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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>QUENTIN FRAZIER,<br><br>Defendant and Appellant. | B281888<br><br>(Los Angeles County Super. Ct. No. LA083934) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph Brandolino, Judge. Affirmed in part, remanded in part, with directions.

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Heather B.

Arambarri, Deputy Attorney General, for Plaintiff and Respondent.

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The jury convicted defendant and appellant Quentin Frazier in counts 1 and 2 of first degree murder (Pen. Code, § 187, subd. (a)),[1] and in count 3 of assault with a semiautomatic firearm (§ 245, subd. (b)).[2] As to counts 1 and 2, it found true the special circumstance that defendant committed multiple murders (§ 190.2, subd. (a)(3)), that the murders and firearm assault were committed for the benefit of a criminal street gang (§186.22, subd. (b)(1)(C)), and that a principal personally and intentionally discharged a firearm in the commission of the murders (§ 12022.53, subd. (c) & (e)(1)). It found not true the allegations in counts 1 and 2 that defendant's firearm use caused the victims' deaths. (§ 12022.53, subd. (d).) In count 3, the jury found true the allegation that the assault was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), and not true

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[1] All future references are to the Penal Code unless otherwise indicated.

[2] The jury acquitted defendant of assault with a firearm in count 4. (§ 245, subd. (b).)

the allegation that defendant personally used a firearm to assault the victim (§ 12022.5, subds. (a) & (d)).[3]

As to counts 1 and 2, the trial court sentenced defendant to life without the possibility of parole, plus a consecutive term of 25 years to life for firearm use pursuant to section 12022.53, subdivision (d), with the sentence in count 2 to run concurrently with the sentence in count 1. It struck the multiple murder special circumstance in count 2. In count 3, defendant received a consecutive sentence of 2 years, plus a term of 10 years in prison for the section 186.22, subdivision (b)(1)(C) gang enhancement.

Defendant contends that: (1) there is insufficient evidence to support the jury's finding that a semiautomatic firearm was used in the assault in count 3; (2) a witness's in-court identification of him was the product of an unduly suggestive procedure; (3) the trial court erred when instructing the jury with respect to the multiple murder special circumstance allegation; (4) the gang enhancement in count 3 is unauthorized; and (5) the firearm enhancements in counts 1 and 2 are unauthorized or inadequately pleaded,

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[3] As we note later, the Attorney General mistakenly believes that defendant was found to have personally used a firearm in commission of the crimes. The record shows that the jury found true that a *principal* used a firearm in commission of the murders, but found not true the allegations that defendant *personally* used a firearm in all counts. (§§ 12022.53 (c) & (e)(1) [counts 1 & 2], 12022.5 (a) & (d) [count 3].)

or in the alternative, the cause must be remanded to allow the trial court to consider exercising its discretion under section 1385 to strike the section 12022.53, subdivision (d) firearm use allegations under recently enacted section 12022.53, subdivision (h). (Senate Bill No. 620 (2017–2018 Reg. Sess.).)

The Attorney General agrees that the gang enhancement in count 3 was unauthorized. Although the Attorney General asserts that imposition of firearm enhancements under section 12022.53, subdivision (d) was proper, it agrees the cause must be remanded to allow the trial court to exercise its discretion to consider dismissing the firearm use enhancements. It argues the remaining contentions are either without merit or that any error is harmless.

We modify the judgment to reflect that defendant's conviction for assault with a semiautomatic weapon in count 3 under section 245, subdivision (b), is reduced to assault with a firearm in violation of section 245, subdivision (a)(2), and to strike the 25 years to life firearm enhancements in counts 1 and 2 (§ 12022.53, subds. (d) & (e)(1)), and the 10-year gang enhancement in count 3 (§ 186.22, subd. (b)(1)(C)). We remand for resentencing in count 3, and to permit the trial court to exercise its discretion under Senate Bill No. 620 to either strike or impose the firearm enhancements under section 12022.53, subdivisions (c) and (e)(1), in counts 1 and 2. The judgment is otherwise affirmed.

## FACTS

### *Prosecution*

On August 19, 2011, Eddie Miller and Justin Wright hosted a party at Miller's house on Coldwater Canyon. The party was attended by members of rival gangs Pasadena Denver Lanes (PDL) and the Rollin' 40's.

Defendant went to Miller's house with a group of fellow Rollin' 40's members, including Telvin Breaux and Gregory Edmonds. PDL members Wilson Pierre and Deon Bastian were at the party along with Pierre's girlfriend, Cedjanae Walker. A fight broke out after midnight between the gangs in Miller's backyard. Wright believed the fight began after the disc jockey played a gang-related song and people started throwing up gang signs. He heard someone use the term "O-Killa" just before the fight started. Walker believed the fight started after Pierre and a Rollin' 40's member "hit each other up"—i.e. exchanged gang affiliations. Pierre told the Rollin' 40's member he was an "O-Killa," meaning that his gang killed Rollin' 40's members. A second man walked over and hit Pierre up. Walker told Pierre not to say anything and urged him to leave because she saw a gun in the man's waistband. A third man approached and struck Walker.

The fight involved between 10 and 20 people, including Breaux, Bastian, Pierre, and Walker. Walker grabbed a big stick and started swinging it. One man was slammed to the ground and appeared to be badly injured. The fight broke

up, and Miller escorted a group of four to five people out of the party through the front door. The injured man had to be supported by friends to walk. Wright saw defendant, who appeared to be very angry, leave the party through the house. Defendant's clothes were disheveled and dirty. Wright felt something bad was about to happen, so he went into the backyard and told people to leave through the front. Wright told Bastian and a man with him to leave. Bastian responded, "We'll leave. We're just going to chill for a bit." Wright told Bastian to leave again and then went inside the house to look for Miller. When he re-entered the house, Wright heard two gunshots.

Miller attempted to shepherd a group of Rollin' 40's to the gate separating his front yard from the sidewalk. The men remained in the front yard. Some other men were standing on the sidewalk in front of the house. One of the men handed a gun to a man inside the gate. The man who received the gun told the others that he was "going to hit the fence," and began walking toward the side of the house, where a fence separated Miller's front and back yards. Miller did not want the man to go into the backyard, so he grabbed the man by the shoulders in attempt to stop him. The man turned around, held the gun a few inches from Miller's face and told him to "[b]ack the fuck up." The armed man and the group he was with went over the fence into Miller's backyard. Miller immediately went inside and told people that someone had a gun. Inside, Miller found Wright and warned him not to go in the backyard. He called 911.

While he was speaking with the dispatcher, Miller heard gunshots.

Walker had remained in the backyard with Pierre and Bastian. After she heard the first gunshot, she and Pierre ran to the far end of the yard and hid near a tree. Pierre told Walker he would distract the gunman. While she ran for the house, he ran behind a car. Two of the men involved in the initial confrontation with Pierre were searching the yard for Pierre and Bastian. One of the men found Pierre and alerted the gunman, "He's right here." Pierre ran toward the house, but the gunman shot him in the chest. Walker got Pierre into her car and drove him to the hospital, but Pierre died on the way. Bastian was found dead on the ground with a gunshot wound to the head.

**The Investigation**

Los Angeles Police Department Detective Thomas Townsend investigated the crimes. Miller described the shooter as five feet eight inches or five feet ten inches. The shooter wore a hat and was not skinny. Miller only saw the gunman while the gun was in his face. Miller identified Breaux as one of the people involved in the initial fight with one of the victims. About a month after the shooting, Miller saw Breaux at a club, and Breaux asked him why he was "snitching."

Miller told Detective Townsend that he had heard some of the people from the party were in a rap video called

"Hard In The Paint." The detective watched the video with Miller, who identified Breaux as one of the people at the party. Detective Townsend investigated Breaux, and learned that he and Edmonds were close friends. The detective put Edmonds's photograph in a photographic six-pack to show witnesses. Breaux and Edmonds were arrested together.

Walker identified four different people as the gunman in photographic lineups that did not include defendant.[4] Detective Townsend never showed Walker a six-pack containing defendant's photo, because "she was incorrect on four other times."

Breaux's sister, Fantesia Davis, knew defendant from school. She told Detective Townsend that her brother told her the day after the shootings that defendant shot some guys at the party. Defendant also told Davis he had gotten into a fight and shot two PDL members at a party. Defendant told her he was afraid of being caught because one of the men he shot did not die.

While in custody, Breaux told his sister and his mother that defendant was the shooter. He also told Detective Townsend that he saw someone give defendant a gun at the

[4] Walker made an in-court identification of defendant as the gunman.

party.[5] Breaux's mother told Detective Townsend that defendant had called her and told her he killed Bastian and Pierre.

Detective Townsend found defendant's number in Breaux's cell phone. He was able to determine that defendant's phone had been near Miller's house on the night of the party. The detective put a photo of defendant in a six-pack of photographs. Miller and Wright identified defendant as someone who had been at the party. Miller thought defendant resembled the gunman, but could not positively identify him.[6]

Detective Townsend arrested defendant. Defendant denied that he handled a gun at the party. No physical evidence linked him to the shooting. During a recorded jail call, defendant said a man named Jamie Williams was snitching.

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[5] At trial, Breaux said he made up the story about defendant having a gun because he was afraid that he was still a suspect. He told his mother and sister to go along with the story.

[6] Miller testified at trial that he did not think he had ever seen defendant before the proceedings.

**Expert Witness Testimony**

The prosecution called two police officers, who testified as experts on gangs and gang culture.[7] They testified the Rollin' 40's is a street gang with a pattern of criminal activity, and opined that defendant is a Rollin' 40's gang member. When given a hypothetical with facts that paralleled the instant case, both officers opined that the murders were committed for the benefit of a criminal street gang.

***Defense***

The defense called Dr. Kathy Pezdek, a professor of cognitive science at Claremont Graduate University, as an expert on memory and eyewitness identifications. Dr. Pezdek testified regarding numerous factors that can adversely affect the accuracy of a witness identification. In Dr. Pezdek's opinion, the photographic six-pack containing defendant's photo essentially offered a choice of three possible suspects, because the other three people could be eliminated immediately on the basis of the witnesses' description of the suspect. In her opinion, this was an "unacceptable" identification procedure. She further opined

[7] Defendant does not challenge the sufficiency of the evidence underlying the jury's gang allegation findings.

that an in-court identification is "worthless as a test of eyewitness memory."

## DISCUSSION

### *Sufficiency of the Evidence*

Defendant challenges the sufficiency of the evidence supporting the jury's finding that he used a semiautomatic weapon to assault Miller in count 3. We agree. We reduce defendant's conviction for assault with a semiautomatic weapon under section 245, subdivision (b), to assault with a firearm in violation of section 245, subdivision (a)(2), and remand for resentencing on that count.

We review the sufficiency of the evidence in the light most favorable to the judgment for substantial evidence—evidence that is reasonable, credible, and of solid value. (*People v. Maury* (2003) 30 Cal.4th 342, 396; *People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Section 245 is divided into several offenses based on the instrumentality of the assault. The defendant's punishment depends on which specific offense he committed. If a standard firearm is used, the maximum term is four years (§ 245, subd. (a)(2)); if a semiautomatic firearm is

used, the punishment may be as high as nine years (§ 245, subd. (b)). Defendant had a Sixth Amendment right to a jury determination of the type of firearm used in the assault. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 ["[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"]; *Alleyne v. United States* (2013) 570 U.S. 99, 103 ["any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury"].)

Section 245, subdivision (b), is violated by a defendant who commits an assault with a semiautomatic firearm. Section 17140 defines a semiautomatic pistol as "a pistol with an operating mode that uses the energy of the explosive in a fixed cartridge to extract a fired cartridge and chamber a fresh cartridge with each single pull of the trigger." The testimony of a lay witness is sufficient to establish the nature of a firearm. (See *People v. Haynes* (1984) 160 Cal.App.3d 1122, 1136, fn. 7; *People v. Williams* (1976) 56 Cal.App.3d 253, 255.)

The firearm used in the crimes was never recovered. Miller testified that a man with "a gun" said he was going to go into the backyard where the fight had broken out. When Miller tried to stop the man he pointed the gun at Miller's face and threatened him to back off. Pierre and Bastian were both shot to death. Criminalist Jeffrey Lowe of the Los Angeles Police Department's Forensic Science Division testified that he recovered and examined four "discharged

cartridge cases" from the backyard where the shootings occurred. He explained that discharged cartridge cases are "ejected from the handgun after the bullet is fired." All of the discharged cartridge cases bore the headstamp "380," which meant that all four bullets were .380 caliber.

The evidence presented shed little light on the type of firearm used, beyond the fact that it ejected cases. No percipient witness described the firearm, and neither of the criminalists who collected and examined the firearm evidence testified regarding the operation of the gun or what type of gun it was. There was simply not sufficient evidence for the jury to make a determination as to whether the firearm used to commit the assault was semiautomatic.

Although the evidence in support of count 3 was insufficient to establish that defendant used a semiautomatic firearm, the jury necessarily found defendant committed assault with a firearm, which was supported by Miller's testimony that he was assaulted by a man with a gun. (§ 245, subd. (a)(2).) When a conviction is contrary to law, but the evidence shows that defendant is guilty of a lesser-included offense, we may reduce the conviction to the lesser-included offense and affirm the judgment as modified. (§ 1181, subd. (6); § 1260; *People v. Navarro* (2007) 40 Cal.4th 668, 681.) We therefore modify count 3 to reflect a conviction of assault with a firearm, in violation of subdivision (a)(2) of section 245.

***In-Court Identification***

Defendant argues that admission of Walker's in-court identification was a violation of his due process rights because it was the product of an unduly suggestive procedure. Because defendant has not alleged improper law enforcement activity, the contention necessarily fails.

In *Perry v. New Hampshire* (2012) 565 U.S. 228, at pages 232–233 (*Perry*), the United States Supreme Court explained: "We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. . . . Our decisions . . . turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." Moreover, where an identification is not procured under unnecessarily suggestive circumstances arranged by law enforcement, the due process clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification. (*Id.* at

pp. 247–248; *People v. Thomas* (2012) 54 Cal.4th 908, 930–931 (*Thomas*).)

Defendant was afforded the appropriate protections here. Evidence was presented that Walker attempted to identify defendant in three photographic lineups and a video prior to trial, and that in every instance she identified different individuals—none of whom was defendant. Detective Townsend admitted that he did not want to show Walker a lineup containing defendant because "she was incorrect on four other times." The jury witnessed the in-court identification and necessarily understood that Walker had only one option to choose from when identifying defendant. Walker was subject to cross-examination, and the defense presented an expert on eyewitness identifications who testified that such identifications are often unreliable and that the identification in the instant case in particular was "worthless." The jury was properly instructed on both reasonable doubt (CALCRIM Nos. 220, 224, 401, 520, and 521) and on the caution with which eyewitness testimony should be viewed (CALCRIM No. 315). Because defendant's due process rights were not implicated, the trial court did not err in refusing to exclude the identification. Absent improper law enforcement activity, the reliability of the in-court identification was for the jury to determine. (*Perry*, *supra*, 565 U.S. at pp. 247–248; *Thomas*, *supra*, 54 Cal.4th at p. 931.)

***Multiple Murder Special Circumstance Instruction***

**Intent to Kill**

Defendant contends that the trial court erred in failing to instruct the jury under CALCRIM No. 702 that it was required to find he had the intent to kill before it could find true the multiple murder special circumstance. Although we agree the omission was error, we conclude that the error was harmless beyond a reasonable doubt, because the jury convicted defendant of two counts of first degree murder—which requires the specific intent to kill—and was properly instructed as to those offenses.

"Under California law, a person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259; *People v. McCoy* (2001) 25 Cal.4th 1111, 1116–1117 (*McCoy*); see § 31.) Therefore, "a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts." (*McCoy*, *supra*, at p. 1117.) A defendant can be liable as an aider and abettor in two ways. "First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' [Citation.]" (*Ibid*.)

Where there is substantial evidence that the defendant is an aider and abettor rather than the direct perpetrator, the jury must find that he had the specific intent to kill before finding the multiple murder special circumstance true. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 928.) The court has a sua sponte duty to instruct the jury on the mental state required for accomplice liability when a special circumstance is charged and there is sufficient evidence to support the finding that the defendant was not the actual killer. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1117.) The duty to give the accomplice intent instruction exists regardless of the prosecution's theory of the case. (*Ibid.*)

Here, there was substantial evidence to support the conclusion that defendant was not the shooter. Walker testified that two men were searching for the victims just before Pierre was killed. One man shot Pierre after the other man pointed out his location. Although Walker identified defendant as the shooter at the trial, she was unable to identify him in four lineups prior to trial, and no other eyewitness identified him as the shooter. Miller and Wright only tentatively identified defendant as being present at the party. Miller said defendant resembled the man who assaulted him with a gun but could not positively identify him. Breaux's statements to Detective Townsend were inherently suspect, and he disavowed them at trial. The witnesses who claimed defendant confessed to them were Breaux's family members—who had a strong motivation to lie to protect him. Defendant contested that

he was the shooter, and presented expert testimony on the unreliability of eyewitness identifications. The trial court's omission of the instruction was therefore error.

We conclude that the error was harmless beyond a reasonable doubt, however. (See *Neder v. U.S.* (1999) 527 U.S. 1, 17 (*Neder*) [omission of an element of an offense is error subject to harmless error analysis]; *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) [reversal is required unless it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"].) The prosecution advanced the theories that defendant was liable either as a direct perpetrator or an aider and abettor, and that he aided and abetted in the murders either directly or indirectly under the natural and probable causes doctrine. The jury was instructed on first degree murder (CALCRIM No. 521), second degree murder under the natural and probable consequences doctrine (CALCRIM No. 403), and aiding and abetting intended crimes (CALCRIM No. 401). In both counts, it found not true the allegation that defendant personally and intentionally discharged a firearm causing death, but convicted him of first degree murder—i.e., it found defendant guilty under a direct aiding and abetting theory of liability.

In convicting defendant of first degree murder on both counts 1 and 2, the jury necessarily found that he intended to kill. CALCRIM No. 521 instructs that: "[T]he defendant is guilty of first degree murder if the People have proved that he/she acted willfully, deliberately, and with

premeditation. The defendant acted *willfully* if he/she intended to kill." CALCRIM No. 401 advises that, to be guilty as a direct aider and abettor, defendant had to have known that the perpetrator intended to commit the crime, i.e., murder, and "intended to aid and abet the perpetrator in committing the crime." If a defendant knows the perpetrator intends to commit murder, and intends to aid the perpetrator in committing the murder, the aider and abettor necessarily intends to kill. CALCRIM No. 401 reiterated that one "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." A defendant who knows the perpetrator intends to kill, and specifically intends to aid, facilitate, promote, encourage, or instigate the murder, cannot lack the intent to kill. There is no question that "the error 'did not contribute to the verdict obtained.' (*Chapman*, *supra*, [386 U.S.] at [p.] 24.)" (*Neder*, *supra*, 527 U.S. at p. 17.) "[T]he only mens rea or scienter requirements for the multiple victim circumstance are subsumed within the requirements of the underlying offenses, which were litigated and resolved against the defendant." (*People v. Mancebo* (2002) 27 Cal.4th 735, 747; see also *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 46 [failure to instruct on element of intent for multiple murder special circumstance harmless where "the jury necessarily found under other properly given instructions that any defendant that it convicted of murder

on a theory of aiding and abetting possessed the intent to kill"].)

**Beyond a Reasonable Doubt Standard**

Defendant further contends that he was prejudiced by the court's failure to instruct the jury that the multiple murder special circumstance must be proved beyond a reasonable doubt under CALCRIM No. 700. He argues that in light of the trial court's instructions on the beyond a reasonable doubt standard with respect to the offenses and allegations, its failure to instruct on the burden of proof for finding a special circumstance true may have led the jury to believe that it did not require the same burden of proof.

Defendant's contention fails because the instructions, viewed as a whole, advised the jury the special circumstance must be proved beyond a reasonable doubt. "A single jury instruction may not be judged in isolation, but must be viewed in the context of all instructions given. (*Middleton v. McNeil* (2004) 541 U.S. 433, 437; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 182; *People v. Huggins* (2006) 38 Cal.4th 175, 192.)" (*People v. Thomas* (2011) 52 Cal.4th 336, 356 (*Thomas*).)

We agree with the parties that the jury must be instructed that a special circumstance allegation is subject to the beyond a reasonable doubt standard of proof. (*People v. Ochoa* (1998) 19 Cal.4th 353 (*Ochoa*), 420; *People v. Frierson* (1979) 25 Cal.3d 142, 180 (*Frierson*).) But these authorities

do not require a separate instruction on the subject, and to do so would run contrary to the rule expressed in *Thomas*, *supra*, 52 Cal.4th at page 356, as well as countless other published decisions. *Frierson* and *Ochoa* predate the 2005 publication of the CALCRIM instructions; the juries in those cases were instructed on reasonable doubt pursuant to CALJIC No. 2.90. CALJIC No. 2.90's explanation of reasonable doubt is more constrained that the inclusive language of CALCRIM No. 220. CALJIC No. 2.90[8] focuses the jury's application of reasonable doubt to proof of guilt, without specifying that it applies to all issues the prosecution must prove. In contrast, CALCRIM No. 220 is more explicit, in that it does not limit the application of proof beyond a reasonable doubt to "guilt." CALCRIM No. 220

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[8] CALJIC No. 2.90 provides as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.

"Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

advises the jury that proof beyond a reasonable doubt is required any time the court instructs that there is "something" the prosecution must prove. (CALCRIM No. 220 ["Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]."])

CALCRIM No. 721 explicitly places the burden of proving the multiple murder special circumstance allegation on the prosecution: "[T]he People must prove that: [¶] 1. The defendant has been convicted of at least one charge of first degree murder in this case; AND [¶] 2. The defendant has also been convicted of at least one additional charge of either first or second degree murder in this case." In combination, CALCRIM No. 721 advises the jury the People must prove the multiple murder special circumstance, and CALCRIM No. 220 directs the jury to apply the proof beyond a reasonable doubt standard to those things the People must prove.[9] Nothing more was required.

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[9] As in *Thomas*, defendant's jury also received various other instructions requiring proof beyond a reasonable doubt. (CALCRIM Nos. 224—sufficiency of circumstantial evidence; 401—aiding and abetting of intended crimes; 520—first or second degree murder with malice aforethought; and 521—first degree murder.)

*Sentencing Errors*

**Firearm Enhancements**

Defendant challenges imposition of the firearm enhancements in counts 1 and 2. He first argues the 25 years-to-life enhancements pursuant to section 12022.53, subdivisions (d) and (e)(1) in counts 1 and 2 must be stricken because the jury found the allegations not true. He additionally argues that the jury's true findings on all firearm allegations in counts 1 and 2 must be vacated because the prosecution failed to properly plead and prove that the crimes were gang-related.[10] Defendant further

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[10] The Attorney General responds, in part, to defendant's contentions with an argument that defendant does not accurately state the jury's findings. With respect to defendant's argument that the jury verdicts did not support imposition of the section 12022.53, subdivision (d) enhancements, the Attorney General maintains in a footnote that defendant "repeatedly and inexplicably states that the jury determined he did not personally use a firearm." The Attorney General accuses defendant of misrepresenting the record, because "the jury found true the § 12022.53, subdivision (c) allegations that he personally and intentionally discharged a firearm to commit murder" in counts 1 and 2. We believe it is the Attorney General's interpretation of the record that is incorrect. The jury found not true the allegation under subdivision (d), and its finding

argues in a supplemental brief that he is entitled to a remand of the cause to permit the trial court, if it so chooses and within the limits of section 1385, to strike the firearm use findings pursuant to the new authority set forth in Senate Bill No. 620. The Attorney General concedes that a remand is in order.

We agree with defendant that the verdicts do not support imposition of the section 12022.53, subdivision (d) enhancements in counts 1 and 2. We also conclude that the information properly alleged the murders were gang-related, that defendant had adequate notice of the section 12022.53, subdivision (c) and (e)(1) allegations, and defendant is subject to the 20-year enhancement under subdivision (c) as to counts 1 and 2. We remand to the trial court to exercise its discretion under Senate Bill No. 620 to either strike or impose the firearm enhancements under section 12022.53, subdivision (c) and (e)(1) in counts 1 and 2.

***Section 12022.53***

Section 12022.53, subdivisions (b)–(d), provide for sequentially greater enhancements applicable to various crimes, including murder as charged in counts 1 and 2. Under subdivision (b), a defendant who *personally uses* a firearm in a murder is subject to a consecutive term of 10

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under subdivision (c) was that a principal used a firearm, not that defendant personally did so.

years in state prison. Subdivision (c) increases the enhancement to 20 years for any person who *personally and intentionally discharges* a firearm. An enhancement of 25 years-to-life applies under subdivision (d) to a defendant who *personally and intentionally discharges a firearm and proximately causes great bodily injury or death*.

The enhancements in section 12022.53 also "shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." (§ 12022.23, subd. (e)(1).)

***Jury Verdicts***

Defendant correctly contends that imposition of the 25 years-to-life enhancements in counts 1 and 2 was unauthorized under section 12022.53, subdivision (d). He reasons that the jury found *not true* the allegations that he personally and intentionally discharged a firearm resulting in death under subdivision (d), and that it was not charged with determining whether a principal violated that subdivision. The jury having found the allegations under subdivision (d) not true, the trial court was without jurisdiction to impose the 25 years-to-life enhancements. These enhancements must be reversed and stricken.

We next turn to whether defendant is subject to the 20-year enhancement under section 12022.53, subdivision (c).

***Failure to Allege Counts 1 and 2 Were Gang-Related***

Defendant contends the jury's true findings on all firearm allegations in counts 1 and 2 must be vacated.[11] Defendant reasons that the information did not allege the existence of the facts required under section 12022.53, subdivisions (e)(1) and (j).[12] These subdivisions require the prosecution to plead and prove that a defendant violated section 186.22, subdivision (b) (§ 12022.53, subd. (e)(1)), to invoke a firearm use finding based on the conduct of a principal. He further argues that the prosecution's failure to allege the crimes were gang-related violated his constitutional right to due process because he did not have proper notice of the enhancements. We reject both arguments.

Defendant is mistaken to the extent he argues the prosecution was required to expressly allege in counts 1 and

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[11] We need not further discuss subdivision (d), as the jury found that allegation not true.

[12] Section 12022.53, subdivision (j) provides as follows: "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

2 that the murders were gang related under section 186.22, subdivision (b). Section 12022.53, subdivision (j), "only requires the facts necessary to sustain the enhancement be alleged in the information; it does not say where in the information those facts must be alleged or that they must be alleged in connection with a particular count in order to apply to that count." (*People v. Riva* (2003) 112 Cal.App.4th 981, 1001, fn. omitted (*Riva*).)

The information alleged in counts 1 and 2 that a principal personally and intentionally discharged a handgun within the meaning of section 12022.53, subdivisions (c), (d), and (e)(1). One element of section 12022.53, subdivision (e)(1), is that the defendant must have violated section 186.22, subdivision (b). The information further alleged that the offenses in counts 3 and 4, which were part of the same continuous transaction with counts 1 and 2, were committed for the benefit of a criminal street gang under section 186.22, subdivision (b)(1)(C). The information, read as a whole, was sufficient to comply with the requirements of section 12022.53, subdivisions (e)(1) and (j). (See *Riva*, *supra*, 112 Cal.App.4th at pp. 1002–1003.)

For the reasons set forth above, we also hold defendant was provided notice of the allegations by the information. The court and parties at trial understood that the enhancements in counts 1 and 2 alleged that a principal discharged a firearm in the commission of gang-related murders. Additionally, the jury was instructed, without objection from defense counsel, that it must determine

whether defendant committed all four charged offenses for the benefit of a criminal street gang, pursuant to section 186.22, subdivision (b)(1). (CALCRIM No. 1401.) As to counts 1 and 2, the jury was specifically instructed that before it could decide whether the section 12022.53 enhancements applied, it must first have found that defendant committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further or assist in criminal conduct by gang members. (CALCRIM No. 1402.) The verdict forms, to which there was no objection, included the allegations in counts 1 and 2 that a principal personally and intentionally discharged a handgun within the meaning of section 12022.53, subdivisions (c) and (e)(1), and that the crimes were committed for the benefit of a criminal street gang, pursuant to section 186.22, subdivision (b)(1)(C). There can be no doubt that defendant was on notice of the allegations.

Defendant is subject to the 20-year enhancement provided by subdivision (c) of section 12022.53. The cause is remanded to the trial court for imposition of the 20-year enhancement in counts 1 and 2, subject to the application, if any, of Senate Bill No. 620 and section 12022.53, subdivision (h), as discussed below.

***Senate Bill No. 620***

Although the trial court was required to impose the firearm enhancement at the time defendant was convicted, while this appeal has been pending the Governor signed Senate Bill No. 620, which amends former section 12022.53, subdivision (h), to permit the trial court to strike a firearm enhancement as follows: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 1.) We conclude that the court should be afforded the discretion to strike the section 12022.53, subdivisions (c) and (e)(1) firearm use allegations under Senate Bill No. 620 in the first instance, and we remand for that purpose.

**Gang Enhancement**

We agree with the parties that the trial court erred in count 3 by imposing the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). Section 186.22, subdivision (b)(1)(C), authorizes a 10-year enhancement where the underlying offense is a "violent felony," as defined in section 667.5, subdivision (c). Assault with a firearm qualifies as a violent felony under section 667.5 where the firearm use within the meaning of section 12022.5 has been

charged and proved. (§ 667.5, subd. (c)(8).) The information alleged defendant personally used a firearm within the meaning of section 12022.5, subdivisions (a) and (d) in count 3, but the jury found the allegation not true. As a consequence, the conviction in count 3 is not a violent felony and imposition of the gang enhancement is unauthorized. We order the trial court to modify the judgment to strike the section 186.22, subdivision (b)(1)(C) enhancement in count 3. (*In re Renfrew* (2008) 164 Cal.App.4th 1251, 1253 [an unauthorized sentence may be corrected on appeal].)

## DISPOSITION

Defendant's conviction for assault with a semiautomatic weapon in count 3 under section 245, subdivision (b), is reduced to assault with a firearm in violation of section 245, subdivision (a)(2). We modify the judgment to strike the 25 years-to-life firearm enhancements in counts 1 and 2 (§ 12022.53, subdivision (d)), and the 10-year gang enhancement in count 3 (§ 186.22, subdivision (b)(1)(C)). We remand for resentencing in count 3, and to permit the trial court to exercise its discretion under Senate Bill No. 620, to either strike or impose the firearm enhancements under section 12022.53, subdivision (c) and (e)(1), in counts 1 and 2. In all other respects the judgment is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J. KIM, 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.