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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EFRAIN RAMIREZ, Defendant and Appellant.	B267516 (Los Angeles County Super. Ct. No. BA397039)

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed as modified and remanded with directions.

Law Office of Mark R. McKinniss and Mark R. McKinniss, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Colleen M. Tiedemann and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Efrain Ramirez, convicted along with a co-defendant of two counts of attempted premeditated murder with gang and weapons enhancements, contends that the trial court imposed an unauthorized sentence, and that the minute order and abstract of judgment failed to properly describe an imposed restitution fine as joint and several. He further contends that he received ineffective assistance of counsel and that the court erred in rejecting a proposed instruction on assault with a deadly weapon, a lesser related offense. We remand for correction of the minute order and abstract of judgment with respect to the restitution fine, but otherwise affirm.

A. *Information*

Appellant and co-defendant Edwin Celis were charged by information with the premeditated attempted murder of Bryan G. and "John Doe" (Pen. Code, § 664/187, subd. (a), counts one and two).[1] The information alleged that the offenses were committed "for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members" within the meaning of section 186.22, subdivision (b)(1)(C). It was further alleged with respect to both counts that a principal personally and intentionally discharged a firearm which proximately caused great bodily injury to the victims within the meaning of

[1] Undesignated statutory references are to the Penal Code.

section 12022.53, subdivisions (d) and (e)(1), that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1), and that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1).[2]

B. *Evidence at Trial*

1. *Prosecution Evidence*

a. *Shooting of Bryan G. (Count One)*

On April 26, 2012, Bryan G. was standing on the sidewalk in front of a friend's house on Drew Street.[3] A blue SUV drove by and moments later, returned. It stopped a few feet from Bryan. The front passenger, a man, leaned out the front window and asked Bryan where he was from. Seeing that the man had a gun, Bryan started to run. The man said "Rascals gang" and "fuck Noodles gang," and shot at Bryan, hitting him multiple times.[4] Bryan ran behind a house

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[2] Subdivisions (b), (c) and (d) of section 12022.53 apply to the person who personally used or discharged a firearm; subdivision (e)(1) extends the applicability of those three subdivisions to any principal in the commission of the offense, if he or she also violated subdivision (b) of section 186.22.

During trial, the court dismissed the section 12022.53, subdivision (d) and (e)(1) great bodily injury allegations pertinent to the John Doe shooting (count two).

[3] As Bryan was 13 at the time of the shooting and 14 at the time of trial, he will not be identified by his full name.

[4] Bryan understood "Noodles" to be a disrespectful reference to the Avenues gang, an understanding confirmed by a gang expert. Bryan denied responding to the shooter by saying "Avenues" or being a member of that
(Fn. continued on next page.)

where he fell, bleeding. He was taken to a hospital for treatment, and at the time of trial had scars on his arm and shoulder. After the shooting, Bryan was shown a six-pack of photographs and identified co-defendant Celis as looking similar to the shooter. At trial, he testified that he had no doubts that Celis was the shooter.

That same day, Gloria Garcia was in her car on Estara Street near the intersection with Drew Street when she heard gunshots and saw people running. She saw a dark vehicle drive past on Drew Street and turn right at the street after Estara, running a stop sign. Although Garcia could not remember any further details at trial, shortly after the incident, she told an officer the vehicle she observed was a blue SUV, and that she saw two Hispanic males inside.

b. *Shooting of John Doe (Count Two)*

On April 26, 2012, at around 4:20 p.m. Mark Tubalinal, who lived near the intersection of Avenue 33 and Division Street, heard a commotion and looked out his window. He saw a Hispanic male (John Doe) running toward Division Street, followed by a speeding blue SUV. A man wearing a gray hooded sweater leaned out of the passenger side of the SUV and started shooting. Tubalinal called 911. The car sped away, nearly striking a child crossing the street.

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or any other gang, but was presented with evidence -- photographs and art from his Facebook page -- suggesting that he was a member of Avenues.

Tubalinal was later shown a six-pack of photographs, and identified Celis as the shooter.

At approximately the same time, Humberto Parra was waiting at a stop sign facing northbound on Division Street. He saw a blue SUV make a U-turn on Avenue 33 and stop in front of a store. He heard gunshots. Later, he was shown photographs by police officers and identified Celis as a passenger in the SUV.

c. *Appellant's Arrest*

Shortly after the shootings took place, a blue SUV was spotted by police officers at an Atwater Village fast food restaurant known as a Rascals hangout. When officers approached the vehicle, Celis got out and ran. Appellant and a passenger in the back seat, Joey O., remained in the vehicle.[5] All three were taken into custody. Celis was wearing a sweatshirt with a hood. Officers found a loaded handgun in the SUV's passenger door, and a box of ammunition in the glove box.

The blue SUV belonged to appellant. Criminalists lifted fingerprints from the ammunition box and the front passenger door of the SUV, and identified them as Celis's. Another criminalist tested Celis, appellant and Joey for gunshot residue, and found residue on Celis's left hand but not on appellant or Joey. Spent cartridges and bullet fragments collected at the scene of the shootings were tested

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[5] Joey was 14 at the time.

and found to have come from the handgun found in the passenger door of appellant's SUV. The criminalist who performed the ballistics testing described the handgun as "low end." During his testing, it jammed.

d. *Interview and Testimony of Joey*

After the suspects' arrest, Joey was interviewed by two detectives. His videotaped interview was played to the jury. In it, Joey told the detectives about the shootings that had occurred during his drive with appellant and Celis. He said one of his companions saw "an enemy" on Drew Street and said "'bust a bitch, bust a bitch.'" Either appellant or Celis asked the victim where he was from. Joey could not recall the victim saying anthing before starting to run. Celis said "Rascals" and started shooting, hitting the victim multiple times in the chest.[6] Joey also described seeing "'another one'" standing in front of a liquor store on Division Street. When the SUV stopped near him, this indivual said: "'[W]hat's up fool[?] Avenues.'" Celis replied "[W]hat the fuck[?] Rascals," and shot at him. The gun jammed. Joey described the motive for the shootings as "revenge" for "some guy that was murdered." He denied being a gang member and said that "the driver" (appellant) was not a gang member, but that "[t]he passenger" (Celis) was.

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[6] During the interview, Joey described the shooter as "he" or "my hommie," not by name, but there was no theory presented to the jury that anyone other than Celis had a gun or shot at the victims.

At trial, Joey testified he was friends with Celis and appellant, whom he knew as "Evo," and that on April 26, 2012, they picked him up in appellant's blue SUV at approximately 4:00 p.m.[7] Joey claimed they immediately started drinking and he became too drunk to remember anything else that happened that day. He also claimed not to recall anything he told the detectives. He acknowledged that if he ever told anyone what had happened, he would be labeled a "snitch" and killed. He stated that a person who claimed a gang he did not belong to would "die." Joey also testified that he had been told someone wanted him come to court and say, untruthfully, that a gun had been pointed at appellant and him during the drive.

e. *Gang Expert Testimony*

Officer Ryan Watterson, the expert on the Rascals gang and on one of its rivals, the Toonervilles, had testified in only two prior proceedings as an expert, including the preliminary hearing in the underlying case. However, he had been a police officer for seven years, and had had significant gang-related training and extensive interaction with gang members. He testified that the primary activities of the Rascals gang included tagging, robberies, home invasions, and assaulting other gang members. The gang

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[7] Appellant's nickname is sometimes referred to in the record as "Evil," but the parties agree it was, in fact, "Evo." Joey was not aware of a nickname for Celis.

had a distinguishing sign or symbol made by arranging fingers in the shape of an "R." He stated that it was a relatively small gang, with 80 to 100 members, only 20 to 30 of whom were active, in contrast with the Avenues with over 1,000 members. The prosecution introduced through Officer Watterson evidence establishing prior violent felony convictions of three active Rascals gang members.

According to Officer Watterson, the Rascals gang claims Atwater Village. Drew and Division Streets are claimed by the Avenues. In fact, "Drew Street" and "Division Street" are the names of cliques within the Avenues gang. A block away from Drew Street is a contested area. Officer Watterson expressed the opinion that no gang member would go into another gang's territory, except to engage in some activity that would earn the member status or "respect," such as assaulting a rival gang member or tagging property within a rival's territory. Officer Watterson also expressed the opinion that a gang member intending to commit a drive-by shooting would take a trusted fellow gang member with him to drive. Asked a hypothetical that tracked the evidence introduced by the prosecution, Officer Watterson opined that the shootings benefited the Rascals gang and increased the status of the individuals who committed them.

Concerning the defendants' status as gang members, Officer Watterson testified that field identification cards had been prepared for appellant and Celis, but neither identified

them as members of Rascals or any other specific gang.[8] Neither defendant had self-identified as a gang member. There was no evidence that either had tattoos. Only appellant had a nickname. Nonetheless, Officer Watterson opined that both were gang members. He testified that in his experience, younger gang members were not getting tattoos, shaving their heads, or wearing gang attire, making them more difficult to identify. On cross-examination, defense counsel established that there was no evidence either defendant had engaged in gang-related criminal activity prior to April 26, 2012. Officer Watterson believed the shootings may have been an initiation into the gang for Celis, who was several years younger than appellant.

Officer Joseph Bain, the primary investigating officer and an expert on the Avenues gang, testified that the characterization of the shooting as a gang-related crime derived from the words spoken by the shooter, the location of the shootings, the time of day they occurred, the known victim's background, and the suspects' backgrounds and associations. He described appellant as a "known Rascals gang member" and said that he learned of appellant's gang affiliation from other officers more familiar with the Rascals. On cross-examination, appellant's counsel established that

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[8] Field identification cards are filled out by officers when they encounter suspected gang members. The cards contain descriptions of an individual's companions and any other circumstances surrounding the encounter that raised the officer's suspicions. In some encounters, the individual admits being a gang member.

Officer Bain had never filled out a field identification card for appellant or been told by appellant he was a gang member. Officer Bain further acknowledged that he had observed no gang tattoos or gang attire on appellant, and found no gang paraphernalia in his vehicle. He also acknowledged that he received no information prior to the shootings that Celis was a gang member.

2. *Defense Evidence*

a. *Gang Expert Flores*

Celis's counsel called a gang expert, Martin Flores, who testified that he interviewed Celis for several hours and reviewed police reports and other evidence in the case, and had came to the conclusion Celis was not a gang member. Although Flores had not interviewed appellant, when questioned by appellant's counsel, Flores expressed the opinion that appellant was not a gang member either. He based this conclusion on the lack of tattoos and other indicia of gang affiliation, as well as the other evidence he had reviewed concerning the circumstances of the shootings. Based on a hypothetical similar to the evidence presented at trial, Flores opined that it was possible the shooting was done for personal reasons. However, the hypothetical presented to him by defense counsel did not include any of the words allegedly spoken by the victims or the suspects. On cross-examination, Flores acknowledged that if any of the participants had said "where are you from" or "fuck

Noodles," as several witnesses had testified, that would indicate the shootings were gang-related.

b. *Appellant's Testimony*

Appellant, testifying on his own behalf, admitted driving the blue SUV involved in the shootings on April 26, 2012, accompanied by Celis and Joey. He had known Celis for eight to ten months and Joey for approximately six months. They had driven around together many times in the past. Appellant denied knowing that Celis was armed when they got together on April 26, 2012, or what Celis planned to do. He testified that he believed Celis was giving him directions to a relative's house, where they planned to hang out. Shortly after appellant picked Celis up, they saw Joey, and Celis directed appellant to bring him along. When Celis suddenly said "'bust a bitch,'" appellant understood that as an instruction to make a U-turn. After the U-turn, Celis told appellant to stop in the middle of the street, and asked a young male standing nearby "'you Noodles?'" The boy shook his head. Celis said: "'Fuck that[,] . . . Rascals'" and shot at the boy. Celis then directed appellant to drive to the fast food restaurant in Atwater Village where appellant hoped Celis would get out. Instead, Celis directed him to another area and told him to make another U-turn and stop in front of a market. Appellant said "'Don't do anything stupid.'" Celis told him to "'shut the fuck up.'" Celis yelled "'where you from[?]'" at another male, who replied "'I don't bang.'" Celis shot at him. According to appellant, he did

everything Celis told him to do because he was in shock and was afraid Celis would shoot him too. During the drive, Celis held the gun in his right hand in his lap, pointed toward appellant. When they got back to the victiniy of the fast food restaurant in Atwater Village and saw police officers, Celis took off running. He told appellant and Joey to "'not say shit.'" Appellant said he did not give information to officers after his arrest because he was afraid Celis would hurt him or his family members if he told anyone what had happened.

During his testimony, appellant denied being a gang member. He said his nickname derived from his previous ownership of a Mitsubishi Lancer Evolution. On cross-examination by Celis's counsel and the prosecutor, he claimed not to know what the words "Noodles" or "Rascals" meant, or whether Celis, Joey or anyone else he knew was a gang member. Celis's counsel and the prosecutor also questioned why appellant had not attempted to get away or call for help on his cell phone, why he believed his friend of many months posed a threat to him, how the ammunition got into the glove box of his SUV, or why he had never expressed to anyone prior to trial that he was in fear of or threatened by Celis.

Appellant's counsel called an investigator who testified concerning his unsuccessful efforts to interview Joey. He spoke with the boy's grandmother, mother and father, but denied telling anyone about the topics he wanted to cover or suggesting that Joey should testify in a specific manner.

C. *Pertinent Argument*

In closing argument, the prosecutor described the shooting of Bryan as follows: "Mr. Celis . . . pulled out a gun after he said [']where are you from? Fuck Noodles, bust a bitch. This is Rascals [. . . .'"] [A]nd started firing." She further stated: "The second shot was another direct but ineffective step [toward murder]. The third shot and the fourth shot, Defendant[] Celis did not stop. And just because Mr. Bryan [G.] is alive and he came and testified to you, that wasn't because Mr. Celis did not make the effort to kill him." (Italics omitted.) Describing the John Doe shooting, she stated: "As to count 2, the same thing. Car drives by, stops. Mr. Celis gets out of the window. 'Where are you from[?]' At that time Victim John Doe says, 'What's up fool. It's Avenues.' Well, that's a target right there. So Mr. Celis starts shooting." Later, she stated: "Mr. Celis is shooting. Mr. Ramirez was only driving the car," before explaining the difference between the person who "actually pull[s] the trigger" and an aider and abettor.

Concerning the defendants' gang membership, the prosecutor argued that appellant and Celis must have been gang members because there were negative repercussions for falsely claiming to be a member of a gang, which witnesses said the perpetrators had done. She also explained that the defendants did not have to belong to a gang for the gang allegation to be found true: "So that whole testimony about Mr. Flores, of him believing that Mr. Celis and Mr. Ramirez are not active gang members, okay, fine. We don't need to

prove they're gang members . . . . [E]ven if you believe that neither one of these gentlemen are members of Rascals, it doesn't matter, because what they did and what they said benefitted the gang with the specific intent to promote conduct by gang members."[9] She reminded the jury that defense expert Flores "took that stand and admitted that the hypothetical I gave him, yes, ma'am, in that hypothetical, those crimes were committed for the benefit of, at the direction of and/or in association with a criminal street gang with the specific intent to promote, further, and assist conduct by gang members."

Celis's counsel questioned appellant's credibility based on his "saying all of a sudden, he doesn't know what gangs are; never seen a gang before."[10] He described appellant as "desperate" and "throwing a Hail Mar[]y pass." Counsel conceded that Celis "shot a gun out of a car" and caused bodily injury, but argued the shootings were not gang related, that Celis was not a gang member, and that he did not have the intent to kill the victims.

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[9] The court gave CALCRIM No. 1401, which provides in part: "The people need not prove that a defendant is an active or current member of the alleged criminal street gang." (See *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [declining to read into section 186.22, subdivision (b) "a requirement . . . that violation of that [provision] requires either 'active' or 'current, active' participation in a gang"].)

[10] Celis's counsel also urged the jurors to question the credibility of Joey and Bryan.

Appellant's counsel described Celis as "point[ing] the gun at [appellant] and say[ing], shut the fuck up and drive . . . ." In the midst of describing the threat Celis allegedly posed to appellant, he stated: "There was no opportunity to run away. Ramirez [sic] owns a gun. Owns the car used in the shooting. Motive to stay with his car. But also had a gun pointed at him." He also asked the jury to consider "why didn't Joey ever attempt to run away," adding "I mean this is Celis's [sic] car."

D. *Verdict and Sentencing*

The jury found appellant guilty of both counts.[11] It found the gang allegations true, the section 12022.53, subdivisions (d) and (e)(1) weapon allegations (principal proximately caused great bodily injury and defendant violated section 186.22) true for count one, and the section 12022.53, subdivisions (b), (c) and (e)(1) (principal used or discharged a firearm and defendant violated section 186.22) allegations true for both counts.

The court imposed the following sentence on appellant for count one: life with the possibility of parole for the willful, deliberate premeditated attempted murder of Bryan G., plus 25-years to life because the jury found true pursuant to section 12022.53, subdivision (d) and (e)(1) that a principal personally and intentionally discharged a firearm

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[11] Celis was also found guilty. He appealed separately.

causing great bodily injury.[12] The court mentioned the true finding under section 186.22, but stated "this does not apply" because "the gang allegation has been used as part of the [section 12022.53 (e)(1)] allegation." For count two, the court imposed a consecutive sentence of life with the possibility of parole for the willful, deliberate, premeditated attempted murder of John Doe, plus 20 years based on the jury's finding pursuant to section 12022.53, subdivisions (c) and (e)(1) that a principal personally discharged a firearm.[13] Appellant filed a notice of appeal.[14]

DISCUSSION

A. *Sentence*

Appellant contends his sentence was unauthorized because the court erroneously imposed a term of 15-years to life under section 186.22, and that this error was reflected in the minute order and the abstract of judgment. As noted above, however, appellant's sentence did not include any term imposed under section 186.22. Indeed, the trial court referred to that provision only to explain why it did not

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[12] The court also imposed and stayed a 20-year sentence under section 12022.53, subdivision (c), and imposed and stayed a 10-year sentence under section 12022.53, subdivision (b), based on the findings that a principal personally "discharged" and "used" a firearm during the commission of the offense.

[13] The court also imposed and stayed a 10-year term under section 12022.53, subdivision (b).

[14] Notice was untimely, but this court granted relief from default.

apply -- viz., because section 12022.53 enhancements had been imposed. (See *People v. Brookfield* (2009) 47 Cal.4th 583, 593-594 [accomplices who aid and abet gang-related offenses but do not personally use or discharge firearms are subject to additional punishment under either section 12022.53 or section 186.22, but not both].) The minute order correctly stated the sentence pronounced by the court, as did the abstract of judgment. Neither mentions section 186.22. There was thus no error and nothing to correct.[15]

B. *Restitution*

In sentencing appellant and Celis, the court imposed a "joint and several" restitution fine of $594, plus 10 percent interest. The minute order and abstract of judgment omit the quoted words, indicating the fine would be appellant's sole responsibility. As respondent concedes, this matter must be remanded in order to correct the minute order and abstract of judgment in this regard.

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[15] As respondent points out, based on the record citations in appellant's brief, his counsel appears to have confused appellant's sentence with that of his co-defendant Celis. Because Celis personally used and discharged a firearm, Celis was subject to both the section 186.22, subdivision (b)(5) and the section 12022.53 penalties. When sentencing Celis, however, the court characterized the 15-year minimum parole eligibility period imposed by section 186.22, subdivision (b)(5) as an "'additional term,'" resulting in a minute order and abstract of judgment that improperly reflected the imposition of two additional terms of 15-years to life. We modified the judgment to cure the defect and remanded for correction of the minute order and abstract of judgment in *People v. Celis* (April 21, 2015, B256031) [nonpub].

C. *Ineffective Assistance of Counsel*

"A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to effective legal assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009, italics omitted.) Appellant contends his trial counsel provided ineffective assistance for four reasons: (1) he failed to call a gang expert; (2) he failed to properly prepare appellant for cross-examination; (3) he failed to move for a severance; and (4) he inadvertently stated during closing argument that appellant had the gun and that the car was Celis's. For the reasons discussed, we conclude the record does not demonstrate that trial counsel was ineffective or that any misstatements were prejudicial.[16]

"When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the

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[16] In his reply brief, appellant argues for the first time that his counsel "was not prepared to cross-examine any witness." We need not address arguments raised for the first time in the reply brief. (*City of Merced v. American Motorists Ins*. Co. (2005) 126 Cal.App.4th 1316, 1328-1329; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) In any event, the record contradicts this assertion.

proceeding would have been different." (*People v. Mai*, *supra*, 57 Cal.4th at p. 1009.)

In assessing claims of ineffective assistance of counsel, an appellate court "'indulge[s] in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.'" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) "'Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel.'" (*Ibid.*) "'If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.'" (*Ibid.*)

Moreover, "'there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Cox* (2003) 30 Cal.4th 974, 1019-

1020, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 697.) With these principles in mind, we review the claimed deficiencies.

1. *Failure to Call a Gang Expert*

Appellant contends his counsel was ineffective for failing to call a gang expert to refute the charge that he was a gang member. First, as noted, we presume the choices made by counsel represented sound trial strategy in the absence of any contrary indication in the record. Second, appellant failed to establish prejudice. Appellant's counsel elicited from Celis's gang expert, Flores, the opinion that appellant was not a gang member. In addition, during cross-examination of the prosecution's gang experts, counsel established that appellant lacked certain indicia of gang membership, such as tattoos, and that he had no prior gang-related offenses and had not been positively identified as a member. The experts on both sides agreed that a determination of the gang allegation rested in large part on whether gang challenges and gang insults immediately preceded the shootings.[17] Finally, as highlighted by the prosecutor during her closing argument, the jury's finding under section 186.22, subdivision (b) did not require a determination that the defendants were gang members. On

[17] Both Bryan, the victim in count one, and Joey testified to such remarks. After the experts testified, appellant provided corroboration that Celis issued gang challenges prior to the shootings.

this record, it is not reasonably probable that the presence of a second defense gang expert would have led to a more favorable finding on the section 186.22 enhancement.

2. *Failure to Prepare Appellant to Testify*

Appellant contends his counsel allowed him to testify without adequately preparing him for cross-examination from the prosecutor and Celis's counsel, and that his counsel advised him to deny knowing about the Rascals gang in particular and about how to identify a gang member. Again, this is not a claim that can be resolved by review of the record. Moreover, appellant has presented no evidence to demonstrate prejudice. He does not state what he would have said differently had he been, in his view, adequately prepared, or how more preparation would have led to a different result.

Moreover, the record contradicts appellant's claim that he was unprepared to testify. On direct, he put forth a largely consistent account supporting the defense of duress. The difficulties he encountered on cross-examination were inherent in his version of events, which required the jury to believe that a gang member would trust a non-member to drive him around while he perpetrated multiple gang-related shootings, that appellant never had an opportunity to escape or seek help, and that appellant genuinely feared that his friend of many months would shoot him if he did not comply with instructions. As to appellant's testimony concerning his lack of familiarity with gangs, he fails to show this testimony

had any effect on the jury's verdict. In short, appellant failed to establish either that his counsel was ineffective in preparing him to testify or that any such alleged failure caused prejudice.

3. *Failure to Move for Severance*

Appellant contends his counsel provided ineffective assistance by failing to move for a severance of his trial from his co-defendant's. "Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile." (*People v. Price* (1991) 1 Cal.4th 324, 387.) Here, a motion to sever would have been futile.

In California, "[t]here is a statutory preference for joint trial of jointly charged defendants." (*People v. Masters* (2016) 62 Cal.4th 1019, 1048; see § 1098 ["When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials."].) Joint trials "'promote [economy and] efficiency'" and "'"serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts."'" (*People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 40.) Where, as here, the defendants are facing charges for having committed "'common crimes involving common event and victims,'" the situation presents "a 'classic case' for a joint trial." (*People v. Hardy* (1992) 2 Cal.4th 86, 168.)

In general, severance is called for where "'"there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants"'" or "'"prevent the jury from making a reliable judgment about guilt or innocence."'" (*People v. Homick* (2012) 55 Cal.4th 816, 848.) This may include situations where "'the defendants will present conflicting defenses'" or "'there is an incriminating confession by one defendant that implicates a codefendant.'" (*Ibid.*) However, "'[a]ntagonistic defenses do not per se require severance, even if the defendants are hostile or attempt to cast the blame on each other.' [Citation.]" (*People v. Hardy*, *supra*, 2 Cal.4th at p. 168, italics omitted; accord, *People v. Homick*, *supra*, at p. 850 ["Severance is not required simply because one defendant in a joint trial points the finger of blame at another"].) "If the fact of conflicting or antagonistic defenses alone required separate trials, it would negate the legislative preference for joint trials and separate trials 'would appear to be mandatory in almost every case.'" (*People v. Hardy*, *supra*, at p. 168.) "'[T]o obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' [Citations.]" (*Ibid.*) When the prosecutor presents "strong evidence" of the defendant's guilt "independent of the evidence [a codefendant] offer[s] in his own defense," antagonistic defenses do not compel severance. (*People v. Tafoya* (2007) 42 Cal.4th 147, 163.)

Here, appellant presented a version of events that implicated Celis, but Celis's defense -- that he was the shooter, but not a gang member and did not intend to kill anyone -- was not antagonistic to or irreconcilable with appellant's. Moreover, the prosecution presented strong independent evidence of both defendants' guilt. Multiple witnesses identified Celis and appellant's SUV. The gun found in the SUV matched the shells found at the scene of the shootings. There was extra ammunition fitting the gun in the glove box of appellant's vehicle. Celis had gunshot residue on his hand. Their companion Joey's statement to detectives immediately after the shooting indicated that appellant willingly drove Celis from one shooting incident to another, and did nothing to impede or prevent his commission of the crimes. Bryan's testimony about the circumstances surrounding his shooting matched Joey's statement in key respects. On this record, we find no reasonable probability that the trial court would have granted a severance, had appellant's counsel requested one.

4. *Counsel's Misstatements During Closing Argument*

Appellant contends he could "not help but be prejudiced by the jury hearing his attorney proclaiming that he 'owns a gun.'" As noted above, in closing argument, appellant's counsel mistakenly recounted that appellant "own[ed] a gun." He immediately follows with "own[ed] the car used in the shooting." Counsel's misstatement could not

have prejudiced appellant. The evidence was undisputed that Celis was the shooter. Every percipient witness identified him as the shooter. The gun was found in the passenger door. Celis was the only one of the three occupants of the SUV to have gunshot residue on his hand. His fingerprints were found on the ammunition box. During closing, the prosecutor repeatedly referred to Celis as the shooter and appellant as the driver and aider and abettor. Celis's own counsel conceded that his client was the shooter, arguing only that there was insufficient evidence of his gang membership and his intent to support specific charges and enhancements. Prior to the misstatements, appellant's counsel referred to Celis's holding a gun on appellant and to appellant's being the driver and owner of the SUV. The verdict forms submitted to the jurors with respect to Celis asked them to determine whether "Edwin Celis" personally and intentionally discharged or used a firearm. With respect to appellant, the forms asked the jurors to consider whether "a principal" personally and intentionally discharged or used a firearm. On this record, there is no reasonable possibility that the jurors were confused by appellant's counsel's slip of the tongue.

D. *Lesser Related Offense Instruction*

During trial, the court denied a request by appellant that the jury be instructed on assault with a deadly weapon when the prosecutor objected. Relying on outdated

authority, appellant contends this was error. No error occurred.

Trial courts are obligated to instruct sua sponte on lesser included offenses that the evidence tends to prove. (*People v. Alarcon* (2012) 210 Cal.App.4th 432, 436.) Lesser related offenses are another matter: "[A] criminal defendant has [no] unilateral entitlement to instruction on lesser offenses which are not necessarily included in the charge." (*People v. Birks* (1998) 19 Cal.4th 108, 136.)[18] "[I]nstruction on a lesser related offense is proper only upon the mutual assent of the parties." (*People v. Taylor* (2010) 48 Cal.4th 574, 622.) Assault with a deadly weapon is not a lesser included offense of attempted murder because attempted murder can be committed without use of a deadly weapon, and weapon enhancements may not be considered as part of the accusatory pleading. (*People v. Richmond* (1991) 2 Cal.App.4th 610, 616; accord, *People v. Alarcon*, *supra*, at p. 436; *People v. Parks* (2004) 118 Cal.App.4th 1, 6.) Accordingly, binding authority required the court to reject the proposed instruction.

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[18] *People v. Birks, supra,* 19 Cal.4th 108, overruled *People v. Geiger* (1984) 35 Cal.3d 510, cited by appellant in his brief.

DISPOSITION

The judgment is modified to reflect that the restitution fine is joint and several. So modified, the judgment is affirmed. The matter is remanded with directions to the trial court to correct the minute order to reflect the modification, to prepare an amended abstract of judgment, and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.