement, but would not mention any "crossing out." The prosecutor added: "If it's not on the recording, I'm not going [to] say it." The trial court denied Vargas's motion.

After the recording was played for the jury but before Officer Ortega testified, Vargas's counsel sought to bar the prosecutor from asking Ortega hypothetical questions based on a phone call informing appellants that someone was crossing out St. Andrews gang graffiti. Counsel acknowledged that Vargas's recorded remarks indicated that Galdamez received a phone call, "got his shit," and left the residence with Vargas. Nonetheless, counsel argued that the recording contained no evidence that the phone call concerned the crossing out of gang graffiti. In denying the motion, the trial court concluded that the parties' conflicting theories regarding whether the phone call concerned "crossing out" were properly submitted to the jury. In addition, the court stated that the jury would be instructed that Ortega's opinions were to be evaluated in light of the jury's resolution of the conflict.

Following the ruling, the prosecutor examined Ortega as follows:

> "[Prosecutor:] [H]ypothetically speaking, if you had a Mara Salvatrucha associate or gang member going into St. Andrews territory and he starts crossing [their graffiti] out . . . , what would you expect St. Andrews gang members to do if they were notified [that] someone is doing this out there?
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> "[Ortega:] Immediately go out there and confront that individual.

"[Prosecutor:] What's the expectation in general with St. Andrews gang members if they're going to confront a rival? . . .

"[Ortega:] Usually it's going out there to use extreme violence. . . .

"[Prosecutor]: If a St. Andrews gang member were to be notified that someone is crossing [their graffiti] out, grabs a gun and goes with another St. Andrews gang member to confront that rival, is there an expectation that someone could die and that the gun he's taking may have to be used?

"[Ortega:] Of course."

After the close of the presentation of evidence, the jury was instructed with CALCRIM No. 332, which states in pertinent part: "An expert witness may be asked a hypothetical question. . . . If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion." During closing arguments, the prosecutor urged the jury to listen to Vargas's recorded remarks carefully. Pointing to the evidence that Canenguez had been crossing out St. Andrews gang graffiti before he was murdered, the prosecutor maintained that Canenguez had been "doing the kind of thing that would get [appellants] out there." The prosecutor further argued that after the phone call, appellants knew "who was out there" and "what was going to happen."

We discern no abuse of discretion in the trial court's decision to permit the hypothetical questions directed to Ortega. As our Supreme Court has explained, "[a] hypothetical question . . . may be 'framed upon any theory which can be deduced' from any evidence properly admitted at trial, including the assumption of 'any facts within the limits of the evidence[.]'" (*People v. Sims* (1993) 5 Cal.4th 405, 436, fn. 6, italics omitted, quoting 3 Witkin, Cal. Evidence (3d ed. 1986)

Introduction of Evidence at Trial, § 1848, p. 1804, overruled on another ground in *People v. Storm* (2002) 28 Cal.4th 1007, 1031-1032.)

When the trial court ruled on the motion regarding hypothetical questions, the trial court had heard the recording, and thus had an opportunity to assess whether it could support the prosecutor's theory. Because the recording had been admitted into evidence, the court properly concluded that the jury was entitled to examine it to determine whether the phone call concerned "crossing out." Furthermore, even if the recording did not directly establish the call's subject matter, the evidence as a whole supports the inference that the call alerted appellants that someone was crossing out St. Andrews gang graffiti. The recording shows that Galdamez received a phone call at his home, "got his shit," and left with Vargas; in addition, there was evidence that Canenguez had been obliterating St. Andrews gang graffiti with black spray paint before Galdamez shot him. In view of the recording and the other evidence, the jury reasonably could have inferred that Galdamez armed himself and recruited Vargas's assistance because the phone call described Canenguez's activities. In sum, the trial court did not err regarding the hypothetical questions posed to Ortega.

C. *Accessory After the Fact Instruction*

Vargas contends the trial court improperly rejected his request for an instruction on the crime of being an accessory after the fact to murder, as defined in section 32.[8] In denying the request, the court concluded that the crime is not a

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[8] Section 32 provides: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said

(Fn. continued on next page.)

lesser offense included within murder, and that Vargas was not entitled to an instruction on the crime as a lesser related offense of murder. We agree with the trial court.

Because it is well established that being an accessory after the fact is not a lesser included offense of murder (*People v. Majors* (1998) 18 Cal.4th 385, 408), Vargas's request for an instruction was subject to the principles governing instructions on lesser related offenses (*People v. Schmeck* (2005) 37 Cal.4th 240, 291-292, abrogated on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643). The leading case regarding these principles is *People v. Birks* (1998) 19 Cal.4th 108 (*Birks*). Under *Birks* and its progeny, the trial court is not required to instruct on a lesser related offense, either sua sponte or on the defendant's request, even if there is substantial evidence to support a conviction for the offense. (*Birks*, *supra*, 19 Cal.4th at p. 137; *People v. Lam* (2010) 184 Cal.App.4th 580, 583; *People v. Valentine* (2006) 143 Cal.App.4th 1383, 1387.) Although an instruction on a lesser related offense is proper if both defense and prosecution agree to it, the court may not instruct on a lesser related offense over the prosecution's objection. (*Birks*, *supra*, 19 Cal.4th at p. 136, fn. 19; *People v. Lam*, *supra*, 184 Cal.App.4th at p. 583; *People v. Valentine*, *supra*, 143 Cal.App.4th at p. 1387.) Accordingly, the trial court properly rejected Vargas's request for an instruction because the prosecutor objected to it.

Vargas maintains that the refusal to instruct contravened his state and federal constitutional rights to present a defense. We disagree. Under California law, the trial court's obligation to give defense instructions flows from its general duty to

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principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony."

provide instructions adequate for the case.[9] (*People v. Stewart* (1976) 16 Cal.3d 133, 140.) In *Birks*, our Supreme Court examined the application of this general duty to lesser related offenses. (*Birks*, *supra*, 19 Cal.4th at pp. 118-132.) The court concluded that "the California Constitution should not be construed to grant criminal defendants an affirmative right to insist on jury consideration of nonincluded offenses without the prosecutor's consent." (*Id*. at p. 136.) Because the obligation to give defense instructions stems from the general instructional duty, it provides no independent basis to depart from *Birks*.

Vargas's argument also fails to the extent it invokes federal constitutional rights, as our Supreme Court has repeatedly reaffirmed *Birks* in response to contentions of this type, including contentions framed in terms of a right to present a defense. (*People v. Rundle* (2008) 43 Cal.4th 76, 148, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 ["[T]here is no federal constitutional right of a defendant to compel the giving of lesser-related-offense instructions[,]" including a due process right "to present the 'theory of the defense case.'"]; accord, *People v. Foster* (2010) 50 Cal.4th 1301, 1343-1344.) We are bound by these determinations. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In sum, there was no instructional error.

D. *Prosecutorial Misconduct*

Appellants contend the prosecutor engaged in misconduct during his closing argument. To prevail on a claim of prosecutorial misconduct based on remarks to

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[9] "[I]n criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

the jury, "the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Moreover, absent an objection and request for an admonition to the jury, we review a contention of prosecutorial misconduct solely when "'an admonition would not have cured the harm cause by the misconduct.'" (*People v. Earp* (1999) 20 Cal.4th 826, 858.) As explained below, appellant has failed to establish prosecutorial misconduct.

Appellants maintain the prosecutor improperly attacked their defense counsel. Generally, it is improper "for the prosecutor 'to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case. . . . Casting uncalled for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom.'" (*People v. Fierro* (1991) 1 Cal.4th 173, 212, disapproved on another ground in *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 203-207, quoting *People v. Thompson* (1988) 45 Cal.3d 86, 112.) Nonetheless, an improper comment occurs only when there is a "personal attack" on defense counsel. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1167.)

At the beginning of the rebuttal portion of the prosecutor's closing argument, the prosecutor stated: "Just like yourselves, I'm listening to what defense counsel have to say about their clients . . . , and it kind of reminds me of this story about J. P. Morgan. . . . [¶] He was this individual that owned a lot of companies back [at] the turn of the century. . . . [A]t one point, the government was coming after him [on] an antitrust issue. They thought he was monopolizing these industries. [¶] He asked his right-hand man, 'I want you to find me the best

attorneys to represent me in this case.' [¶] His right-hand man goes out . . . to the best law schools and finds three individuals and they are all interviewed by J.P. Morgan and he says, 'You know what, I don't want any of these guys.' [¶] The right-hand man says, 'Why not? These guy are top of their class, incredibly smart. They know what's right, they know what's wrong, they can argue the law, they can argue the facts.' [¶] J. P. Morgan said, 'I don't need someone to tell me what's right or wrong. I know what's right or wrong. What I want is an attorney that can make the wrong thing look right."

At this point, appellants' counsel objected to the argument on the ground that it denigrated them. The trial court "noted" the objection, but did not expressly sustain or overrule it. The prosecutor continued: "I don't mean to attack the defense attorneys, it's just their characterization of the evidence. It's kind of turning it on its head and it's up to you to decide if that's the case . . . ."

Because no request for an admonition accompanied appellants' objection, they have forfeited their contention of misconduct, as the prejudice (if any) from the prosecutor's remarks was not incurable by an admonition. Because the jury is presumed to follow instructions to disregard improper argument, "[i]t is only in the exceptional case that 'the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions.'" (*People v. Allen* (1978) 77 Cal.App.3d 924, 934-935, quoting *People v. Seiterle* (1963) 59 Cal.2d 703, 710.) No exceptional circumstances are present here. As explained below, the prosecutor's disclaimer regarding the anecdote's point nullified its potential for prejudice. Moreover, even if that disclaimer had failed to eliminate the potential for prejudice, an admonition would have been sufficient to cure any prejudice flowing from the anecdote. (*People v. Friend* (2009) 47 Cal.4th 1, 30 [admonition

nullified prejudice from prosecutor's intemperate comment that defense counsel was a "'true believer'" who "'support[ed] her belief based only on her belief'"].)

Appellants maintain their failure to request an admonition did not work a forfeiture because the court overruled their objection before they could seek an admonition. (*People v. Cole* (2004) 33 Cal.4th 1158, 1201 [absence of request of admonition is excused when court immediately overrules objection and defendant has no opportunity to ask for an admonition].) However, as the court noted the objection without immediately ruling on it, the court did not deny appellants an opening to ask for an admonition.

We also would reject the contention of prosecutorial misconduct were we to consider it. In view of the prosecutor's disclaimer regarding the anecdote, it is not reasonably likely that the jury regarded it as a personal attack on defense counsel. As our Supreme Court has explained, criticisms of defense tactics are not misconduct when they are too general or diffuse to constitute a personal attack on defense counsel. (*People v. Medina* (1995) 11 Cal.4th 694, 759 ["To observe that an experienced defense counsel will attempt to 'twist' and 'poke' at the prosecution's case does not amount to a personal attack on counsel's integrity."]; *People v. Taylor*, *supra*, 26 Cal.4th at p. 1167 [prosecutor's statement in closing argument that defense counsel used "'tricks'" and "'moves'" to demonstrate witness's confusion or uncertainty "involv[ed] no improper personal attack"].) In sum, appellants have shown no prosecutorial misconduct.

E. *Sentencing Under Section 12022.53*

Vargas contends the gun use enhancement on his sentence relies on a constitutionally infirm statute. The enhancement was imposed under subdivisions (d) and (e)(1) of section 12022.53, which jointly establish additional punishment

for aiders and abettors of gang-related murders. Vargas argues that these provisions denied him equal protection of the law. We disagree.

"Section 12022.53, subdivisions (d) and (e)(1) . . . require the trial court to impose a consecutive 25-years-to-life sentence enhancement when a defendant is convicted of murder for the benefit of a criminal street gang and '[*a*]*ny* principal in the offense' 'personally and intentionally discharges a firearm and . . . causes . . . death, to any person other than an accomplice.'. . . Under this sentencing regime an aider and abettor who is found guilty of murder is subject to the 25 years to life enhancement even though he or she did not personally and intentionally discharge a firearm causing death if the murder was committed for the benefit of a criminal street gang and 'any principal' in the offense personally and intentionally discharged a firearm causing death. In all other killings subject to section 12022.53, subdivision (d) -- that is, killings not for the benefit of a criminal street gang -- a principal, including an aider and abettor, is only subject to the 25-year enhancement if he or she personally and intentionally discharged a firearm causing death." (*People v. Hernandez* (2005) 134 Cal.App.4th 474, 480, (*Hernandez*), fns. omitted.)

Pointing to the increased punishment imposed upon aiders and abettors of gang-related murders, Vargas maintains the statutory scheme contravened his right to equal protection of the laws. However, this precise contention was rejected in *Hernandez*, which held that the disparity in treatment between aiders and abettors of gang-related murders and aiders and abettors of other murders under the statute is properly founded on the state's "legitimate interest in suppressing criminal street gangs." (*Hernandez*, *supra*, 134 Cal.App.4th at pp. 481-483.) The appellate court in *Hernandez* explained: "Clearly the Legislature had a rational basis for imposing a 25-years-to-life enhancement on one who aids and abets a gang-related murder in

which the perpetrator uses a gun, regardless of the relationship between the aider and abettor and the perpetrator. . . . [T]he purpose of this enhancement is to reduce through punishment and deterrence 'the serious threats posed to the citizens of California by gang members using firearms.' One way to accomplish this purpose is to punish equally with the perpetrator a person who, acting with knowledge of the perpetrator's criminal purpose, promotes, encourages or assists the perpetrator to commit the murder. It is irrelevant to this purpose whether the aider and abettor was a hard-core gang member or merely a 'wannabe.'" (*Id*. at p. 483, fn. omitted, quoting *People v. Gonzales* (2001) 87 Cal.App.4th 1, 19.)

Vargas urges us to reject *Hernandez*, arguing that under *People v. Olivas* (1976) 17 Cal.3d 236, 243-257 (*Olivas*), the disparity in punishment established in subdivisions (d) and (e)(1) of section 12022.53 must be examined under the so-called "strict scrutiny" standard, rather than the rational basis standard. In *Olivas*, our Supreme Court examined a statute that permitted the imposition of greater punishment on persons under the age of 21 than on older persons who committed the same crimes. (17 Cal.3d at p. 239.) Noting that the statute implicated personal liberty, which the court characterized as a "'fundamental interest,'" the court applied the strict scrutiny standard and held that the statute denied equal protection of the laws to persons under the age of 21. (*Id*. at pp. 243-257.)

We conclude that *Hernandez* correctly relied upon the rational basis standard in examining the contention before us. In *Hernandez*, the appellate court determined that *Olivas* did not mandate the application of the strict scrutiny standard because decisions after *Olivas* have confined its holding. (*Hernandez*, *supra*, 134 Cal.App.4th at p. 483.) An especially significant case is *People v. Wilkinson* (2004) 33 Cal.4th 821, 837-838 (*Wilkinson*), in which our Supreme Court examined an equal protection contention similar to that before us.

In *Wilkinson*, the defendant challenged a statutory scheme that permitted the imposition of greater punishment on a person who inflicted injury while committing a battery on a custodial officer than on a person who committed a battery on a custodial officer without injury. (*Wilkinson*, *supra*, 33 Cal.4th at p. 832.) In determining that the defendant's equal protection contention was subject to assessment under the rational basis standard, the Supreme Court concluded that *Olivas* did not require the application of the strict scrutiny standard. (*Id.* at pp. 837-838.) The court stated: "The language in *Olivas* could be interpreted to require application of the strict scrutiny standard whenever one challenges upon equal protection grounds a penal statute or statutes that authorize different sentences for comparable crimes . . . . Nevertheless, *Olivas* properly has not been read so broadly." The court noted with approval a decision that interpreted *Olivas* as "'requir[ing] only that the boundaries between the adult and juvenile criminal justice systems be rigorously maintained.'" (*Id.* at pp. 837-838, quoting *People v. Davis* (1979) 92 Cal.App.3d 250, 258.)

In view of *Wilkinson*, we find *Hernandez* persuasive on Vargas's contention. Accordingly, the gun use enhancement on his sentence does not rely on a constitutionally infirm statute.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.