Filed 1/3/20 P. v. Foster CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TRAVIS ODELL FOSTER, Defendant and Appellant.	B286544 Los Angeles County Super. Ct. No. BA431591

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Richman, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

John A. Colucci, 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, Assistant Attorney General, Colleen M. Tiedemann and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Travis Odell Foster of one count of first degree murder as an aider and abettor, and found true firearm and gang allegations. The trial court sentenced Foster to 75 years to life. On appeal, Foster argues insufficient evidence supports his conviction and the true findings, the trial court abused its discretion when it admitted evidence about a subsequent uncharged shooting, and the court committed reversible error in its instructions to the jury about that evidence.

We reverse the true findings on the gang and firearm allegations and otherwise affirm the judgment.

BACKGROUND

An amended information charged Foster with the December 14, 2011 murder of Greg Hudson (Pen. Code,[1] § 187, subd. (a)); alleged a principal personally used a firearm (§ 12022.53, subds. (b), (c), (d), and (e)), and the murder was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)); and alleged Foster had a 1996 conviction of a serious and/or violent felony (voluntary manslaughter). (§§ 667, subd. (d), 1170.12, subd. (b), 192, subd. (a).) After trial, a jury convicted Foster of first degree murder, and found true the allegations that he personally used and discharged a firearm, and that he committed the murder for the benefit of a criminal street gang. The trial court in a bifurcated trial found Foster had a prior conviction for voluntary manslaughter. The court sentenced Foster to 25 years to life for the murder, doubled to 50 years under the Three Strikes Law, plus 25 years for the firearm enhancement under section 12022.53, subdivision (d). The court

---

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

struck the gang allegations under section 12022.53, subdivision (e)(2), and imposed and stayed a 10-year term under section 12022.53, subdivision (b) and a 20-year term under section 12022.53, subdivision (c). Foster filed a timely notice of appeal.

1. *Prosecution evidence*

a. The December 14 shooting

On December 14, 2011, Quanisha Stinnett lived with her children and their father Miguel Luna on West 65th Street, about six houses away from the Foxx Liquor Store. Just before 8:30 p.m., Stinnett was on the front porch watching Luna back his truck out of the driveway. She saw a silver Charger speeding down the street and called to Luna to wait. After the car sped past, nearly hitting Luna's car, he backed out of the driveway and left. Within 30 seconds a speeding car passed by again, headed in the same direction. Stinnett went into the house, and 30 to 40 seconds later she heard multiple gunshots.

When a detective interviewed Stinnett in January 2013, she told him the Charger passed by three times at around 60 miles per hour, skidding and running stop signs. The driver was a husky black man in his 30s with dark skin. Shown a photographic lineup of six different men, Stinnett identified a photograph of Foster as the driver because of his facial hair and the shape of his bald head. She added, "I'm not saying that's him," but the profile was most like the driver. The light was poor, and she had a blurry side view.

Stinnett testified she was upset during the 2013 interview because she "didn't want to be a part of anything," and she had been taking several medications following a recent hospital stay. She testified reluctantly, claiming not to remember her recorded

statements to the detective. Stinnett was worried about "street politics" and her children's safety.

Luna testified that a speeding silver Dodge Charger almost crashed into him as he backed out of the driveway. He drove to the liquor store to pick up his friend, the cashier. Luna got out of his truck and saw the Charger speed by again on Denver, and then make a right turn onto 65th. Luna heard multiple gunshots, and he ducked and ran into the store. The shooting victim screamed the cashier's name. Luna looked outside and saw Hudson, whom he recognized as the father of a friend, sitting on the curb by Luna's truck. Luna ran outside; Hudson had collapsed five feet from the door of the store. Hudson could barely talk, but he recognized Luna and asked him to call his family and get help. Luna ran to Hudson's house and alerted the family. He saw a puddle of blood near the street where Hudson had been shot, and trails of blood where Hudson had walked toward the store.

Luna could not remember telling the police that the driver was a big, stocky black guy with a beanie and a shaggy beard, or that a skinny man on the curb, wearing shorts and a hoodie, did the shooting. All he remembered now was ducking the bullets and running into the liquor store. Luna had lived in the area for 15 years and had no idea whether it was affiliated with a gang. As far as Luna knew, Hudson and his son were not gang members. When he had been shown the same six-photograph lineup as Stinnett, Luna had not identified any of the photographs as the driver of the Charger.

Hudson's daughter testified her father was called "the cook" because on the weekends he fixed fish dinners and barbecue for everyone in the neighborhood. She ran to the liquor store when

Luna told her family that Hudson had been shot. Wearing plain black basketball shorts, a white t-shirt, a black apron, and a black do-rag, Hudson lay in a pool of blood, asking her to help him. He was taken to the hospital, where he died four months later after many surgeries. Hudson was not a gang member and had no enemies in the neighborhood.

The medical examiner removed two bullets from Hudson's lower right chest and right thigh. Treatment of his gunshot wounds required surgeries to remove Hudson's spleen, his left kidney, and part of his bowels, and his stomach and liver were injured. The cause of Hudson's death was complications from the multiple surgeries.

Los Angeles Police Department (LAPD) Detective Brian Williams, a member of the gang enforcement detail, responded to the December 14 shooting at the liquor store, which was in the 77th Division at the corner of 65th Street and Denver Avenue. Detective Williams did not remember seeing graffiti at the liquor store, and could not identify the store as the hangout of any particular gang.

Hudson was lying on the pavement just outside the store, conscious but bleeding from multiple gunshot wounds to his torso. Hudson told Detective Williams he was walking on the sidewalk by the liquor store when a gray Dodge Charger passed him heading east, and stopped mid-block. A male black passenger got out and fired at Hudson multiple times with a black handgun. The shooter got back into the car, which drove away down 65th Street toward Figueroa. Hudson could not describe the driver, and said nothing about gangs. Hudson was taken to the hospital. Police found two bullet casings and a spent bullet at the scene.

b. *The December 21 shooting*

One week later, on December 21, 2011, at around 10:30 p.m., Tamika Baul drove to her friend's house on Brynhurst Avenue to pick up some cookies, stopping her car on the curb across the street. Baul was texting her friend from the driver's seat when a gray Dodge Charger pulled up next to her car. Through the passenger side window she saw Foster in the Charger's driver's seat, "looking around and kind of being suspicious." Baul called her friend to come outside because she knew the area was Rolling 60s gang territory (from friends' warnings, gang attire, and graffiti). But before she could complete the call, Baul saw flashes, and heard six or seven shots and bullets hitting her car. She dropped to the floor of the car, and crawled out the front passenger door. She saw Foster shoot. He was three or four feet away, and she got a good look at him: he was bald with a little facial hair "like a bottom beard on [his] chin," he wore a black hoodie with the hood down around his neck, and he was husky. The gun in his hand was not shiny and she thought it was black. Baul waited by the passenger side of her car until she heard Foster speed off, and then she ran across the street to her friend's house.

At the same time, two police officers in the neighborhood heard about eight gunshots, and a speeding silver Dodge Charger almost collided with their patrol car. The driver gave the officers a startled look, drove around the patrol car, and sped away, blowing through stop signs. The officers followed with lights and sirens activated, until the Charger hit a stop sign and rolled to a stop at 75th and Van Ness. During the chase, the officers saw items being thrown out of the Charger's windows. The officers ordered the occupants out of the Charger and arrested them.

Foster was the driver, and the two passengers were Marquis Graham and Bryan Cook. When he was booked, Foster was five feet 9 inches tall, and weighed 200 pounds.

The officers found items that had been thrown from the speeding Charger, including two handguns (a loaded black nine-millimeter Beretta and a loaded Colt .45 caliber revolver), a pair of orange and black True Grip gloves, and a left-hand black and orange True Grip glove matching a right-hand glove later found in Graham's home. Police also collected six .45 caliber cartridge casings and four spent .45 bullets at the scene outside the house on Brynhurst, and found a live .45 caliber round on the front passenger floorboard of the Charger. The police brought Baul to the intersection of Van Ness and Florence, where she identified Foster as the shooter (she was 98 percent sure).

Department of Motor Vehicles (DMV) records showed that in October 2011, Foster bought the silver Charger he drove after the December 21, 2011 shooting. In 2011, 1,183 Dodge Chargers (not classified by color) were registered in Los Angeles County.

c. *Forensic testimony*

A senior criminalist in the firearms analysis unit testified the spent bullet and bullet casings found outside the liquor store after the December 14 shooting had been fired by the black Beretta thrown from Foster's Charger as it sped away from the December 21 shooting. Another criminalist testified she also analyzed the bullet, the casings, and the gun, and reached the same conclusion.

A Federal Bureau of Investigation agent analyzed the call records from the cell phones taken from Foster and Graham after the December 21 shooting. Within two and a half hours of the December 14 shooting, the phone taken from Foster made and

received more than 20 calls, with a gap in activity between 8:19 p.m. and 8:45 p.m. The cell towers used for all those calls were about one mile south of the liquor store where Hudson was shot.

The prosecution played the December 14 surveillance video from the liquor store. A still taken from the video showed a silver Dodge Charger passing by; the license plates and the driver were not visible.

d. *Gang evidence*

LAPD Sergeant Jesse West testified as a gang expert. In gang culture, "street politics" meant the way gangs thought things should operate on the street, and if things weren't meeting the standard, the gang would take action to restore order. The gang also would punish a regular citizen who talked to the police. Respect was a top concern for gangs, achieved by instilling fear in rival gangs and local citizens. To instill fear, gangs commit crimes such as "jump-out" shootings, where a car pulls up, a passenger jumps out, and shoots the intended target. To intimidate another gang, a gang will go into rival gang territory and commit a shooting, usually (but not always) yelling out the name of their gang, wearing gang colors, or asking where the victim is from, to make their gang known and to gain notoriety and respect for their boldness. Local citizens would also be discouraged from cooperating with police.

Over 18 years, Sergeant West had become very familiar with the 74 Hoover Criminals, which was bonded with another Hoover subset called the 8 Trey Hoovers. The two subsets were considered "sister" Hoover cliques because their territories were "right on top of each other." In 2011, the subsets had about 200 members each. The two subsets often committed crimes together,

which would benefit the entire Hoover gang, and when they were "feeling the heat" from a rival gang, the gangs would unite to battle their common enemy. The 74 Hoover Criminals' primary color was orange. The gang was "huge rival[s]" with the Rolling 60 Neighborhood Crips, who controlled the area around Brynhurst where the December 21 shooting took place. The liquor store where the December 14 shooting took place was in an area claimed by the 65 Menlo Crips, another rival of the Hoover Criminals.

The 74 Hoover Criminals' primary activities, all calculated to strike fear in and intimidate rival gangs and neighborhood citizens, ran the gamut from vandalism to street robbery to weapon possession and drive-by, walk-by, or jump-out shootings, which usually resulted in murder or attempted murder. Gang members often committed crimes in groups, usually of two or three, often pairing a junior member who needed to "put in work" ("show that he's down for the cause") with a senior member. For instance, gang members would drive together to a rival gang's neighborhood to shoot a designated target, a rival gang member, or if they could not find either one, an innocent citizen. After such a shooting, the participants would gain notoriety and be celebrated back in their own territory.

Certified conviction records showed that in 2010 two Hoover Criminals members had been convicted of carrying a loaded firearm in public and attempted murder.

Sergeant West and his partner had pursued the Charger after the December 21 shooting. The two passengers were 8 Trey Hoover members (as evidenced by their tattoos and monikers), and Foster, the driver, was a 74 Hoover Criminal whose moniker was "Castro." Tattoos on Foster's body showed his allegiance to

the 74 Hoover Criminals, and his hatred toward the Rolling 60s (by replacing the letter "R" with another letter). These tattoos showed membership in the gang and required the wearer to put in work to earn them.

Presented with a hypothetical tracking the facts in evidence of the December 14 shooting and assuming the driver was a Hoover Criminal member, Sergeant West opined the crime was committed for the benefit of a criminal street gang. A known member of the 74 Hoover Criminals gang, in the territory of a rival gang (the Menlo Crips) "punch[ed] out" a designated shooter, so the shooter could gain respect and notoriety from the senior member. After the shooting, the car drove away and turned right toward safety in Hoover territory. In "pure intimidation," a 74 Hoover member went into a rival gang area and put in work (the shooting), showing blatant disrespect and striking fear in the rival gang and witnesses in the community.

On cross-examination, Sergeant West testified he vaguely remembered one contact with Foster in 2006 or 2007. He did not document that contact with a field identification card, and Foster did not identify himself as a Hoover Criminals member. He agreed no suspected gang members were hanging out at the liquor store on December 14, 2011, and no reports showed gang graffiti around the store, although 40 to 50 gang-related incidents had taken place in that block of 65th Street from 2011 to the time of testimony in 2017. He was not aware of any evidence of gang hand signs, gang clothing, or that anyone identified himself as a gang member or asked Hudson, " 'Where are you from?' " Sergeant West believed his knowledge of Foster's gang moniker came from a field interview card prepared by a different officer.

LAPD Sergeant Joseph Scida testified that Lewis Marquis Burns was a Hoover gang member, and certified court documents showed he was convicted of a February 2010 attempted murder.

2. *Defense evidence*

Sergeant Scida testified that his sole contact with Foster occurred when Sergeant West arrested him on December 21, 2011.

Dr. Mitchell Eisen testified as a defense expert on eyewitness identification, discussing factors that can affect the memory of an eyewitness. The reliability of an identification increases if the witness observes the suspect longer, and decreases with time. Presenting a witness with a six-pack photographic lineup more than a year after the event may suggest to the witness that the suspect's photograph is included.

DISCUSSION

1. *Sufficient evidence supported Foster's conviction for first degree murder*

Foster argues insufficient evidence supported his conviction for Hudson's murder. We review the entire record in the light most favorable to the judgment to determine whether any rational trier of fact could have found the evidence proved the elements of the crime beyond a reasonable doubt. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) We draw all reasonable inferences in favor of the judgment, do not resolve credibility issues or reweigh the evidence, and ask only if the evidence reasonably justifies the findings of the jury. (*Ibid.*)

Substantial evidence supports the guilty verdict. Stinnett and Luna both testified that on December 14, 2011, a silver Dodge Charger sped past their home. Stinnett described the driver as a husky black man, and around a year later identified

a photograph of Foster in a six-pack photographic lineup as looking most like the driver. Stinnett saw the Charger speed by again, and Luna saw the Charger speed past the liquor store where Hudson was shot. Luna told police the driver was a big, stocky black guy and the shooter was skinny, but did not identify Foster in the same photographic lineup shown to Stinnett. The bullet casings and the spent bullet found at the scene were fired from a gun thrown from Foster's silver Dodge Charger as Foster sped away from the December 21 shooting. Baul identified Foster in a field showup as the driver who shot at her from the Charger, which DMV records showed Foster had owned since October 2011. The phone found on Foster on December 21 showed numerous calls on December 14 using a tower about a mile south of the liquor store shooting, with a gap in activity around the time Hudson was shot. In combination, this evidence was sufficient to convict Foster for Hudson's murder. Foster argues that neither Stinnett nor Luna definitively identified him, but the evidence linking Foster to the Charger and the black Beretta that fired the bullet casings found at the scene, and the records showing the phone taken from him on December 21 was in the area near the liquor store before and after the December 14 shooting, are strong corroboration. We do not reweigh the evidence, and we will not second-guess the jury's conclusion.

2. *Insufficient evidence supported the true finding on the gang allegation*

Foster argues that the evidence related to the December 14, 2011 shooting was insufficient to prove the gang allegation. We apply the same standard of review to determine whether substantial evidence supports the true finding on the gang

allegation. (*People v. Franklin* (2016) 248 Cal.App.4th 938, 947 (*Franklin*).) We agree that the evidence was insufficient to support a finding that the December 14 shooting was gang-related, and committed with the specific intent to promote or further the gang.

When the trial court admitted the evidence of the December 21, 2011 shooting, the court allowed the prosecution to use the testimony that Foster was with Hoover gang members on December 21 to show that Foster was an active gang member who associated with other gang members. The court also allowed the evidence of the December 21 shooting to be used to prove that Foster had the intent to kill necessary for the first-degree murder charge. The court expressly did not allow the evidence to be used to show that Foster intended to benefit the gang or further criminal activity by gang members by participating in the December 14 shooting. We therefore do not consider the evidence related to the December 21 shooting in evaluating the sufficiency of the evidence regarding the gang allegation.

Section 186.22, subdivision (b)(1) allows imposition of sentencing enhancements on a "person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." The gang enhancement may be found true only if the prosecution proves beyond a reasonable doubt (1) that the underlying felony was for the benefit of or in association with a gang; and (2) that the defendant had the specific intent to promote or assist in criminal conduct by gang members when he committed the felony. (*People v. Perez* (2017) 18 Cal.App.5th 598, 606-607 (*Perez*)). The jury found true the allegation that Foster

committed the murder for the benefit of a gang with the specific intent to promote criminal conduct by gang members.

First, insufficient evidence established that the December 14 shooting was committed for the benefit of a gang. "Not every crime committed by a gang member is gang related. [Citation.] Nor can a crime be found to be gang related simply because the perpetrator is a gang member with a criminal history." (*Perez*, *supra*, 18 Cal.App.5th at p. 607; *People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).)

" 'Expert opinion that particular criminal conduct benefitted a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was "committed for the benefit of . . . a[ ] criminal street gang." ' " (*Perez*, *supra*, 18 Cal.App.5th at p. 608.) Sergeant West testified Foster was a member of the 74 Hoover Criminals gang, the December 14 shooting took place in the territory of a rival gang, and when the Dodge Charger took off after the shooting the car turned right and headed toward 74 Hoover Criminals territory. That evidence is not sufficient to support a finding the shooting benefitted the 74 Hoover Criminals.

Although Foster (the driver) did not act alone, there was no evidence the unidentified shooter was a gang member, let alone a member of the 74 Hoover Criminals, to support a conclusion that Foster acted in association with another gang member, or relied on a common gang membership, to commit the shooting. (*Albillar*, *supra*, 51 Cal.4th at p. 60.) For a finding that the crime was committed "in association with" members of a criminal street gang, the others must be members of the same gang as the defendant. (*Franklin*, *supra*, 248 Cal.App.4th at p. 950.) There was no evidence that either Foster or the shooter

shouted out a gang name, threw up a gang sign, wore gang colors, or displayed visible tattoos, and therefore no evidence that they were members of the same gang. There also was no evidence Hudson or Luna knew either the driver or the shooter was a member of a gang. (*Perez*, *supra*, 18 Cal.App.5th at p. 609.) There was no evidence that Stinnett, Luna, or Hudson, the victim, were associated with the Menlo Crips, a rival of the 74 Hoover Criminals, or with any other gang, or that anyone associated with the Menlo Crips saw the shooting. Although Sergeant West testified that gangs commit "jump-out" shootings, there was no evidence that *only* gangs committed such shootings. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 662.) And although the liquor store was in an area associated with the Menlo Crips, Detective Williams denied seeing any graffiti nearby and could not identify the store as a Menlo Crips hangout. The Charger's right turn in the direction of Hoover territory after the shooting does not, without more, support a conclusion that the shooting was for the benefit of a gang.

Second, the evidence was insufficient to establish that Foster engaged in the December 14 shooting with the specific intent to promote, further, or assist criminal conduct by the 74 Hoover Criminals. Foster did nothing to show he was a 74 Hoover Criminal himself, or to make the gang known in any way to the witnesses of the crime or to any rival gang members. To the extent his repeated speeding through the neighborhood and the subsequent shooting frightened or intimidated members of the community, there is no evidence supporting a conclusion that would enhance respect for, or create fear of, the 74 Hoover Criminals, who remained unidentified throughout. (*Perez*, *supra*, 18 Cal.App.5th at p. 612.) Further, no evidence established that

Foster or anyone else bragged about the crime afterwards, or in any way took credit for the shooting on behalf of the 74 Hoover Criminals. (*Id.* at p. 611.)

Sergeant West testified that having two participants would allow a junior member to "put in work" and gain the respect of a senior gang member by jumping out and doing the shooting. "[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar*, *supra*, 51 Cal.4th at p. 68.) But the prosecution presented no evidence of the shooter's identity, and as we stated above, no evidence established that he, like Foster, was a member of the 74 Hoover Criminals, let alone that he was a junior member of the gang.

The evidence does not support a conclusion that Foster acted for the benefit of the 74 Hoover Criminals and had the specific intent to promote the gang when, on December 14, 2011, he drove the Charger to the liquor store where his passenger shot Hudson. We reverse the true finding on the gang enhancement.

3. *Insufficient evidence supported the true finding that Foster personally used and discharged a firearm*

We also agree with Foster that the evidence was insufficient to support the jury findings that in committing the December 14 shooting he *personally* used and discharged a firearm under section 12022.53, subdivisions (b), (c), and (d).

The amended information alleged a *principal* personally used and/or discharged a firearm during the commission of Hudson's murder (§ 12022.53, subds. (b), (c), (d) & (e)(1)), and that the murder was committed for the benefit of a criminal

street gang under section 186.22, subdivision (b)(1)(C). Section 12022.53, subdivision (e)(1) states the firearm enhancements in subdivisions (b)-(d) 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 [the gang allegation]. (B) *Any principal* in the offense committed any act specified in subdivision (b), (c), or (d)." (Italics added.)

Throughout the trial, the prosecution argued that Foster, as the driver of the Charger, was guilty of aiding and abetting the man who got out of the car and shot Hudson at the liquor store in the December 14 shooting. Using CALCRIM No. 1402 ("GANG-RELATED FIREARM ENHANCEMENT"), the court instructed the jury that if it convicted Foster of Hudson's murder and found the gang enhancement true, the jury must also determine whether "the People have proved the additional allegation that one of the principals personally used, personally and intentionally discharged a firearm during that crime and caused death." After listing the elements of the allegation, the instruction defined a "principal" as someone who "directly commits the crime or if he or she aids and abets someone else who commits the crime." The court also gave CALCRIM Nos. 400 and 401 on the elements of aiding and abetting liability. In closing argument, the prosecutor argued, "[A]n aider and abettor is equally guilty . . . so it doesn't matter that [Foster] wasn't the shooter on December 14th, 2011." Foster was the driver, which was "a pretty important role[;] that's how they got there, that's how they got away," and the December 21 shooting was gang-related, which was relevant to Foster's knowledge, intent, and motive on December 14.

As submitted to the jury, however, the verdict form for first degree murder asked the jury to find whether Foster was the shooter. The form asked the jury to answer "true" or "not true" to the questions whether "the defendant, TRAVIS FOSTER, personally and intentionally discharged a firearm, to wit: a handgun, which proximately caused death to GREG HUDSON" within the meaning of Section 12022.53, subdivisions (c) and (d), and whether "the defendant, TRAVIS FOSTER, personally used a firearm, to wit: a handgun, within the meaning of Penal Code section 12022.53(b)." The verdict form did not ask whether a *principal* used or discharged a firearm. During deliberations, the jury submitted a jury question form to the court: "Clarification re: the allegation that the defendant personally and intentionally discharged a firearm as it relates to the charges of 1st degree and 2nd degree murder. I.e. does aiding and abetting equal personally & intentionally discharging a firearm." The jury also asked for a definition of first and second degree murder. The court's response stated: "The firearm allegations apply equally to 1st degree and 2nd degree murder. Please review 1402, 400 + 401 [the instructions on the firearm enhancement and on aiding and abetting]."

The jury subsequently found true the three allegations that Foster himself personally discharged and used a firearm under section 12022.53, subdivisions (b), (c), and (d). When the court polled the jury after the clerk read the verdict as it was written on the verdict form, each juror confirmed that he or she found true that Foster personally used and discharged a firearm.

But no evidence supported the jury's true findings. The only eyewitnesses to the shooting, Luna and Hudson himself, both told the police that someone other than the driver of the

silver Dodge Charger got out of the car and shot Hudson, and Luna described the shooter as a "skinny" black male. Stinnett described the driver, Foster, as "husky," which is inconsistent with the description of the shooter. The prosecutor never argued that Foster was the shooter, and on appeal Respondent does not argue that sufficient evidence supports the true findings that Foster personally used and discharged a firearm.

Instead, Respondent argues that Foster was properly charged with the gang-related firearm enhancement in section 12022.53, subdivision (e)(1), that section allows personal-use enhancements to be applied to an aider and abettor of a gang-related shooting, and the prosecution proved all the elements of that section. This argument misses the point. While the prosecution presented sufficient evidence to support a jury finding that a principal *other than Foster* used and discharged a firearm, the jury in this case was never asked to make, and never made, that finding. Instead, the jury was only asked whether it was true or not true that *Foster himself* used and discharged a firearm. No evidence supported a finding that Foster personally used and discharged a firearm during the December 14 shooting. We reverse the jury's true findings under section 12022.53, subdivisions (b), (c), and (d).[2]

---

[2] If the verdict form had asked whether a *principal* used a firearm for the benefit of a criminal street gang under section 12022.53, subdivision (e), and the jury had found the allegation true, we still would reverse that finding, given that (as we explain above) insufficient evidence supports the finding that the shooting was committed for the benefit of a gang and with the specific intent to promote criminal activity by the gang.

4. *The trial court did not abuse its discretion when it admitted evidence of the December 21 shooting*

Foster argues the trial court abused its discretion when it allowed the prosecution to introduce evidence of the uncharged December 21 shooting. "On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion." (*People v. Kipp* (1998) 18 Cal.4th 349, 369 (*Kipp*).)

Before trial, the prosecution moved to admit evidence of the December 21 shooting under Evidence Code section 1101, subdivision (b), to prove intent, common design, and identity in the December 14 shooting of Hudson. Defense counsel objected to the evidence as not sufficiently probative to overcome the undue prejudice. The trial court found that some of the evidence arising out of the December 21 shooting—that Foster was driving a silver Dodge Charger, and that the firearm used to shoot Hudson was tossed from the Charger—was circumstantial evidence relevant to the December 14 shooting, to prove Foster's intent to kill, and common plan and scheme, but not identity. The evidence that Foster was associating with other Hoover gang members on December 21 was admissible to show he was an active gang member to prove the gang allegation. The evidence could not be used, however, to show that at the time of the December 14 shooting Foster had the intent to further criminal activity by gang members.

Before the prosecutor introduced any evidence of the December 21 shooting (and with defense counsel continuing to object), the court instructed the jury on how to use the evidence. The court told the jury that if the prosecution proved by a preponderance of the evidence (a different standard of proof

from beyond a reasonable doubt) that Foster was involved in the December 21 shooting, the jury could use the evidence "for the limited purposes of whether Mr. Foster had the intent that is required for the December 14 incident, whether he had motive for the December 14 incident, whether he knew that what happened on December 14 was going to happen, or what's called common plan and scheme."

The trial court instructed the jury with CALCRIM No. 375 on the permissible use of the evidence of the December 21 shooting. We address the propriety of that instruction below.

In closing, the prosecutor described the evidence of the December 21 shooting, Baul's identification of Foster as the shooter, and the matching of the Beretta thrown from the Charger to the bullet casings found at the scene of the December 14 shooting. The prosecutor argued the jury could use the evidence to decide whether Foster intended to aid and abet the shooter on December 14, whether Foster's motive on December 14 was gang-related and whether he knew what would happen when the shooter got out of the Charger, and whether the similarities between the crimes showed a common plan or scheme. The prosecutor continued: "But in addition to that, aside from all of that, those facts just give you more circumstantial evidence. The silver Dodge Charger and the murder weapon are circumstantial evidence that links those crimes together and therefore, Travis Foster to the murder of Greg Hudson."

Foster's counsel argued that although one reasonable conclusion was that Foster possessed the Beretta on both December 14 and December 21, another reasonable conclusion was that the Beretta was a "gang gun[ ]" jointly possessed by

the Hoover gang. She cautioned the jury to follow the court's instructions and not to conclude from the December 21 shooting that Foster had a bad character or was disposed to commit crimes. "You can use the uncharged incident to say if Mr. Foster was the driver on December 14th, then he would have had a motive go to into Menlo Crip territory and carry this out." She also argued a different Dodge Charger was involved in the December 14 shooting, and urged the jury to follow CALCRIM No. 375 and require the prosecution to prove the December 14 shooting beyond a reasonable doubt: "[Y]ou can't use [the December 21] incident to fix the weaknesses in the evidence on December 14th."

In rebuttal, the prosecutor argued: "The circumstantial evidence in this case is highly compelling. It's highly reliable. And the most significant piece of circumstantial evidence that has no memory problems, that has no problems with eyesight[,] is the matching of that bullet—one of the bullets that killed Greg Hudson, and the 9[-]millimeter that he threw out of the car for a very good reason because the police were chasing him." The evidence from the December 21 shooting had not been introduced to fix weaknesses in the case, but that evidence "actually supports this case, and that's how you put cases together. . . . It's not because if he did [the December 21] shooting, then he must have done the shooting on December 14th, 2011. It's because the circumstantial evidence ties him to that case." Baul's identification of Foster was consistent with Stinnett's identification, and it was not just a coincidence that Foster was driving the Charger again a week later on December 21.

Evidence that a defendant has committed crimes other than the crimes currently charged is not admissible under

Evidence Code section 1101, subdivision (b) to prove bad character or criminal disposition, but may be admitted to prove "the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes." (*Kipp*, *supra*, 18 Cal.4th at p. 369.) "The conduct may . . . have occurred after the charged events, so long as the other requirements for admissibility are met." (*People v. Leon* (2015) 61 Cal.4th 569, 597 (*Leon*).) To be relevant and admissible on the issue of common design or plan, the uncharged crime and the charged crime must have " ' "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." [Citation.]' " (*Id.* at p. 598.) To be admissible as evidence of intent, the uncharged crimes must be similar enough to support an inference that the defendant probably harbored the same intent as in the charged crime. (*Ibid.*)

In both the December 14 and December 21 shootings, Foster drove his silver Dodge Charger, carrying passengers, into rival gang territory. On December 14, Foster's passenger shot Hudson; on December 21, Foster shot at Baul. Neither victim was a gang member. After both shootings, Foster sped away. This is sufficient similarity to support an inference of a common plan carried out with the same intent, to drive the Charger into rival gang territory with the intent to commit random shootings and to escape by speeding away. A common plan " 'need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense.' " (*Leon*, *supra*, 61 Cal.4th at pp. 598-599.) Although Foster challenged Stinnett's identification of him as the driver of the Charger on December 14, "[t]he threshold *admissibility*

of uncharged crimes evidence does not require proof that the defendant was the perpetrator in both sets of offenses." (*Id.* at p. 599.)

The evidence of the December 21 shooting was highly relevant to prove Foster's intent and common plan, and its value was further enhanced by the close proximity in time (one week) of the two shootings. (*Kipp*, *supra*, 18 Cal.4th at p. 371.) The two crimes were proved by the testimony of separate witnesses. (*Ibid.*) The prosecution had to prove that Foster was the driver on December 14, and that he had the intent to kill when he raced to the liquor store, stopped the car so the passenger could get out, shoot Hudson, and get back in the car, and when Foster sped away. As in *Kipp*, "[T]he prosecution substantially relied upon evidence of the [uncharged] crimes to prove material and disputed factual issues. . . . When the trial court ruled the evidence admissible, defendant had not conceded any of these facts, nor did the prosecution have other evidence that proved these material disputed facts so conclusively that evidence of the [December 21 shooting] could be excluded as merely cumulative." (*Id.* at pp. 371-372.) "The probative value of [the evidence of the December 21 shooting] was high because [it] showed defendant committed the charged crimes according to the same plan and using the same weapon." (*Leon*, *supra*, 61 Cal.4th at p. 599.)

"Against this substantial probative value on material and contested issues, we must weigh the danger of undue prejudice to defendant, of confusing the issues, or of misleading the jury." (*Kipp*, *supra*, 18 Cal.4th at p. 372.) The trial court's balancing of probative value and prejudice under Evidence Code section 352 is an abuse of discretion when its ruling " 'falls outside the bounds of reason.' " (*Kipp*, at p. 371.) The evidence of the December 21

shooting did pose a real danger of undue prejudice to Foster, as a jury might incorrectly (and contrary to the instructions) view the evidence that he had shot at Baul as evidence of his criminal propensities. "But prejudice of this sort is inherent whenever other crimes evidence is admitted." (*Id*. at p. 372.)

The December 21 shooting, in which bullets hit Baul's car, was not more inflammatory than the December 14 shooting, which left Hudson bleeding on the sidewalk from multiple gunshot wounds and led to his death after multiple surgeries. (*Kipp*, *supra*, 18 Cal.4th at p. 372; *Leon*, *supra*, 61 Cal.4th at p. 599.) And we find it unlikely the jury was confused or misled, because as we explain below, the jury was properly instructed on the purposes for which it could consider the evidence of the December 21 shooting, including that the jury could not consider the evidence to prove Foster's bad character or criminal disposition, and that it must find Foster guilty of the charged offenses beyond a reasonable doubt. (See *Kipp*, at pp. 371-372; *Leon*, at pp. 599-600; *People v. Carter* (2005) 36 Cal.4th 1114, 1150.) The trial court did not abuse its discretion when it admitted the evidence of the December 21 shooting.

5. *CALCRIM No. 375 did not lower the prosecution's burden of proof on the crimes charged against Foster*

Foster argues the trial court erred when it gave CALCRIM No. 375, a standard instruction on other crimes evidence,[3]

---

[3] As given, CALCRIM No. 375 read:

> "The People presented evidence of a[n] incident involving Tamika Baul which occurred on December 21, 2011. That incident is not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the

defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the people have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense, you may, but are not required to, consider that evidence for the limited purpose of deciding whether: [¶] The defendant acted with the intent which is a necessary element of the crime charged; [¶] The defendant had a motive to commit the offense alleged in this case; [¶] The defendant knew the perpetrator intended to commit the crime when he allegedly acted in this case; [¶] OR [¶] The defendant had a plan or scheme to commit the offense alleged in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offense. [¶] Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder or that the gang and/or firearm allegations have been proved. The People must still prove the charge and allegations beyond a reasonable doubt."

because the instruction allowed the jury to find him guilty by a preponderance of the evidence. We disagree.

Preliminarily, we need not decide whether Foster forfeited his challenge to CALCRIM No. 375 because, as we explain below, the instruction was legally correct and applied only to the uncharged December 21 shooting.

Foster argues that giving CALCRIM No. 375 was structural error, because the instruction allowed the jury to find that Foster possessed the Beretta and owned the Charger during the uncharged December 21 shooting "merely [by] a preponderance," and the jury should have been instructed that the prosecution had to prove those facts beyond a reasonable doubt as "an indivisible part" of the charged December 14 shooting resulting in Hudson's murder. That argument fails.

Foster points to *People v. Nicolas* (2017) 8 Cal.App.5th 1165, which concluded that giving CALCRIM No. 375 was structural error because—unlike in this case—*no uncharged acts had been admitted into evidence.* (*Nicolas*, at pp. 1177-1178.) The defendant was charged with vehicular manslaughter with gross negligence, and the prosecution introduced evidence that she was texting and making phone calls just before she rear-ended the victim's car. (*Id.* at pp. 1172, 1175.) Over the defendant's objection, the court gave the jury a modified version of CALCRIM No. 375 explaining that "*the uncharged acts*" could be proven by a preponderance, but could not be used to show bad character. (*Nicolas*, at pp. 1177-1178.) Under these circumstances, "[t]he trial court plainly committed error by instructing the jury regarding uncharged acts using CALCRIM No. 375; there were, in fact, no uncharged acts admitted into evidence." (*Id.* at p. 1178.) As the Attorney General conceded,

the evidence of the defendant's text messages just before the collision was not other acts evidence under Evidence Code section 1101, subdivision (b), but " 'an indivisible part of the offense itself.' " (*Nicolas*, at p. 1178.) Telling the jury to find those indivisible facts by a preponderance, rather than beyond a reasonable doubt, was structural error requiring reversal. (*Id.* at pp. 1181-1182.)

People v. Nicolas does not apply here. First, here there *was* an uncharged act properly admitted into evidence: the December 21 shooting. Second, Foster's ownership of the Charger and his possession of the Beretta during the uncharged December 21 shooting were important facts, but not an indivisible part of the charged December 14 shooting one week earlier.[4] Although the evidence of Foster's car ownership and firearm possession on December 21 strengthened the case against Foster related to the December 14 shooting, this prejudicial effect

---

[4] A comparison to the facts in this case demonstrates the error in Foster's argument. Foster's reckless driving just before he stopped to let his passenger out to shoot Hudson, and his speeding away after his passenger got back into the car, were indivisible facts that were part of the December 14 shooting and evidenced Foster's intent to kill, much as the defendant's texts just before the collision in *People v. Nicolas*, *supra*, were evidence that the defendant was grossly negligent. If no evidence of the December 21 shooting had been admitted, and instead the jury here had been instructed that the fact of Foster's speeding before and after the shooting was "other acts evidence" that needed to be proven only by a preponderance of the evidence, we would confront a similar situation. Instead, the properly-admitted other acts evidence of the shooting a week later added to the quantum of evidence that Foster had been the driver of the Charger the week before.

is not "undue," but inherent in other (uncharged) crimes evidence where, as here, the trial court properly admits it. (*Kipp*, *supra*, 18 Cal.4th at p. 372.) "[J]ury instructions on evidence of *uncharged* crimes admitted . . . for a nonpropensity purpose under section 1101(b) 'are valid and necessary because they explain the *limited purpose* for which evidence of a defendant's other crimes has been admitted. . . . When extensive evidence of a defendant's . . . bad conduct has been presented, the jury needs to hear why this potentially inflammatory, collateral evidence is relevant and how it may properly be considered in deciding whether the defendant committed the charged crimes.' " (*People v. Jones* (2018) 28 Cal.App.5th 316, 330.)

The trial court did not err when it instructed the jury with CALCRIM No. 375.

DISPOSITION

The true findings on the gang and firearm allegations are reversed and the case is remanded for resentencing. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

I concur:

LAVIN, Acting P. J.

DHANIDINA, J., Concurring and Dissenting.

In all respects, but one, I agree with my colleagues. Respectfully, I disagree that the jury's true finding on the gang allegation must be reversed.

Even viewing evidence about Greg Hudson's murder in isolation—thus ignoring the uncharged attempted murder of Tamika Baul—that evidence was sufficient to prove the gang allegation. That evidence shows the following. Travis Foster is an active, documented 74 Hoover Criminal (Hoover) gang member. Per the People's gang expert, gang members commit crimes, including drive-by, walk-up, and jump-out shootings, to create the fear and respect that is all-important to gangs. In a jump-out shooting, the driver stays in the car while the passenger gets out and shoots the victim. A gang member generates more respect and notoriety if he or she gets out of a car and walks to the victim to shoot the victim. While on such a gang mission, gang members may have a designated target. But if they can't find their target, they have no problem killing innocent people.

Thus, on the evening of December 14, 2011, Foster, driving his silver Dodge Charger, made two to three passes down the same street, past Quanisha Stinnett's house. Although the speed limit was 35 miles per hour, Foster drove at more than 60 miles per hour, blowing through a stop sign, and almost hitting a car as it backed out of a driveway. Foster then drove to the nearby liquor store, which Hudson happened to be walking past. Foster's passenger got out and shot Hudson. Severely injured, Hudson said something like, "They got me." The neighborhood in which these events occurred is in territory claimed by the 65 Menlo Crips, which is one of Hoover's rivals. After Hudson

was shot, Foster immediately drove the Dodge Charger in the direction of Hoover territory.

In my view, this evidence is reasonable, credible and of solid value such that a jury could find beyond a reasonable doubt that Foster aided and abetted Hudson's murder for the benefit of, at the direction of, or in association with a gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. (See Pen. Code, § 186.22, subd. (b)(1); *People v. Albillar* (2010) 51 Cal.4th 47, 64.) In sum, Foster drove into rival gang territory in manner likely to attract attention. The only reason to circle Stinnett's neighborhood going 60 miles per hour was to announce the arrival of an intimidating presence. Foster then immediately drove to a public place, the liquor store, where Foster's passenger got out of the car and shot Hudson. Foster drove back to his own territory. I therefore cannot agree that there is insufficient evidence that this crime was committed for the benefit of a gang, with the requisite specific intent to promote, further, or assist criminal conduct by gang members. (Maj. opn. *ante*, at pp. 15–16.)

That we know little about the shooter does not undermine my conclusion. I do not rely on the associational element of the gang allegation to reach my conclusion. Nor is it necessary to do so. Even so, we do know at least two things about the shooter. First, he was with Foster, a Hoover gang member. And, second, the shooter got out of Foster's car and then shot Hudson, which is consistent with a walk-up or jump-out shooting that the gang expert described.

Also, the absence of evidence that Foster or the shooter shouted gang slogans, displayed gang signs or wore gang colors is not dispositive in view of the other evidence. *People v. Perez*

(2017) 18 Cal.App.5th 598 and *People v. Ochoa* (2009) 179 Cal.App.4th 650 are distinguishable. In *Perez*, the defendant, a gang member, was at a college party. When the defendant's friend had a disagreement with someone, the defendant began shooting. (*Perez*, at p. 602.) No gang slogans were shouted, nobody wore gang colors, nobody knew that the defendant was a gang member, and the shooting was not in gang territory. (*Id.* at p. 609.) The only evidence connecting the shooting to a gang was the defendant's status as a gang member, and therefore *Perez* reversed the true finding on the gang allegation. (*Ibid.*) Similarly, in *Ochoa*, at page 662, the gang expert gave overbroad testimony that carjacking was defendant's gang's signature crime, such that any carjacking by a member of that gang would necessarily be for its benefit. The court therefore reversed the true findings on the gang allegations. (*Id.* at p. 665.)

In contrast to these cases, the gang expert here did not testify that murder in general is specific to Foster's gang. The gang expert here testified to the practice of gang members driving into rival territory in a terrifying manner and having a shooter get out of the relative safety of the car to shoot someone. This bizarre practice has no other reasonable explanation than the one given, that it shows Foster's devotion to his gang.

That Hudson was not a gang member in no way diminishes the gang-related nature of the crime. (See *People v. Ochoa*, *supra*, 179 Cal.App.4th at p. 663, fn. 9.) As the gang expert testified, gangs also target innocent people. What better way to terrify a community than to kill someone unassociated with a gang? And, there was no evidence someone else had a motive to kill Hudson, as his daughter testified he had no disputes with anyone in the neighborhood. This lends strength to the

conclusion that the motive for this crime was gang related as opposed to other possible motives.

Further, the way this crime was committed was designed to create fear in the community. And we know it did. Although Stinnett witnessed some of these events, she did not initially come forward with what she knew. Stinnett repeatedly expressed she did not want to be involved, did not want to testify, and was concerned about speaking to police because of where she lived and because of street politics. That Stinnett and other members of the community may not have known it was the Hoover gang specifically that killed Hudson is irrelevant. The gang allegation requires that the defendant have the specific intent to benefit his gang, not that the victims know at the time the crime occurred which specific gang they have to thank for the crime.

Evidence of the uncharged attempted murder of Baul is merely the cherry on top of the other gang evidence. Considering the circumstances of Hudson's murder with the circumstances of the attempted murder of Baul, who like Hudson was not a gang member, renders evidence of the gang allegation overwhelming. In short, just one week after shooting Hudson, Foster, while driving a silver Dodge Charger, committed a similar shooting in another rival's territory, except this time we know that his companions were confirmed to be gang members. Baul was merely sitting in her car, texting, at the time.

As to the uncharged crime, I read the instructions given to the jury on that topic differently than my colleagues. As I read them, the jury was told it *could* consider evidence of the attempted murder of Baul for the purposes of proving the gang allegation, i.e., that Foster intended to benefit Hoover and

further criminal activity, and not just to prove Foster's gang membership. CALCRIM No. 375 stated that if the jury concluded Foster committed the uncharged offense, that was but one factor to consider. That factor alone was insufficient "by itself to prove that the defendant is guilty of murder *or that the gang and/or firearm allegations have been proved*. The People must still prove the charge *and allegations* beyond a reasonable doubt." (Italics added.) By this, the jury was instructed it consider the "factor" of the attempted murder of Baul to prove the gang allegation. It is irrelevant that the trial court may have intended, erroneously, to limit how the jury could use the uncharged-crimes evidence.[1] By including the above language, it placed no limit.

To this, add that the trial court also instructed the jury it could consider evidence of gang activity for the limited purpose of deciding whether Foster "acted with the intent, purpose, and knowledge that are required to prove the gang-related crime and enhancements charged" or Foster "had a motive to commit the crime charged." (CALCRIM No. 1403.)

Hence, evidence of Foster's gang activity was not limited to the events of December 14, 2011. It included any gang activity on December 21, 2011 when Foster tried to kill Baul. The jury was instructed that it could consider evidence of the uncharged crime for intent, motive, and plan or scheme. If the jury found that

---

[1] The trial court's ruling appears to have been based on a mistaken belief that Evidence Code section 1101, subdivision (b), applies to a substantive offense but not to allegations, such as one under Penal Code section 186.22. The face of Evidence Code section 1101, subdivision (b) does not support this ruling. The section applies to evidence "relevant to prove some *fact*" such as intent, motive, plan or scheme. (Evid. Code, § 1101, subd. (b), italics added.)

Foster's intent in attempting to kill Baul was gang related, it could conclude he intended to aid and abet Hudson's murder for a gang-related purpose. If the jury found that Foster's motive to kill Baul was to benefit the Hoover gang, then the jury could find that his motive to kill Hudson was also to benefit the Hoover gang. And, the jury could find that shooting innocent people in rival gang territories was part of Foster's plan or scheme to intimidate communities and instill fear of his gang, so that anyone seeing his silver Dodge Charger driving through the neighborhood would be on notice that whether they belong to a gang, are texting a friend, or walking to the store, their lives could be at risk.

For these reasons, I would reverse the true findings on the firearm allegations and otherwise affirm the judgment.

DHANIDINA, J.