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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LARON LEE LARRIMORE et al. Defendants and Appellants.	B221303 (Los Angeles County Super. Ct. No. BA347367)

APPEAL from a judgment of the Superior Court of Los Angeles County. George G. Lomeli and Frederick N. Wapner, Judges. Affirmed in part, reversed in part.

Fay Arfa for Defendant and Appellant Laron Lee Larrimore.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant Jonathan Banks.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, and Victoria B. Wilson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

This appeal arises out of a drive-by shooting in which a three-year-old child was killed and her father was seriously wounded. Following a jury trial, appellant Laron Lee Larrimore, the alleged driver, was convicted of the second degree murder of the child (Pen. Code[1] § 187, subd. (a)) and the attempted premeditated murder of the father (§§ 664, 187, subd. (a)). Following a retrial, appellant Jonathan Banks, the alleged shooter, was convicted of the first degree murder of the child (§ 187, subd. (a)), the attempted premeditated murder of the father (§§ 664, 187, subd. (a)), and the attempted premeditated murder of the child's sibling who was seated beside her during the shooting (§§ 664, 187, subd. (a)). As to each of these counts, there were also true findings on the alleged firearm enhancements (§ 12022.53, subds. (b)-(e)) and the alleged gang enhancements (§ 186.22, subd. (b)). Both Larrimore and Banks now appeal their convictions on numerous grounds.

As to both appellants, we conclude that each of the gang enhancements must be stricken because the "primary activities" element of the enhancement was not supported by substantial evidence. As to Larrimore only, we further conclude that reversal of the gang enhancements requires reversal of the firearm enhancements pursuant to section 12022.53, subdivision (e). As to Banks only, we also conclude that his presentence custody credit must be corrected to reflect his actual custody time. Otherwise, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Charges

In an information filed on December 18, 2008, the Los Angeles County District Attorney jointly charged Larrimore and Banks with the murder of Kaitlyn Avila (§ 187, subd. (a)), the attempted willful, deliberate, and premeditated murder of Cesar Avila (§§ 664 & 187, subd. (a)), and the attempted willful, deliberate, and premeditated murder

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1 Unless otherwise stated, all future statutory references are to the Penal Code.

of Cassey[2] Avila (§§ 664 & 187, subd. (a)). As to each charged offense, it was alleged that a principal personally and intentionally discharged a firearm which proximately caused death or great bodily injury (§ 12022.53, subds. (b)-(e)), and that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)). Larrimore and Banks each pleaded not guilty to all counts and denied the enhancement allegations.

II. Joint Trial of Larrimore and Banks

A. Prosecution Evidence

1. The Shooting

In September 2006, Cesar Avila was living in an apartment on Pinafore Street in Los Angeles with his wife and their two young daughters, five-year-old Cassey and three-year-old Kaitlyn. Avila had never been arrested or involved in a criminal street gang. On the afternoon of Sunday, September 24, 2006, Avila, Cassey, and Kaitlyn went shopping and then to a fast-food restaurant before returning home in Avila's car at around 2:45 p.m. Both Kaitlyn and Cassey were seated in the back seat of the car with Kaitlyn sitting directly behind Avila and Cassey sitting beside her. Avila parked in front of his apartment building by the main entrance and began to exit his car.

As Avila stepped out of his car, a silver four-door vehicle came to a stop right beside him. The front passenger seat was rolled down and the rear windows were tinted. A person in the front passenger seat, who was about two feet from Avila, shouted out "Fuck 18." Avila turned around and observed the passenger and the driver. Both were Black men and the passenger wore his hair in braids. The passenger shouted out "Black P. Stones," pulled out a gun with his right hand, and fired one shot at Avila from the vehicle. The bullet struck Avila in his chest. Immediately upon being shot, Avila began running toward his apartment building, believing that the shooter would follow. The

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[2] In the trial court proceedings, the young attempted murder victim's name was spelled as both "Casey" and "Cassey." Because her father testified that the correct spelling of her name was "Cassey," we use that spelling here.

shooter exited his vehicle and then fired a second shot at Avila, which struck Avila in his hand. Avila collapsed in the courtyard area of his apartment complex where his wife and neighbors came to assist him. At trial, Avila identified Banks as the shooter and Larrimore as the driver.

At the time of the shooting, Marvin Barahona was standing near the intersection of Pinafore Street and Coco Avenue a little more than 36 feet from Avila's car. Barahona first observed a silver vehicle stop beside Avila's car. He then heard a single shot and saw a tall Black man with braids exit the silver vehicle from the front passenger seat and begin chasing Avila. The man was wearing a black sweatshirt, white shirt, and black pants. As the man chased Avila toward an apartment building, Barahona heard a second shot. He then saw the man run back to Avila's car, open the left rear passenger door, and fire a third shot into the car with his right hand. After the third shot, the man appeared to reach for an object on the ground before getting back into his vehicle. The vehicle sped away, running a stop sign with tires screeching as it fled. As Barahona called "911," he saw a small child lying on the ground beside Avila's car.

Yenicelli Centeno lived in the same apartment complex as Avila and his family. She was in her second-floor apartment when she heard three gunshots. Centeno looked out her window onto Pinafore Street and observed a tall Black man with braids bending down into Avila's car. The man stood up and began walking toward a silver Chrysler vehicle, but stopped for a moment to pick up a small black object from the ground. The man then got into the front passenger seat of the silver vehicle, which sped away. Centeno went downstairs where she saw Avila lying in the courtyard covered in blood, and Kaitlyn lying on the ground near Avila's car.

Barahona and other neighborhood residents tried to resuscitate Kaitlyn while waiting for medical assistance to arrive. Kaitlyn subsequently died of a single gunshot wound to the chest. The bullet struck Kaitlyn on the upper left side of her chest and exited at her lower right back. The trajectory of the bullet was "left to right, front to back, and downward." It perforated Kaitlyn's heart and lungs, ultimately causing her death.

2. The Police Investigation

Los Angeles Police Detectives Stanley Evans and Dorian Henry were the lead investigating officers on the case. At various times in the investigation, they were assisted by other officers, including Detectives Richard Gordon and Dave Garrido. During the investigation, officers recovered one nine-millimeter casing from the ground directly behind Avila's car. A single bullet also was recovered from the side panel of the car's right rear passenger door. Avila's car was dusted for fingerprints, but none of the prints identified belonged to Larrimore or Banks.

Officers responding to the scene of the shooting attempted to obtain a statement from Avila before he was transported to the hospital. Avila appeared to be in shock, but was able to tell the officers that the perpetrators were two Black men in a gray four-door Chrysler; he described the gun as a semi-automatic handgun. At the scene, Barahona told the police that the shooter was a Black man with braids wearing a black hooded sweatshirt, white shirt, and black pants. Barahona also indicated that he believed the shooter was 20 to 24 years in age and was five feet seven inches to five feet eight inches in height. Centeno provided the police at the scene with a brief description of the shooter as a tall thin Black man with braids. While in the hospital, Avila told the police that he would recognize the perpetrators if he saw them again.

Shortly after the shooting, officers detained Shunde Smith, a Black P. Stones gang member, as a possible suspect. Smith matched the general description of the shooter that had been provided to the police in that he was a Black man with braids wearing a black sweatshirt, white shirt, and black pants. Approximately three hours after the shooting, officers separately took Barahona and Centeno to a field show-up of Smith a few blocks from the crime scene. An emotional Barahona identified Smith as the person that he saw shoot into Avila's car. Centeno, on the other hand, told officers that Smith was not the person that she saw. Although Barahona positively identified Smith at the field show-up, he testified both at the preliminary hearing and at trial that Banks was the shooter.

In the days following the shooting, the police received three anonymous phone calls about the crime. One caller stated that "Gambino" was the shooter. That same

person called a few days later and said that "Gambino" was present at the crime but was not the shooter, and that "Baby Casper" and "Lil Pookie" were also involved. In another call, "Bambino" and "Boogie" were identified as the only individuals involved in the shooting. In response to these calls, Detective Evans consulted with gang officers about Black P. Stones members with these monikers and determined that Banks was known as "Gambino" or "Bambino." After viewing photographs of each of the individuals identified in the calls, Detective Evans noticed a strong physical similarity between Banks and Smith, and decided that further investigation was warranted before arresting Smith for the shooting.

On September 29, 2006, Detectives Gordon and Garrido interviewed Kerry Cahee, a known Black P. Stones gang member, following his arrest for grand theft auto. The purpose of the interview was to ascertain whether Cahee had any knowledge about the shooting. During the tape recorded interview, Cahee initially was reluctant to provide any information because he did not want his gang to know he was cooperating with the police. Cahee eventually admitted, however, that he knew that "Bambino" was the shooter and that "Boogie" or "Boogie Stone" was the driver based on telephone conversations that he had with each of them. Cahee also related that he had known "Bambino" for about a year and had known "Boogie Stone," a fellow Black P. Stones member, all his life. Based on Cahee's disclosure, the detectives had "six-pack" photographic lineups prepared that included photographs of Larrimore and Banks. After reviewing the six-packs, Cahee reluctantly identified "Bambino" as Banks and "Boogie Stone" as Larrimore.

During the interview with Detectives Gordon and Garrido, Cahee recounted that Larrimore and Banks were headed to a Black P. Stones gang meeting at Kenneth Hahn Park prior to the shooting. On that day, Larrimore was driving a gray Chrysler Pacifica rental car that he had for a few weeks. The day after the shooting, Banks called Cahee and said that he had shot a rival gang member from the 18th Street gang and that the shooting of the girl was an accident. The following day, Larrimore also had a telephone conversation with Cahee in which he confirmed that he was driving when Banks shot a

Hispanic man and child, and that the shooting of the child was a mistake. Cahee told both Banks and Larrimore that the neighborhood was "hot."

Following the interview with Detectives Gordon and Garrido, Detective Evans met with Cahee. During a videotaped interview with Detective Evans, Cahee shared the same information about the shooting that he had provided in his initial interview with the other detectives. Cahee also told Detective Evans that he had been a member of the Black P. Stones for seven years and that he had sponsored Banks's entry into the gang. In addition, Cahee admitted to Detective Evans that he knew that Bambino's given name was Johnny Banks and that Boogie's given name was Laron Larrimore.

On October 3, 2006, while Avila was in the hospital, Detective Evans showed him two photographic six-packs that included photographs of Larrimore and Banks. The photograph of Banks had been taken in August 2006, approximately one month before the shooting. Upon reviewing the six-packs, Avila identified Banks as the shooter and Larrimore as the driver, but noted that he would like to see Larrimore in person "to be sure." At trial, Avila testified that he was certain that Larrimore was in fact the driver, and was confident that his prior photo identification of Larrimore was correct. On October 4, 2006, Detective Henry showed Centeno a six-pack that included a photograph of Banks. After reviewing the six-pack, Centeno identified Banks as the person that she saw bending into Avila's car.

On October 6, 2006, Detective Henry assisted in executing a search warrant for a motel room in Los Angeles where Larrimore had been arrested earlier that day. A firearm of the same caliber as the weapon used in the shooting was recovered from a nightstand in the motel room; it was later determined not to be the murder weapon. In a dresser, officers found gang graffiti written throughout the bottom of a drawer. Officers also found rental receipts in Larrimore's name for a silver Chrysler Pacifica SUV which showed that the vehicle had been returned on September 25, 2006. Detective Henry eventually located the Chrysler Pacifica that had been rented to Larrimore, but no evidence was recovered from the vehicle. On October 10, 2006, Banks was arrested in San Bernardino County. Officers conducted a search of Banks's home in Los Angeles

and recovered photographs that showed Banks with several Black P. Stones gang members.

3. The Informant's Testimony

At trial, Cahee testified that he had been a member of the Black P. Stones for 10 years and that his moniker was "P-Nut." Cahee also stated that he had known Banks, whose nickname was "Bambino," for three years, and that he had known Larrimore, whose nickname was "Boogie," since he was a young boy. However, Cahee testified that he did not know whether Banks or Larrimore were members of the Black P. Stones. Cahee admitted that he had been interviewed by detectives about the shooting, but testified that he had lied when he told them that Banks and Larrimore were involved in the shooting because he wanted to get out of his grand theft auto arrest. At trial, Cahee denied any knowledge of the actual perpetrators of the crime.

The video recording of Cahee's interview with Detective Evans was played for the jury. Both Detective Evans and Detective Gordon testified that they never made any promises to Cahee in exchange for his cooperation, and that they made it clear to Cahee during the interviews that he needed to be completely truthful. The detectives also testified that they never contacted the district attorney to request that Cahee receive favorable treatment in his arrest for grand theft auto based on his cooperation in their murder investigation. Following his interviews with the detectives, Cahee was released from custody, and a few days later, was charged with taking a vehicle without the owner's consent. The deputy district attorney who filed the charge against Cahee testified that she was never approached by any officers about Cahee's status as a potential witness in a murder case, nor was there any indication that Cahee had been afforded special treatment in his case.

4. The Gang Expert's Testimony

Los Angeles Police Officer Brian Thayer testified as a gang expert for the prosecution. Officer Thayer had been assigned to the Southwest Division's gang enforcement detail for over three years and was the senior gang expert on the Black P. Stones criminal street gang. Officer Thayer had testified as a certified gang expert in

more than 50 cases, including cases involving the Black P. Stones. As described by Officer Thayer, the Black P. Stones was a Bloods gang with approximately 850 documented members in Los Angeles and 20,000 members nationwide. As a Bloods gang, the Black P. Stones associated itself with the color red, but had its own unique symbols and hand signs. The Black P. Stones also purported to claim two different areas of Los Angeles as its territory -- Baldwin Village which it called "The Jungle," and an area to the north which it called "Bity" or "City" Stones. Gangs considered territory to be important because the larger the area that they claimed, the larger that the gang would appear to the surrounding community. Gangs tried to acquire new territory by battling with rival gangs through fights, stabbings, and shootings. The Black P. Stones' main rival was a Hispanic gang known as the 18th Street gang. Avila's home on Pinafore Street was located in the heart of the Black P. Stones' territory.

Officer Thayer testified that there were different levels of participation in a gang. A hard-core gang member "put in a lot of work for the gang," which meant that the member was active in committing burglaries, robberies, carjackings, assaults, and murders. Officer Thayer was familiar with the types of crimes that the Black P. Stones committed in Los Angeles, and testified that the members "commit anywhere from vandalism [to] robberies, extortion, drive-by shootings, assaults with deadly weapons, batteries, murders, [and] grand theft auto." In addition to gathering intelligence about the Black P. Stones through daily contact with its members, Officer Thayer also investigated crimes committed by the gang. Such crimes included possession of rock cocaine committed by a known Black P. Stones member in June 2005, and attempted murder and grand theft auto committed by a known Black P. Stones member in January 2006.

Officer Thayer was personally familiar with Banks based on prior encounters with him. The first encounter occurred on September 10, 2006, when Officer Thayer saw Banks dressed in gang attire in a gang area with two other Black P. Stones members. At that time, Banks admitted to Officer Thayer that he was a member of the Black P. Stones with the moniker "Gambino." Two days later, on September 12, 2006, Officer Thayer again saw Banks with another Black P. Stones member, and Banks confirmed at that time

that he was called "Gambino."[3] At trial, Officer Thayer was shown several photographs that depicted Banks and other Black P. Stones members, most of whom were dressed in gang attire and making gang signs, including Banks. It was Officer Thayer's opinion that Banks was a member of the Black P. Stones based on his prior admissions to Officer Thayer and the photographs shown in court.

Officer Thayer did not personally know Larrimore, but he had learned from Detective Gordon that Cahee had identified Larrimore as a Black P. Stones gang member with the moniker "Boogie" or "Boogie Stone." Officer Thayer also had spoken with a former gang officer who described two encounters with Larrimore in 2002 in which Larrimore admitted to being a Black P. Stones gang member with the moniker "Boogie." In addition, Officer Thayer had reviewed the gang graffiti found in Larrimore's motel room at the time of his arrest, which included references to "BPS," "Black P Stone," and "Boogie Stone." Officer Thayer opined that Larrimore was a member of the Black P. Stones based on his prior admissions to other gang officers, Cahee's statement that Larrimore was his childhood friend and a Black P. Stones member, and the Black P. Stones graffiti found in Larrimore's motel room that referenced his moniker "Boogie Stone."

Officer Thayer testified that, since the shooting, Cahee had been considered a "snitch" by other Black P. Stones members. Officer Thayer explained that he had seen a MySpace page entitled "P-Nut Stop Snitching" that included a photograph of Banks and comments from Black P. Stones members about freeing "Bino." Based on the MySpace page, Officer Thayer opined that the Black P. Stones did not appear to condemn the shooting of the child in this case. It was also Officer Thayer's opinion that the shooting of a suspected 18th Street gang member would be highly regarded by the Black P. Stones, even if an innocent child was accidentally killed in the shooting.

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[3] Officer Thayer testified that the monikers "Gambino" and "Bambino" were essentially the same for Black P. Stones members because they tended to replace the letters "G" and "C," which were associated with rival gangs, with the letter "B" for "Bloods."

When presented with a hypothetical based on the specific facts of the case, Officer Thayer opined that the shooting was committed at the direction of, for the benefit of, and in furtherance of the Black P. Stones gang. In setting forth the basis for his opinion, Officer Thayer stated that the murder of a suspected 18th Street gang member was the ultimate crime that a Black P. Stones member could commit for the gang. Attempting such a crime in broad daylight not only showed dedication to the gang, but also served to instill fear and intimidation in the community. As described by Officer Thayer, "the gang usually takes note of that and shows a lot of respect" to the gang members that commit the crime.

B. Defense Evidence

1. Larrimore's Evidence

Kathy Pezdek, Ph.D., testified on Larrimore's behalf as an expert on eyewitness identification and memory. Dr. Pezdek described the factors that might affect the accuracy of an eyewitness identification, including exposure time, viewing angle, visual obstructions, presence of a weapon, and cross-racial identifications. Dr. Pezdek also described the factors that might affect the reliability of memory, including the passage of time, sharing of perceptions, and stress. It was Dr. Pezdek's opinion that live lineups were generally more reliable than photographic lineups, and that photographic lineups were often susceptible to suggestion by the police.

Detective Henry was called by Larrimore to testify about gang graffiti in the motel where Larrimore was arrested. Detective Henry testified that, after Larrimore's arrest, he spoke with the motel manager about the fact that there was gang graffiti in most rooms at the motel. Detective Henry further testified that, although the graffiti in the other motel rooms was similar to the graffiti found in Larrimore's room, none of the other rooms had graffiti with the moniker "Boogie" or "Boogie Stone."

2. Banks's Evidence

Banks testified on his own behalf. In September 2006, he was 17 years old and had been living in the Baldwin Village area for less than a year. He denied being a member of the Black P. Stones, but admitted that he associated with the gang. He also

admitted that his nickname was "Bambino," but asserted that Officer Thayer had given him that name. Banks further testified that he was left-handed.

On the day of the shooting, Banks was planning to attend a picnic at a park with some Black P. Stones members. Larrimore and two other individuals picked up Banks in a Chrysler Pacifica. Banks sat in the rear seat directly behind the front passenger. Larrimore, whom Banks knew as "Boogie," was driving, and Smith, whom Banks knew as "Little Marky Boy," was in the front passenger seat. A third person, whom Banks knew only as "Little J-Hall," was seated in the back of the vehicle behind Banks.

When Larrimore turned onto Pinafore Street, Smith pointed to Avila's car and said, "do you see that?" In response, Larrimore said, "there you go, right there." Larrimore turned into an alley, stopped the car and briefly got out, and then drove back to Pinafore Street with a gun on his lap. At that point, Banks asked to be taken home and Larrimore agreed. As Banks continued conversing with "Little J-Hall," the car came to a sudden stop. Banks heard three gunshots and immediately ducked. He did not hear anyone say "Fuck 18th Street" or "Black P. Stones." He also did not see anyone shooting from inside the car and believed the shots came from the outside. After the car sped away, Banks saw Smith holding a gun. Larrimore and the others took Banks home, and Smith told Banks not to say anything.

Later that day, a Black P. Stones member named "Infant Time Bomb" warned Banks that the gang was looking for him because they believed he was going to "snitch" about what he saw. Banks did not understand the warning until he learned from his mother that a little girl had been shot. At that time, Banks realized that the gunshots he had heard were related to the shooting of the girl. Banks decided to leave the Baldwin Village area because he feared that the Black P. Stones would harm him based on what he knew about the shooting. Banks went to stay with his aunt in San Bernardino and shaved his head while he was there. Banks denied talking to Cahee or any other Black P. Stones members after the shooting. Banks testified that if he was the shooter, he would admit it because "that was an innocent little girl."

Following his arrest, Banks agreed to an interview with Detective Evans. During the interview, Banks acknowledged that Larrimore, whom he knew as "Boogie," was a member of the Black P. Stones. Banks also identified himself as a Black P. Stone, but indicated that he was not considered an official member by the gang. Banks explained to Detective Evans that there were three other individuals in the vehicle at the time of the shooting, including Larrimore, "Little Marky Boy," and "Little J-Hall," and that "Little Marky Boy" was in the front passenger seat with the gun. Banks repeatedly asked Detective Evans to show him a gang photograph book so that he could identify "Little Marky Boy" and "Little J-Hall," but Detective Evans refused. At trial, Detective Evans testified that, based on Banks's statement, he did attempt to identify "Little Marky Boy" and "Little J-Hall" using department resources, but was unable to find any Black P. Stones members with such monikers.

Tommy Amerson, Avila's neighbor, was called by Banks to testify about a conversation that he had with Avila following his release from the hospital. According to Amerson, Avila said that he exited his car, walked to the entrance of the apartment complex to open the gate, heard the shooting, walked back to the car to check on his daughters, saw Kaitlyn lying on the ground, and was then shot himself. Avila also told Amerson that the shots came from a brown van that was parked down the street.

Kimi Scudder testified on Banks's behalf as a gang intervention specialist. She stated that, based on conversations she had with two former Black P. Stones members who now worked in gang intervention, Banks was not an official member of the Black P. Stones. Instead, Banks merely associated with the gang. Scudder also stated that if the Black P. Stones believed that Banks was the shooter, he would have been disciplined for the killing of an innocent child. However, to Scudder's knowledge, Banks was never disciplined by the gang. Scudder further testified that, because gangs had become a popular part of hip-hop culture, it was not uncommon for young people to dress in gang attire and to make gang signs without being gang members.

C. Verdict and Sentencing

After deliberating for three days, the jury found Larrimore guilty of the second degree murder of Kaitlyn and guilty of the attempted willful, deliberate, and premeditated murder of Avila, with true findings on the firearm enhancements (§ 12022.53, subds. (b)-(e)) and gang enhancements (§ 186.22, subd. (b)) alleged as to each of those counts. The jury was unable to reach a unanimous verdict as to Larrimore on the count of attempted murder of Cassey, and the trial court declared a mistrial as to that count. In addition, the jury was unable to reach a unanimous verdict as to Banks on all counts, and a mistrial was declared as to each count alleged against Banks.

The trial court sentenced Larrimore to a total term of 72 years to life in state prison. As to the second degree murder of Kaitlyn, Larrimore was sentenced to a term of 15 years to life, plus 25 years to life based on the firearm enhancement (§ 12022.53, subds. (d), (e)(1)). As to the attempted murder of Avila, Larrimore was sentenced to a consecutive term of seven years to life, plus 25 years to life based on the firearm enhancement (§ 12022.53, subd. (d)).[4] Larrimore was awarded presentence custody credit of 1,159 days.

III. Retrial of Banks

A. Prosecution Evidence

1. The Shooting

In September 2006, Cesar Avila lived in a small apartment complex on Pinafore Street in Los Angeles with his wife and two daughters, five-year-old Cassey and three-year-old Kaitlyn. Avila had never been a member of a criminal street gang. On the afternoon of Sunday, September 24, 2006, Avila and his daughters went shopping in Avila's blue Oldsmobile Cutlass Sierra. Kaitlyn was seated in the rear passenger seat directly behind Avila and Cassey was seated beside her. When they returned home,

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[4] Because Larrimore's convictions on the two underlying counts were for violent felonies punishable by imprisonment for life, the trial court did not impose an additional prison term based on the gang enhancements. (§ 186.22, subd. (b)(5).)

Avila parked his car in front of the apartment complex on Pinafore Street. He got out of the car and was about to open Kaitlyn's door when a gray SUV stopped next to them.

Avila heard someone in the gray vehicle shout "Fuck 18" and "Black P. Stone." Avila turned around and saw two Black men sitting in the driver and front passenger seats of the vehicle about three feet away. He did not see anyone else inside the vehicle. The man in the front passenger seat, who wore his hair in braids, pointed a gun at Avila with his left hand and shot him once in the chest.[5] Upon being shot, Avila ran toward the front entrance of his apartment complex in an effort to distract the shooter from his daughters who were still in the car. The shooter exited his vehicle as Avila was running away and fired a second shot that struck Avila in his right hand. Once Avila entered the courtyard area of his apartment complex, he collapsed to the ground. At Banks's retrial, Avila identified Banks as the shooter.

Marvin Barahona was standing near the intersection of Pinafore Street and Coco Avenue at the time of the shooting. Upon hearing a single loud gunshot, he looked up and saw a gray car stopped beside a blue car. A Black man with a gun exited the front passenger seat of the gray car and began chasing a Hispanic man toward an apartment building. The man with the gun had braids and was wearing a black hooded sweatshirt, white shirt, and black pants. Barahona could not see how many individuals were inside the gray car. Barahona heard a second shot and then saw the man with the gun come back toward the blue car. The man opened the left rear passenger door of the blue car, pointed his gun inside the car, and fired one shot directly into it. He then appeared to grab an object from the ground before getting back into the front passenger seat of the gray car. The car sped away with its tires screeching. As Barahona called "911," he ran over to the blue car and saw a little girl lying on the ground covered in blood. At Banks's retrial, Barahona identified Banks as the shooter.

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[5] Avila acknowledged that he had testified in a prior court proceeding that the shooter fired the gun with his right hand, but stated that upon further reflection, he believed it was actually the left hand.

Yenicelli Centeno was in her second-floor apartment on Pinafore Street at the time of the shooting. Upon hearing three loud gunshots, she looked out her window and saw a Black man with braids bending down into the left rear passenger area of Avila's car. The man stood up and began running toward a silver Chrysler that was parked nearby. He briefly stopped to pick up something off the ground and then got into the front passenger seat of the silver vehicle, which sped away. Centeno could not see how many individuals were inside the vehicle. Centeno immediately ran downstairs where she saw Avila lying in the courtyard and Kaitlyn lying in the street.

Kaitlyn died of a single gunshot wound to the chest. The bullet struck the child in her upper left chest and exited at her mid right back. The trajectory of the bullet was left to right, front to back, and downward. The bullet hit the heart and both lungs, causing massive blood loss and death.

2. The Police Investigation

Los Angeles Police Detective Stanley Evans, the lead investigating officer on the case, testified that the police collected ballistic evidence from the crime scene following the shooting. A single nine-millimeter casing was recovered by the rear of Avila's car. A single bullet was recovered from inside Avila's car in the right rear passenger door.

Shortly after the shooting, while Avila was being transported to the hospital in an ambulance, he provided the police with a description of the shooter as a Black man in a gray vehicle. Avila also said that someone in the vehicle had shouted out "Black P. Stones." On October 3, 2006, while he was in the hospital, Avila was shown two six-pack photographic lineups that included photographs of Larrimore and Banks. At that time, Avila identified Larrimore as the driver and Banks as the shooter. Avila made subsequent in-court identifications of both individuals at the preliminary hearing in January 2007 and at the trial in March 2009. At Banks's retrial, Avila testified that he was confident that his prior identifications of Larrimore and Banks were correct.

At the scene, Barahona told the police that the shooter was a slim Black man with braids wearing a black sweatshirt, white shirt, and black pants, and was approximately five feet seven inches to five feet eight inches in height and 20 to 24 years in age. Later

that day, officers took Barahona to a field show-up of Shunde Smith, who had been detained as a possible suspect about eight blocks from the shooting. From a patrol car, Barahona saw Smith in handcuffs standing approximately 35 feet away. Smith, a Black man, was wearing a white shirt and black pants and had braids in his hair. At that time, Barahona, who was shaking and crying, identified Smith as the shooter. Barahona subsequently identified Banks as the shooter at both the preliminary hearing in January 2007 and at the trial in April 2009. At Banks's retrial, Barahona was shown side-by-side photographs of Banks and Smith, and testified that he was confident that the shooter was Banks.

At the scene, Centeno described the shooter to the police as a tall Black man with braids and a white shirt. A few hours after the shooting, officers took Centeno to a field show-up of Smith. From a patrol car, Centeno saw Smith in handcuffs standing approximately 27 feet away. Centeno told the officers that he was not the man that she had seen by Avila's car. On October 4, 2007, Detective Henry showed Centeno a six-pack lineup that included a photograph of Banks. After reviewing the six-pack, Centeno identified Banks as the individual that she saw and told the police that she was positive about her identification.

Following Barahona's field identification of Smith as the shooter, Smith was detained but not charged in connection with the shooting. That same day, Detective Evans interviewed Smith and arranged for a gunshot residue test to be done on him. Detective Evans testified that he decided not to arrest Smith for the shooting at that time because it was still early in the investigation and there were conflicting eyewitness accounts about whether Smith was involved. Detective Evans also considered Smith's demeanor during the interview in deciding to investigate further before making an arrest. The following day, Detective Evans executed a search warrant on Smith's residence, but did not recover any evidence connecting him to the crime.[6]

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6 At the time of Smith's detention, it was Detective Evans's understanding that Smith's only monikers were "Molly B." and "M.B." Following the joint trial of

During the course of the investigation, Detective Evans decided that any Black P. Stones member who came into contact with the police should be interviewed about the shooting. On September 29, 2006, Detective Evans interviewed Black P. Stones member Kerry Cahee about the shooting following his arrest for grand theft auto. In a videotaped interview, Cahee told Detective Evans that both Banks and Larrimore had called him after the shooting and had admitted to Cahee that Larrimore was the driver and Banks was the shooter. Following the interview, Cahee was released from custody and later charged with taking a vehicle without the owner's consent. Detective Evans testified that he had no involvement in Cahee's arrest or subsequent charge, and never contacted the district attorney or the court to request that Cahee receive favorable treatment in his case.

On October 6, 2006, Larrimore was arrested at a motel in Los Angeles County. During a search of his motel room, officers recovered rental receipts in Larrimore's name for a silver Chrysler Pacifica, which showed that the vehicle had been rented on September 9, 2006, and returned on September 25, 2006. There was also gang graffiti found in a dresser drawer in Larrimore's room that included references to "August Street" and "Boogie." On October 6, 2006, officers executed a search warrant at Banks's residence and recovered 18 photographs depicting Banks and other individuals dressed in gang attire and making gang signs. Banks was arrested in San Bernardino County on October 10, 2006, based on information provided by his father. At the time of his arrest, Banks's head had been shaved.

3. The Informant's Testimony

At Banks's retrial, Cahee testified that that he had been a member of the Black P. Stones since 2004 with the moniker "Peanut." Cahee knew Banks as "Bambino" and Larrimore as "Boogie Stone," and both Banks and Larrimore were members of the August Block clique of the Black P. Stones. Cahee also knew Shunde Smith, whose

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Larrimore and Banks, Detective Evans learned that Smith also went by the moniker "Marky Boy."

moniker was "Markie Boy," to belong to the August Block clique and to wear his hair in cornrows like Banks. Banks, Larrimore, Smith, and Cahee used to spend time together. On the day of the shooting, Cahee was at Kenneth Hahn Park where a "hood meeting" was being held. The purpose of a hood meeting was to discuss gang business and only Black P. Stones members were permitted to attend. Larrimore and Banks were supposed to attend the meeting that day, but they never arrived. Both Larrimore and Banks later called Cahee and asked him if the neighborhood was "hot."

During his testimony, Cahee denied that Banks ever told him in their telephone call that he was the shooter. However, Cahee admitted that, in September 2006, he was interviewed by Detective Evans about the shooting and told him the truth about what he knew during the interview. Cahee specifically admitted that he told Detective Evans that Banks called him shortly after the shooting. During that call, Banks said that he and Larrimore were driving to the hood meeting when they saw a Hispanic man who they thought was an 18th Street gang member. Banks also said that he shot the man, opened the door of the man's car and fired another shot inside, dropped the magazine of his gun and picked it up, and then got back into Larrimore's car. In addition, Cahee told Detective Evans that Larrimore also called him after the shooting and admitted his involvement to Cahee. During these calls, neither Banks nor Larrimore ever said that anyone else was with them at the time of the shooting.

At Banks's retrial, Cahee stated that he felt bad about the shooting, but he did not want to testify against his friends and fellow gang members. Both Cahee and his girlfriend had been threatened about his involvement as a witness in the case and he continued to fear for their safety. At the time of his testimony, Cahee was in custody for failing to respond to a subpoena to appear as a witness. While in custody, Cahee learned that Banks had passed a "kite," or note, with Cahee's name on it to other inmates, calling him a snitch. Cahee believed that other Black P. Stones members also considered him a snitch, and that he could no longer return to the gang once he was released from custody because he would be killed.

On October 6, 2009, a few weeks before his trial testimony, Cahee told Detective Evans and the prosecutor of his safety concerns. At that time, Cahee denied that he had received any telephone calls from Banks after the shooting in which Banks admitted his involvement in the crime. Cahee also disclosed that he had spoken with Banks while in custody, and that Banks had told him to blame Smith for the shooting.[7]

4. The Gang Evidence

At Banks's retrial, Los Angeles Officer Brian Thayer again testified as a gang expert for the prosecution. Officer Thayer had been assigned to the Southwest Division's gang enforcement detail for four years and was a court-certified expert on the Black P. Stones gang. The Black P. Stones was a Bloods gang with approximately 915 documented members in Los Angeles and 40,000 members nationwide. A clique called "August Block" was one of the most active and violent sects within the gang. Officer Thayer was familiar with the crimes typically committed by the Black P. Stones, which included vandalism, robberies, drive-by shootings, homicides, burglaries, murders, rapes, extortion, drug sales, and weapons possession. Officer Thayer also had personal knowledge of a conviction of a Black P. Stones member for possession of rock cocaine for sale in June 2005, and a conviction of a Black P. Stones member for attempted murder and grand theft auto in January 2006.

Officer Thayer recounted that one of the Black P. Stones' main rivals was the 18th Street gang. He further explained that if an 18th Street gang member was seen in an area claimed by the Black P. Stones, it would be a sign of disrespect that a Black P. Stones member would be expected to remedy. The primary territory that the Black P. Stones purported to claim was an area in Baldwin Village known as "The Jungle." Avila's apartment on Pinafore Street was in the center of the gang's claimed territory.

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[7] At Banks's retrial, a video recording of Cahee's September 29, 2006 interview with Detective Evans, and an audio recording of Cahee's October 6, 2009 conversation with Detective Evans and the prosecutor, were both played for the jury.

Officer Thayer was acquainted with both Larrimore and Banks. He had been informed by other officers that Larrimore was a self-admitted member of the Black P. Stones with the moniker "Boogie" or "Boogie Stone." Officer Thayer was also aware that Black P. Stones graffiti with Larrimore's moniker had been found in his motel room at the time of his arrest, and that Larrimore had been detained in the past with other documented Black P. Stones members. Based on these facts, it was Officer Thayer's opinion that Larrimore was a member of the Black P. Stones. On three prior occasions in September 2006, Officer Thayer had personally encountered Banks in areas claimed by the Black P. Stones either by himself or in the company of documented Black P. Stones members. During those encounters, Banks admitted to Officer Thayer that he was a member of the Black P. Stones with the moniker "Bambino." In addition, Officer Thayer personally had observed Banks dressed in gang attire, and had seen several photographs of Banks wearing gang colors and making gang signs along with other documented Black P. Stones members. While this case was pending, Officer Thayer also had viewed a MySpace page entitled "P-Nut Stop Snitching" that included a photograph of Banks and comments posted by Black P. Stones members about freeing Banks. Based on these facts, Officer Thayer opined that Banks was a member of the Black P. Stones.

When given a hypothetical based on the facts of the case, Officer Thayer further opined that the shootings of Avila and his daughter were committed at the direction of, for the benefit of, and in association with the Black P. Stones gang. Officer Thayer reasoned that the shooter's references to "Fuck 18th Street" and "Black P. Stones" immediately before the shooting showed gang involvement. In addition, the murder of a suspected rival was the ultimate crime that a gang member could commit for the gang and would elevate the status of both the gang and the individual member. The commission of a murder in broad daylight also would enhance the gang's reputation by spreading fear and intimidation through the gang world and the surrounding community. Officer Thayer explained that the murder of a small child could be excused by the gang if it was accidental, and that the perpetrators could still get credit for attempting to kill a

perceived rival gang member. It was Officer Thayer's opinion that both Larrimore and Banks remained well-respected within the Black P. Stones gang.

Los Angeles Police Officer Arnel Asuncion worked as gang officer in the Baldwin Village area. Officer Asuncion testified that, on August 15, 2006, he saw Banks at a known gang location in the company of Cahee and an individual named Elias Dawson. All three of them had previously admitted their membership in the Black P. Stones to Officer Asuncion. When Officer Asuncion and his partner stopped in their patrol car, Banks and Cahee attempted to run away before being detained. At that time, Banks had in his possession a wooden baseball bat with "Angels" on it, which the Black P. Stones considered a gang symbol. The bat also had other gang writing on it, including "Bambino 2 The Homies," "BPSN," and "Black P Stone Snakes."

Los Angeles Police Officer Geraldine Thomson worked as a patrol officer in the Baldwin Village area. Officer Thomson testified that, in 2006, she had three encounters with Banks in areas claimed by the Black P. Stones. On each of those occasions, Banks was with Dawson, a Black P. Stones member known as "M-Dog." Banks admitted to Thomson that he was a Black P. Stones member with the moniker "Bambino."

Los Angeles Deputy Sheriff Albert Nunez worked in the Men's Central Jail. Deputy Nunez testified that, on February 6, 2007, he spoke with Banks, who identified himself as "Bambino" from the Black P. Stones. Banks also said that he had belonged to the gang since he was 14 years of age.

5. Banks's Prior Testimony

Banks's prior testimony from the joint trial with Larrimore was read into the record for the jury.

B. Defense Evidence

Los Angeles Police Officer Kevan Beard testified that he detained Smith shortly after the shooting based on a suspect description that had been broadcast by the police. Officer Beard and his partner saw Smith walking on a sidewalk eight to ten blocks from the crime scene, and Smith cooperated with the police when he was detained. Smith gave Officer Beard his correct name and also confirmed that he was a Black P. Stones member

with the moniker "Molly B." Smith fit the general description of the suspect in that he was a Black man with braids wearing a white t-shirt and jeans.

Jennifer Keir and Diego Tabares both worked as forensic specialists for the Los Angeles Police Department. Keir testified that she lifted latent prints from Avila's car shortly after the shooting. Tabares testified that he analyzed the latent prints recovered from Avila's car and determined that none of them matched to Banks or Smith.

Los Angeles Police Detective Richard Gordon testified that he conducted an interview of Cahee on September 29, 2006. During the interview, Cahee was reluctant to implicate Banks and Larrimore in the shooting because he was close to them and concerned about his safety. However, Cahee ultimately told the detective that Banks and Larrimore each called Cahee after the shooting and disclosed to him that Larrimore was the driver and Banks was the shooter. Cahee also told the detective that Banks and Larrimore were both fellow members of the Black P. Stones, that Banks was known as "Bambino," and that Larrimore was known as "Boogie" or "Boogie Stone." Detective Gordon could not recall whether he tried to verify the telephone calls that Cahee received from Banks and Larrimore. Detective Gordon acknowledged that the subject of Cahee's arrest for grand theft auto was discussed during the interview, but he repeatedly told Cahee that he could not make any promises to him regarding his arrest.

Morris Phillips testified that he was a member of the Black P. Stones and a "shot caller" among the younger members of the gang. Phillips was at the park with other Black P. Stones members for a hood meeting when the shooting occurred. He denied receiving any telephone calls from Larrimore or Banks that day. Phillips testified that he knew Cahee to be a Black P. Stones member, but Phillips did not respect him because Cahee did not "put in work" for the gang and was regarded as a "snitch." Phillips also testified that Banks was known in the neighborhood as "Bambino" or "Little Bambino," but had never officially joined the gang.

C. Verdict and Sentencing

At the conclusion of the retrial, the jury found Banks guilty of the first degree murder of Kaitlyn, the attempted willful, deliberate, and premeditated murder of Avila,

and the attempted willful, deliberate, and premeditated murder of Cassey. The jury also made true findings on the firearm enhancements (§ 12022.53, subds. (b)-(e)) and gang enhancements (§ 186.22, subd. (b)) alleged as to each count.

The trial court sentenced Banks to a total state prison term of 75 years to life, plus a consecutive and indeterminate life term. As to the first degree murder of Kaitlyn, Banks was sentenced to a term of 25 years to life, plus 25 years to life based on the firearm enhancement (§ 12022.53, subds. (d), (e)). As to the attempted murder of Avila, Banks was sentenced to a consecutive indeterminate life term, plus 25 years to life based on the firearm enhancement (§ 12022.53, subds. (d), (e)). As to the attempted murder of Cassey, Banks was sentenced to a concurrent indeterminate life term, plus 25 years to life based on the firearm enhancement (§ 12022.53, subds. (d), (e)).[8] Banks was not awarded any presentence custody credit.

DISCUSSION

I. Sufficiency of the Evidence on the Underlying Counts

On appeal, Larrimore and Banks each challenge the sufficiency of the evidence supporting their convictions on the murder and attempted murder counts. In assessing the sufficiency of the evidence to support a conviction, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict – i.e., evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] . . . We resolve neither credibility issues nor evidentiary conflicts;

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8 Because Banks's convictions on the underlying counts were for violent felonies punishable by imprisonment for life, the trial court did not impose an additional prison term based on the gang enhancements. (§ 186.22, subd. (b)(5).)

we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) With these principles in mind, we turn to each appellant's arguments about the sufficiency of the evidence supporting his convictions.

A. Larrimore

Larrimore was convicted of the second degree murder of Kaitlyn and the attempted willful, deliberate, and premeditated murder of Avila under an aiding and abetting theory of liability. Larrimore contends that the evidence was insufficient to support his convictions because it merely established that he was present at the scene, but failed to show he had knowledge of the shooter's intent. We disagree.

"'A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 851.) The requisite intent to aid in the crime must be formed prior to or during the commission of the offense. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) An aider and abettor has the requisite intent "when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) Although mere presence at the scene of the crime is not sufficient to constitute aiding and abetting, it is a circumstance that may be considered in assessing criminal liability. (*People v. Garcia* (2008) 168 Cal.App.4th 261, 272-273.) Other factors to be considered by the trier of fact include "'failure to take steps to attempt to prevent the commission of the crime, companionship, flight, and conduct before and after the crime.'" (*Id.* at p. 273.)

"'The mental state necessary for conviction as an aider and abettor . . . is different from the mental state necessary for conviction as the actual perpetrator. [¶] The actual perpetrator must have whatever mental state is required for each crime charged . . . . An

aider and abettor, on the other hand, must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] The jury must find 'the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense . . . .' [Citations.] Once the necessary mental state is established, the aider and abettor is guilty not only of the intended, or target, offense, but also of any other crime the direct perpetrator actually commits that is a natural and probable consequence of the target offense. [Citation.]" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1122-1123.) In this case, there was substantial evidence to support the jury's findings that Larrimore aided and abetted the shooting of both Avila and Kaitlyn.

First, the eyewitness testimony established that Larrimore stopped his vehicle a few feet from Avila as one of the occupants in the vehicle shouted out "Fuck 18" and "Black P. Stones." Larrimore maintained his vehicle in that position as the front passenger pulled out a gun and fired a first shot at Avila. Larrimore continued to maintain his vehicle in that position as the front passenger exited the vehicle, fired a second shot at Avila, opened the rear passenger door of Avila's car, and fired a third shot into the car killing Kaitlyn. Larrimore also waited as the passenger picked up evidence that he apparently had dropped on the ground and then got back into the vehicle. As soon as the passenger re-entered the vehicle, Larrimore sped away, running a stop sign with tires screeching,

Second, there was substantial evidence that Larrimore's involvement in the shooting was gang-motivated. The prosecution presented evidence that Cahee, a Black P. Stones gang member and longtime friend of Larrimore, told the police that both Banks and Larrimore called him after the shooting and admitted that they were driving to a gang meeting when Banks shot a man that they believed to be a rival 18th Street gang member and accidentally shot a little girl. Although Banks denied that he was the shooter at trial, he admitted that he was with three other individuals in Larrimore's vehicle when one of them named "Little Marky Boy" pointed out Avila's car and Larrimore responded "there you go." Larrimore then drove around the block and made a brief stop before returning

to the street where Avila's car was parked with a gun on his lap. The prosecution also presented evidence of Larrimore's gang membership. In particular, there was evidence that both Banks and Cahee told the police that Larrimore was a Black P. Stones member with the moniker "Boogie" or "Boogie Stone," that Larrimore himself had admitted his membership in the gang to officers in 2002, and that Larrimore was arrested in a motel room with graffiti that referenced both the Black P. Stones and his moniker "Boogie Stone."

On this record, the jury reasonably could have found that Larrimore had knowledge of his companion's criminal plan to shoot a perceived rival gang member and intended to aid in the commission of the crime by maintaining his vehicle in a position to flee. The evidence was therefore sufficient to support Larrimore's convictions for the second degree murder of Kaitlyn and the attempted premeditated murder of Avila.

B. Banks

Banks was convicted on retrial of the first degree murder of Kaitlyn, the attempted willful, deliberate, and premeditated murder of Avila, and the attempted willful, deliberate, and premeditated murder of Cassey. As to all three counts, Banks argues that the evidence was insufficient to support the jury's finding that he was the gunman in the shooting. As to the attempted murder of Cassey, Banks also asserts that the evidence was insufficient to establish his guilt under a theory of concurrent intent because Cassey was never in the direct line of fire. As set forth below, we conclude that there was substantial evidence to support each of the convictions.

1. Sufficiency of the Evidence of Banks's Identity as the Shooter

Banks contends that his convictions on each of the underlying counts must be reversed because the prosecution's case rested exclusively on unreliable and inconsistent identifications of him as the shooter. It is well-established, however, that "[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Accordingly,

"[w]eaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate." (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.) As our Supreme Court also has made clear, "unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181; see also *People v. Boyer* (2006) 38 Cal.4th 412, 480 ["Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime."].)

Here, Banks was identified as the shooter by three separate eyewitnesses. Avila first identified Banks as the shooter in a photographic lineup that was shown to him approximately one week after the incident. Avila then made in-court identifications of Banks at the preliminary hearing in January 2007, at the joint trial of Larrimore and Banks in March 2009, and at the retrial of Banks in October 2009. At the retrial, Avila repeatedly testified that he was certain of his identification. Centeno likewise identified Banks as the shooter in a photographic lineup that was shown to her about a week after the shooting, and she told the police at that time she was positive about her identification. Although Barahona initially identified another individual, Shunde Smith, as the shooter at a field show-up, he made in-court identifications of Banks at three subsequent court proceedings, and upon reviewing side-by-side photographs of Smith and Banks at the retrial, Barahona testified that he was confident that the shooter was Banks. Any weaknesses in the identifications were matters to be weighed by the jury.

In addition, there was evidence that both Banks and Larrimore called Cahee after the shooting and admitted their involvement in the incident. Banks argues that Cahee's statement to the police about these admissions is inherently unreliable because Cahee later recanted his statement and testified that he lied to the police in order to receive help in his own criminal case. However, at the retrial, the jury was presented with Cahee's recantation as well as his prior recorded police interview. The jury also heard Cahee's testimony that he and his family had been threatened since the interview because the Black P. Stones considered him a snitch and that he continued to fear for their safety. As this Court has stated, "[j]urors are the sole judges of a witness's credibility and they are

rightfully suspicious of trial testimony which deviates 180 degrees from what the witness told the police . . . ." (*People v. Jackson* (2005) 129 Cal.App.4th 129, 167.) The jury in this case reasonably could have concluded that Cahee's statement to the police was more credible and that his subsequent recantation was the simple result of fear. Indeed, at several points in his trial testimony, Cahee himself admitted that his prior statement to the police was the truth. Given these facts, there was substantial evidence to support the jury's finding that Banks was the shooter.

2. Sufficiency of the Evidence on the Attempted Murder of Cassey

Alternatively, Banks claims that his conviction for the attempted murder of Cassey must be reversed because the evidence was insufficient to support a finding that he intended to kill more than one person when he fired a single shot inside Avila's car. We conclude that, because there was evidence that both Kaitlyn and Cassey were directly in the line of fire when Banks fired the close-range shot, the jury reasonably could have found that he acted with the requisite intent to kill both children.

"'The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice -- a conscious disregard for life -- suffices. [Citation.]' [Citation.] In contrast, '[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) "'There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. [Citation.] The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill. . . ." [Citation.]' [Citation.]" (*Id.* at p. 741.) In addition, a person who "indiscriminately fires a single shot at a group of persons with specific intent to kill *someone*, but without targeting any particular individual or individuals, . . . is guilty of a single count of attempted murder. [Citation.]" (*People v. Perez* (2010) 50 Cal.4th 222, 225 *(Perez*).)

The "kill zone" theory of concurrent intent applies in a case where the defendant, with the intent to kill a specific target, employs a means of attack designed to kill everyone in the vicinity of the target to ensure the target's death. (*People v. Bland* (2002) 28 Cal.4th 313, 329-330.) In such a situation, the defendant creates a "kill zone" around the primary victim, and the jury may reasonably infer that the defendant possesses the concurrent intent to kill everyone within the kill zone. (*Ibid*.) "'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity.'" (*Id*. at 329.)

In *Smith*, the defendant challenged the sufficiency of the evidence to support his conviction for two counts of attempted murder of a mother and her infant son based on his firing of a single bullet into a slow moving vehicle in which the two victims were seated. The evidence showed that the mother was driving and that her baby was secured in a car seat directly behind her when the defendant fired a single .38 caliber round from behind the vehicle as it was pulling away from the curb. (*Smith*, *supra*, 37 Cal.4th at pp. 742-743.) The bullet "missed both the baby and the mother by a matter of inches as it shattered the rear windshield, passed through the mother's headrest, and lodged in the driver's side door." (*Id*. at p. 743.) The defendant contended that the evidence was insufficient to establish that he had a specific intent to kill both the mother and the child because he fired only one shot into the vehicle. The California Supreme Court disagreed, holding that "evidence that [a] defendant purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, with each directly in his line of fire, can support an inference that he acted with intent to kill both." (*Ibid*.) "The fact that only a single bullet was fired into the vehicle [did] not, as a matter of law, compel a different conclusion." (*Id*. at p. 736; see also *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 691 ["Where a defendant fires [a single shot] at two officers, one of whom is crouched in front of the other, the defendant endangers the lives of both officers and a reasonable jury could infer from this that the defendant intended to kill both."].)

Similarly, in *People v. Leon* (2010) 181 Cal.App.4th 452 (*Leon*), the defendant fired a single shot into the back of a car containing three people. The bullet entered the right taillight, traveled through the right backseat, and hit the passenger in the right backseat, killing him. (*Id*. at pp. 457-458.) Based on *Smith* and *Chinchilla*, the Court of Appeal held that the evidence was sufficient to convict the defendant of the murder of the backseat passenger and the attempted murder of the front seat passenger because both victims were in the direct line of fire. (*Id*. at p. 465.) However, the evidence was insufficient to support the defendant's conviction for the attempted murder of the driver. As the court explained, the defendant "fired a single shot from behind the [car] into the right side of the passenger compartment, endangering the passengers seated in the right backseat . . . and the front passenger seat." (*Ibid*.) The person "in the driver's seat on the left side of the [car], was out of the line of fire. It was physically impossible for the single bullet to strike [the driver] as well as [the two passengers]." (*Ibid*.)

In *Perez*, the California Supreme Court clarified that "[t]he indiscriminate firing of a single shot at a group of persons, without more, does not amount to an attempted murder of everyone in the group." (*Perez, supra*, 50 Cal.4th at p. 232.) The defendant in *Perez* fired a single bullet from a distance of 60 feet at a group of eight individuals who were standing less than 15 feet apart from one another. The Supreme Court held that the facts of the case supported only a single count of attempted murder even though the eight individuals were in relatively close proximity to each other. (*Ibid*.) In so holding, the Court rejected the People's reliance on the "kill zone" theory of concurrent intent to support eight attempted murder convictions, noting that there was no evidence that the defendant targeted a particular individual in the group, intended to kill two or more persons with a single shot, or was thwarted from firing additional shots by circumstances beyond his control. (*Id*. at pp. 231-232.) The Court also distinguished *Smith* and *Chinchilla*, reasoning that in those cases the "presence of *both* victims in the shooter's direct line of fire, one behind the other, gave him the apparent ability to kill them both with one shot." (*Id*. at p. 233.)

In this case, there was sufficient evidence to support Banks's conviction for the attempted murder of Cassey. The evidence presented by the prosecution showed that, at the time of the shooting, three-year-old Kaitlyn was in the left rear passenger seat of Avila's car and five-year-old Cassey was in the right rear passenger seat directly beside Kaitlyn. After firing two shots at Avila, Banks opened the left rear passenger door of the car where Kaitlyn was seated, pointed his gun directly inside the rear passenger compartment, and fired a single shot into the car. The bullet struck Kaitlyn, entering at her upper left chest and exiting at her mid right back. The trajectory of the bullet was left to right, front to back, and downward. Following the shooting, the police recovered a single bullet in the right rear passenger door near where Cassey had been seated.

From these facts, the jury reasonably could have inferred that, when the bullet struck Kaitlyn, she and Cassey were aligned in such a way that they were both within Banks's direct line of fire, and thus, they both could have suffered a mortal wound from the single shot. The fact that the bullet ended up in the right rear passenger door rather than in the rear passenger seat strongly supports this inference. Moreover, there is nothing in the record to suggest that Banks had a motive to kill one child but not the other. Instead, the evidence at trial demonstrated that each child was the innocent daughter of a man whom Banks believed to be an enemy, and that Banks fired his gun at close range into a small confined space that held both children. Because there was sufficient evidence to support the inference that both Kaitlyn and Cassey were in the direct line of fire, the jury reasonably could have found that Banks had a specific intent to kill each child when he fired a single shot into the rear passenger compartment of the car.

II. Sufficiency of the Evidence on the Gang Enhancements

Both Larrimore and Banks also challenge the sufficiency of the evidence supporting the jury's true findings on the gang enhancements (§ 186.22, subd. (b)) alleged as to each of the underlying counts. Specifically, they assert that the evidence presented by the prosecution was insufficient to show that the "primary activities" of the Black P. Stones were to commit certain enumerated crimes within the meaning of section 186.22, subdivision (f). On this record, we must agree.

At both Larrimore's trial in March 2009 and Banks's retrial in October 2009, the prosecution offered the expert testimony of Officer Thayer to establish the primary activities element of the gang enhancements. At Larrimore's trial, Officer Thayer testified as follows:

> [Prosecutor]: And are you familiar with what types of crimes the Black P Stones gang commits here in Los Angeles?
>
> [Officer Thayer]: Yes.
>
> [Prosecutor]: What types of crimes do they commit?
>
> [Officer Thayer]: The Black P Stones, they commit anywhere from vandalism, robberies, extortion, drive-by shootings, assaults with deadly weapons, batteries, murders, G.T.A.'S.

At Banks's retrial, Officer Thayer similarly testified as follows:

> [Prosecutor]: And are you familiar with what types of crimes Black P Stone gang members typically commit?
>
> [Officer Thayer]: Yes.
>
> [Prosecutor]: What are those?
>
> [Officer Thayer]: They commit several crimes, anywhere from vandalism, robbery, drive-by shootings, homicides, burglaries, murders, rapes, extortion, drug sales, weapons possessions.

In addition to providing testimony about the shooting in the instant case, Officer Thayer testified at both trials that he was familiar with two specific crimes that members of the Black P. Stones had committed in the past for the benefit of the gang. Those crimes were possession of rock cocaine for sale committed by a Black P. Stones member in June 2005, and attempted murder and grand theft auto committed by a Black P. Stones member in January 2006. The prosecution did not ask Officer Thayer any additional questions about the types of crimes committed by the Black P. Stones, and Officer Thayer never testified that any of the gang's criminal activities constituted its primary activities.

To obtain a true finding on an allegation of a criminal street gang enhancement, the prosecution must prove that the crime at issue was "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 . . . ." (§ 186.22, subd. (b)(1).) To prove that a gang is a "criminal street gang," the prosecution must establish that the gang has as one of its "primary activities" the commission of one or more of the crimes enumerated in section 186.22, subdivision (e), and has engaged in a "pattern of criminal gang activity" by committing two or more such "predicate offenses." (§ 186.22, subds. (e), (f); see *People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*).)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations," as opposed to the occasional commission of those crimes by one or more of the group's members. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*).) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*Id*. at p. 324.) Additionally, "[t]he testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities. [Citations.]" (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.) "Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities," and "therefore fall[s] within the general rule of admissibility." (*Sengpadychith, supra*, at p. 323.) While "admissible to establish the statutorily required primary activities of the alleged criminal street gang," "evidence of either past or present criminal acts listed in subdivision (e) of section 186.22 is" "[n]ot necessarily" "alone . . . sufficient to prove the group's primary activities." (*Ibid.*)

In *In re Alexander L.* (2007) 149 Cal.App.4th 605, the Court of Appeal reversed a true finding on a gang enhancement on the ground that the gang expert's testimony was

insufficient to establish the primary activities element. (*Id*. at pp. 611-614.) When asked about the gang's primary activities, the expert testified, "'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.'" (*Id*. at p. 611.) However, the expert "did not directly testify that criminal activities constituted [the gang's] primary activities," and on cross-examination, he conceded that the vast majority of crimes involving the gang were graffiti-related. (*Id*. at p. 612.) Although the expert also testified about two specific crimes committed by members of the gang, the Court of Appeal concluded that "'[w]ithout more, these two convictions do not provide substantial evidence that gang members had '*consistently and repeatedly* . . . committed criminal activity listed in the gang statute.'" (*Id*. at p. 614; see also *People v. Perez* (2004) 118 Cal.App.4th 151,159-160 [reversing true finding on gang enhancement where prosecution failed to elicit any testimony from gang expert about the primary activities of the gang].)

In this case, we conclude that Officer Thayer's testimony at both trials was insufficient to establish the primary activities element of the gang enhancements. The prosecution never asked Officer Thayer to identify any of the primary activities of the Black P. Stones during his testimony. At Larrimore's trial, the prosecution simply asked what "types of crimes the Black P[.] Stones gang commits," and at Banks's retrial, the prosecution asked "what types of crimes Black [P.] Stone gang members typically commit." In his response to both questions, Officer Thayer described the types of crimes committed by the gang, but offered no specifics as to the number of offenses, their frequency, or the time period over which they occurred. Officer Thayer's testimony thus did not provide any indication that the crimes he was describing were the primary, principal, main, or chief activities of the gang. Although Officer Thayer also testified about the present crime as well as two predicate offenses committed by Black P. Stones members in 2005 and 2006, we cannot conclude that such evidence was sufficient to establish the gang's primary activities. The commission of three crimes over a two year period by a gang with more than 800 members does not show that the Black P. Stones

"*consistently and repeatedly* have committed criminal activity listed in the gang statute." (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

The two cases on which the Attorney General relies -- *People v. Margarejo* (2008) 162 Cal.App.4th 102 (*Margarejo*) and *People v. Martinez* (2008) 158 Cal.App.4th 1324 (*Martinez*) -- are distinguishable. In *Margarejo*, the prosecution specifically asked the expert what the "primary activities" of the defendant's gang were to which the expert replied that "their *activities* range from simple vandalism and battery, and can extend all the way to murder." (*Margarejo*, *supra*, at p. 107.) In this case, the prosecution asked Officer Thayer about the "types of crimes" committed by the Black P. Stones, but never asked about the gang's "primary activities." In *Martinez*, the prosecution's gang expert explicitly testified that "the gang's primary activities include robbery, assault – including assaults with weapons, theft, and vandalism." (*Martinez*, *supra*, at p. 1130.) Here, Officer Thayer described a range of crimes committed by the Black P. Stones, but never stated such crimes were among the gang's primary, principal, main, or chief activities.

We do not doubt that had the prosecution properly phrased its questions to ask about the primary activities of the Black P. Stones, Officer Thayer could have provided testimony sufficient to establish this element of the gang enhancements. However, the prosecution never made the requisite inquiry and Officer Thayer never indicated in his responses that he was identifying the gang's primary activities. Section 186.22 expressly mandates compliance with each element of the statute before a gang enhancement may be imposed; the testimony in this case did not comply. Because the evidence was insufficient to establish the primary activities element of the gang enhancements, the prosecution failed to meet its burden of proving that the Black P. Stones was a criminal street gang within the meaning of section 186.22, subdivision (f). Each of the gang enhancements alleged against Larrimore and Banks accordingly must be stricken.

In addition, as to Larrimore only, reversal of the gang enhancements compels reversal of the firearm enhancements imposed pursuant to section 12022.53, subdivisions (d) and (e). As set forth in section 12022.53, subdivision (e), the firearm enhancements under subdivisions (b) through (d) are inapplicable to a principal who does not personally

and intentionally discharge a firearm unless a gang enhancement under section 186.22, subdivision (b) also applies. (§ 12022.53, subd. (e)(1).) Because Larrimore did not personally discharge a firearm in the commission of the crimes, each of the firearm enhancements imposed against him must be stricken.[9]

III. Ineffective Assistance of Counsel Concerning Gang Evidence

Larrimore argues that his trial counsel rendered ineffective assistance in failing to either rebut or object to the gang expert testimony proffered by the prosecution.[10] In particular, Larrimore asserts the following deficiencies in his attorney's performance at trial: (1) failing to call expert and character witnesses to testify that Larrimore was not a gang member; (2) failing to object to Officer Thayer's testimony that Larrimore was a gang member as inadmissible hearsay; (3) failing to object to Officer Thayer's testimony about the subjective mental processes of gang members as impermissibly speculative; (4) failing to object to Officer Thayer's testimony about gangs in general as lacking in adequate foundation; (5) failing to object to Officer Thayer's testimony about the criminal activities of gang members as improper profile evidence; and (6) failing to object to Officer Thayer's testimony on the ultimate issue of whether the crimes in this case were committed for the benefit of a gang.[11]

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9 According to the minute order from Larrimore's sentencing hearing and his abstract of judgment, the trial court imposed the firearm enhancement for the murder of Kaitlyn under section 12022.53, subdivisions (d) and (e)(1), and imposed the firearm enhancement for the attempted murder of Avila under subdivision (d) only. However, the jury's true findings on the firearm enhancements were made under subdivisions (b) through (e) as to both counts, and there is nothing in the record to suggest that Larrimore personally discharged a firearm in the commission of either crime. For these reasons, both firearm enhancements imposed against Larrimore must be stricken with the gang enhancements.

10 While his appeal was pending, Larrimore filed a petition for writ of habeas corpus asserting ineffective assistance of counsel on these same grounds.

11 In his opening appellate brief, Larrimore also claimed ineffective assistance of counsel based on his trial counsel's alleged failure to request an instruction advising

To prevail on his ineffective assistance of counsel claim, Larrimore must demonstrate that his trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-687 (*Strickland*); *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.) "'In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny . . .' and must 'view and assess the reasonableness of counsel's acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.' [Citation.] Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight. [Citation.]" (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) The decision of whether to call certain witnesses is generally a matter of trial tactics. (*People v. Bolin* (1998) 18 Cal.4th 297, 334; see also *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 ["decisions whether . . . to put on witnesses are matters of trial tactics and strategy which a reviewing court generally may not second-guess"].) The same is true of the decision to object to evidence. "'Generally, failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight. . . . A reviewing court will not second-guess trial counsel's reasonable tactical decisions.' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1185.)

The showing of prejudice requires "'a reasonable probability that a more favorable outcome would have resulted . . ., i.e., a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) "A defendant must prove prejudice that is a '"demonstrable reality," not simply speculation.' [Citations.]" (*Ibid.*) In evaluating a claim of ineffective assistance of counsel, "'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 . . . . If it is

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the jury not to consider evidence of gang activity to prove bad character or criminal disposition. Larrimore has since withdrawn that argument from his appeal.

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*, *supra*, 466 U.S. at p. 697.) In this case, we conclude that none of Larrimore's ineffective assistance of counsel claims has merit.

A. Failure to Call Expert and Character Witnesses

Larrimore first claims that his trial counsel was deficient in failing to call a gang expert and character witnesses to testify that he was not a Black P. Stones gang member. In support of this claim, Larrimore cites to the evidence that he submitted with a motion for a new trial brought by newly retained private counsel following his conviction. In particular, Larrimore cites to portions of a police officer declaration filed in 2006 by the Los Angeles City Attorney in support of an application for a gang injunction against the Black P. Stones. In that declaration, the officer described various aspects of the Black P. Stones' customs, habits, and criminal activities, but did not make any reference to Larrimore. Larrimore also cites to declarations provided by six character witnesses who all similarly stated that they did not know him to be a gang member. Larrimore contends that the failure to call witnesses to testify that he was not a gang member deprived him of his constitutional right to effective assistance of counsel.

We need not decide whether defense counsel's failure to call expert and character witnesses to testify about Larrimore's purported lack of gang affiliation constituted deficient performance because Larrimore cannot show that a more favorable result was reasonably probable. The testimonial evidence that Larrimore claims could have been presented on his behalf is simply insufficient to overcome the prosecution's strong evidence of his gang membership. At best, Larrimore's unidentified gang expert could have testified that Larrimore lacked the common indicia of gang membership, while his character witnesses could have testified that they had never known him to belong to a gang. At trial, however, the jury heard testimony that two Black P. Stones gang members, Cahee and Banks, disclosed during their videotaped police interviews that Larrimore was "Boogie" or "Boogie Stone" from the Black P. Stones. The jury also heard testimony that Larrimore had admitted to gang officers in 2002 that he was a Black

P. Stones member with the moniker "Boogie." There was further evidence that, at the time of Larrimore's arrest for the shooting, the police found gang graffiti in his motel room that included specific references to both "Boogie Stone" and the Black P. Stones.

Moreover, even assuming that Larrimore's proffered witnesses would have testified that he was not a gang member, the prosecution presented strong evidence that Larrimore aided and abetted a gang-related shooting. In particular, Larrimore was identified as the driver in a photographic lineup shown to Avila shortly after the shooting, the police recovered rental receipts in Larrimore's name for a silver Chrysler Pacifica that matched the description of the suspect vehicle provided by witnesses, Cahee told the police that Larrimore had admitted his involvement in Banks's shooting of a perceived rival gang member, and Banks testified that Larrimore saw Avila while driving to a gang picnic and then drove back to the street where Avila's car was parked with a gun on his lap. Additionally, there was eyewitness testimony that one of the occupants in the Chrysler shouted out "Fuck 18" and "Black P. Stones" immediately before the shooting, that the driver of the Chrysler maintained the vehicle in a position to flee while his passenger shot Avila and his daughter, and that the driver sped away as soon as the shooter was safely back inside the vehicle. Given the strong evidence of Larrimore's involvement in a gang-motivated shooting, his trial counsel's failure to call witnesses to testify that Larrimore was not a gang member was not prejudicial.

B. Failure to Object to Expert Testimony on Larrimore's Gang Membership

Larrimore asserts that his trial counsel rendered ineffective assistance in failing to object to Officer Thayer's testimony that Larrimore was a member of the Black P. Stones as hearsay. Larrimore reasons that Officer Thayer did not base his opinion on any personal knowledge about Larrimore's gang affiliation, but rather relied on hearsay information obtained from other officers and gang members. This claim fails.

It is well-established that the opinion of a testifying expert "may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions."

(*Gardeley*, *supra*, 14 Cal.4th at p. 618.) "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citation.]" (*Ibid*.) Thus, a gang expert "may give opinion testimony that is based upon hearsay, including conversations with gang members as well as with the defendant. [Citations.] Such opinions may also be based upon the expert's personal investigation of past crimes by gang members and information about gangs learned from the expert's colleagues or from other law enforcement agencies. [Citations.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9; see also *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209 ["[E]xperts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay."]; *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1463 ["[A] gang expert may rely upon conversations with gang members, his or her personal investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies."].)

Furthermore, a gang expert's reliance on hearsay matters in forming an opinion does not violate a defendant's Sixth Amendment confrontation rights under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). As one Court of Appeal has explained, "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. *Crawford* itself states that the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" (*People v. Thomas*, *supra*, 130 Cal.App.4th at p. 1210, quoting *Crawford*, *supra*, at p. 59.) "Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned. [Citation.]" (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.)

Here, Officer Thayer properly testified as to his opinion that Larrimore was a member of the Black P. Stones. Officer Thayer testified that he based his opinion about Larrimore's gang membership on information obtained from other gang officers, on information obtained from a fellow Black P. Stones gang member, and on gang graffiti recovered in Larrimore's motel room that referenced both his gang moniker and the Black P. Stones. Because Officer Thayer's testimony was based on the type of material that may be reasonably relied upon by a gang expert, Larrimore's trial counsel did not render ineffective assistance in failing to object to its admission.

C. Failure to Object to Expert Testimony on the Subjective Mental Processes of Gang Members

Larrimore argues that his trial counsel was deficient in failing to object to Officer Thayer's testimony about the alleged mental processes of gang members in general and Larrimore in particular. In support of this claim, Larrimore points to testimony by Officer Thayer that the Black P. Stones would retaliate if they believed an 18th Street gang member came into their claimed territory, and that appellants could avoid being shunned by the gang if they claimed that the shooting of the little girl was accidental. We conclude that trial counsel's failure to object to such testimony did not constitute deficient performance.

Gang expert testimony may properly be admitted to prove motive and intent. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512-1513; *People v. Valdez* (1997) 58 Cal.App.4th 494, 507-509.) Indeed, expert testimony repeatedly has been deemed admissible to prove the motivation for a particular crime and whether the crime was committed to benefit or promote a gang. (*People v. Garcia*, *supra*, at p. 1513; *People v. Valdez*, *supra*, at p. 509.) Although a gang expert may not offer an opinion on a specific individual's subjective knowledge or intent, the culture and habits of criminal street gangs are appropriate subjects for expert testimony and therefore admissible. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946-947 (*Gonzalez*); *Gardeley*, *supra*, 14 Cal.4th at pp. 617-618.) In addition, a gang expert generally is allowed to provide opinion testimony on the basis of facts presented in hypothetical questions that ask the expert to assume

their truth. (*People v. Vang* (2011) 52 Cal.4th 1038, 1045 (*Vang*); *Gonzalez, supra*, at pp. 946-947; *Gardeley, supra*, at pp. 617-618.)

Here, the prosecutor asked Officer Thayer a series of fact-based hypotheticals that were designed to elicit his expert opinion about the possible motive for the shooting. In response to the prosecutor's inquiry, Officer Thayer testified that, if a suspected 18th Street gang member came into the Black P. Stones' claimed territory, the Black P. Stones would regard it as a sign of disrespect and take action against that individual. Officer Thayer's opinion did not exceed the scope of permissible expert testimony because it was directed at the culture and habits of the Black P. Stones in dealing with their rivals, and "the *expectations* of gang members in general when confronted with a specific action." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658.) In particular, Officer Thayer's testimony would help the jury understand why a gang member might commit a violent shooting in broad daylight on a public street merely upon seeing a perceived rival within his gang's claimed territory.

The prosecution later asked Officer Thayer another series of fact-based hypotheticals about the possible repercussions of the shooting within the Black P. Stones. Officer Thayer testified that, if the gang believed that the killing of an innocent child by one of its members was accidental, they would not shun that individual as long as he explained his actions and intent. It is true that, in presenting these hypothetical questions, the prosecutor made one direct reference to appellants when he asked Officer Thayer, "if Jonathan Banks and Laron Larrimore told other gang members that they were involved in killing the little girl but it was an accident, could that save them from being shunned within the gang?" The prosecutor then returned to framing his inquiry in the form of questions about a hypothetical gang member. The prosecutor's specific reference to appellants in posing this hypothetical question was improper because it related to their subjective state of mind. However, when read as a whole, this line of questioning does not reflect an attempt by either the prosecutor to elicit, or by Officer Thayer to provide, an opinion on Larrimore's subjective knowledge or intent. Nor was Officer Thayer's testimony on the matter tantamount to expressing an opinion as to Larrimore's guilt.

Under these circumstances, the failure of Larrimore's trial counsel to object to this particular question did not constitute ineffective assistance of counsel.

D. Failure to Object to Expert Testimony on Gangs in General

Larrimore contends that his trial counsel rendered ineffective assistance in failing to object to Officer Thayer's testimony about gangs in general as lacking in adequate foundation. According to Larrimore, because Officer Thayer presented himself as an expert on the Black P. Stones in particular, he exceeded his expertise when he testified about gang culture in general, including the customs and habits of other Bloods gangs. This claim likewise lacks merit.

A gang expert may base his or her opinion on knowledge and experience with "street gangs in general." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.) A gang expert also may rely on police investigations and personal contacts with gang members and on information obtained from fellow law enforcement officers in forming an opinion. (*Gardeley*, *supra*, 14 Cal.4th at pp. 619-620; see also *People v. Martinez*, *supra*, 158 Cal.App.4th at p. 1330 [gang expert's "eight years dealing with the gang, including investigations and personal conversations with members, and reviews of reports suffices to establish the foundation for his testimony"]; *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1465 [gang expert's "personal experience in the field gathering gang intelligence, contacting gang members, and investigating gang-related crimes" provided adequate foundation for his testimony].) """Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility."' [Citation]" (*People v. Bolin*, *supra*, 18 Cal.4th at p. 322.)

Contrary to Larrimore's claim, Officer Thayer provided an adequate foundation for his testimony about gangs in general and the Black P. Stones in particular. Officer Thayer testified that he had been a police officer for approximately eight years and had been assigned to the Southwest Division for over six years where he worked primarily in the Baldwin Village area that the Black P. Stones purported to claim. For over three years, Officer Thayer had been assigned to the Southwest Division's gang enforcement

detail where he was the senior gang expert on the Black P. Stones and in charge of the Black P. Stones gang injunction. Officer Thayer had testified over 50 times as a certified gang expert on the Black P. Stones and other Bloods gangs, including the Rollin 20s, Five Deuce Pueblo Bloods, and Bounty Hunter Bloods. In addition, Officer Thayer had frequent contact with gang members while working in the field. He engaged in daily consensual encounters with gang members from whom he would gather intelligence, and his duties included investigating crimes committed by gang members. Officer Thayer thus testified to having extensive training and experience in gang culture and gang crimes, demonstrating the special knowledge, skill, experience and training sufficient to qualify him as a gang expert. Because the foundation for Officer Thayer's testimony on gang culture was well-established, any objection to his expertise would have been futile. (*People v. Diaz* (1992) 3 Cal.4th 495, 562 [failure to make futile or unmeritorious objection is not deficient performance].)

E. Failure to Object to Expert Testimony as Gang Profile Evidence

Larrimore claims that his trial counsel was deficient in failing to object to Officer Thayer's expert testimony as constituting improper profile evidence. Larrimore contends that Officer Thayer provided improper profile evidence by testifying that gangs commit crimes and that Larrimore was a member of a gang. We disagree.

"A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime." (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084.) "In profile testimony, the expert compares the behavior of the defendant to the pattern or profile and concludes the defendant fits the profile. [Citations.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1226.) "'Profile evidence' . . . is not a separate ground for excluding evidence; such evidence is inadmissible only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative." (*People v. Smith* (2005) 35 Cal.4th 334, 357.) "Profile evidence is objectionable when it is insufficiently probative because the conduct or matter that fits the profile is as consistent with innocence as guilt." (*Id.* at p. 358.)

Officer Thayer's expert opinion was not improper profile evidence. While he did testify about the types of crimes committed by gang members, he did not compare Larrimore's conduct to a profile of gang members and conclude that Larrimore was a gang member because he fit the profile. Rather, Officer Thayer based his opinion that Larrimore was a gang member on Larrimore's admission to other gang officers that he was a member of the Black P. Stones with the moniker "Boogie," on his fellow gang member's statement to the police that Larrimore was "Boogie" or "Boogie Stone" from the Black P. Stones, and on the gang graffiti recovered in Larrimore's motel room that referenced both his moniker and the Black P. Stones. Moreover, Officer Thayer did not opine that Larrimore was guilty of the charged offenses or that Larrimore committed the charged offenses for the benefit of his gang. Rather, Officer Thayer properly testified in response to fact-based hypothetical questions posed by the prosecution that the shooting in this case would have been for gang purposes. Given that Officer Thayer's testimony constituted admissible gang evidence, Larrimore cannot establish that his trial counsel's failure to object to the testimony as improper profile evidence was unreasonable.

F. Failure to Object to Expert Testimony on Ultimate Issue

Larrimore asserts that his trial counsel rendered ineffective assistance in failing to object to Officer Thayer's testimony as invading the province of the jury to decide the ultimate issue in the case. This argument does not withstand scrutiny.

Under Evidence Code section 801, expert opinion testimony is admissible if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) Our Supreme Court has made clear that "[t]he subject matter of the culture and habits of criminal street gangs . . . meets this criterion." (*Gardeley, supra,* 14 Cal.4th at p. 617.) Furthermore, as discussed, a gang expert generally may render an opinion "on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.'" (*Id.* at p. 618.) "'Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.' [Citations.]" (*Vang, supra,* 52 Cal.4th at p. 1048.)

In its recent decision in *Vang*, the California Supreme Court reaffirmed its prior holdings that a gang expert may properly testify that a particular crime was committed for the benefit of a gang even though such testimony embraces an ultimate issue to be decided by the jury. (*Vang*, *supra*, 52 Cal.4th at p. 1048.) As the Court explained, while a gang expert may not testify whether the defendant committed a particular crime for gang purposes, the expert "properly could . . . express an opinion, based on hypothetical questions that tracked the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose. 'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. [Citation.]" (*Ibid*.) The Court acknowledged that the expert's opinion, if found to be credible, could "cause the jury to find the [crime] was gang related. 'But this circumstance makes the testimony probative, not inadmissible.' [Citation.]" (*Id*. at pp. 1048-1049.)

In this case, Officer Thayer properly offered his expert opinion that the shooting was committed for benefit of the Black P. Stones gang in response to hypothetical questions posed by the prosecution that were rooted in the evidence presented at trial. Officer Thayer did not provide an opinion on whether Larrimore and Banks actually committed the shooting or whether any of their actions were for the benefit of a gang. Rather, Officer Thayer opined that a shooting committed in the manner described by the prosecution's hypothetical questions would have been done for gang purposes. Officer Thayer did not invade the province of the jury in proffering his opinion, and accordingly, Larrimore's trial counsel did not render ineffective assistance in failing to object.

IV. Failure To Give Accomplice Instructions

Larrimore argues that the trial court erred in failing to sua sponte instruct the jury on the definition and use of accomplice testimony based on the incriminating testimony offered by Banks. Specifically, Larrimore asserts that the trial court was required to instruct the jury that the testimony of an accomplice must be corroborated and viewed with caution. We conclude that the court had no sua sponte duty to do so.

As our Supreme Court has held, "generally, instructions on accomplice testimony must be given on the court's own motion only when the accomplice witness is called by the prosecution or when a defendant, in testifying, implicates his codefendant while confessing his own guilt. But 'where a defendant testifies in his own behalf and denies guilt while incriminating a codefendant, it is at most for the discretion of the trial judge whether to give accomplice testimony instructions on his own motion.'" (*People v. Avila* (2006) 38 Cal.4th 491, 562 (*Avila*), quoting *People v. Terry* (1970) 2 Cal.3d 362, 399, overruled on another point in *People v. Carpenter* (1997) 15 Cal.4th 312, 381-382.) The sua sponte obligation to give accomplice instructions does not arise when the testifying codefendant denies guilt because "it would subject the [testifying] codefendant to unfair prejudice in the eyes of the jury to give even a limited instruction on accomplice testimony." (*People v. Catlin* (1959) 169 Cal.App.2d 247, 255; see also *People v. Ramos* (1982) 30 Cal.3d 553, 582, reversed on other grounds in *California v. Ramos* (1983) 463 U.S. 992 ["[W]hen, as here, a codefendant testifies that he was not involved in the crime -- and thus that he was not an accomplice -- the trial court may properly conclude that the giving of accomplice instructions might improperly prejudice the codefendant's case."].) "[I]n such a situation the giving or withholding of such instructions lie within the sound discretion of the trial court." (*People v. Ramos*, *supra*, at p. 582.)

In this case, Banks was a codefendant who testified on his own behalf and denied culpability while incriminating Larrimore. In particular, Banks testified that he was merely a passenger in Larrimore's vehicle when the shooting occurred and that he lacked any knowledge that the shots originated from Larrimore's vehicle until after the fact. Banks further testified that, upon seeing Avila's car, Larrimore said "there you go," turned into an alley for a brief stop, and then drove back to Avila's car with a gun on his lap. Because Banks testified that he had no involvement in the shooting but Larrimore did, the trial court did not have a sua sponte duty to give accomplice instructions.

None of the cases cited by Larrimore compels a contrary conclusion, including *Avila*, *supra*, 38 Cal.4th 491, *People v. Box* (2000) 23 Cal.4th 1153 (*Box*), *People v. Alvarez* (1996) 14 Cal.4th 155 (*Alvarez*), and *People v. Coffman and Marlow* (2004) 34

Cal.4th 1 (*Coffman*). In *Avila* and *Box*, the defendant requested accomplice instructions as to a testifying codefendant, and the issue was whether the trial court erred in refusing the request. (*Avila*, *supra*, at pp. 561-562; *Box*, *supra*, at pp. 1208-1209.) In *Alvarez* and *Coffman*, the trial court gave accomplice instructions as to a testifying codefendant, and the issue was whether it was proper to do so. (*Alvarez*, *supra*, at pp. 217-218; *Coffman*, *supra*, at pp. 104-105.) As the Court of Appeal noted in *People v. Smith* (2005) 135 Cal.App.4th 914, 928, the subsequent cases on accomplice instructions "have not disturbed the long-standing rule that an accomplice instruction need not be given sua sponte when the testifying accomplice is a codefendant."

Moreover, even if we were to assume that the trial court erred in failing to sua sponte give accomplice instructions, any such error was harmless because there was sufficient corroborating evidence connecting Larrimore to the charged crimes. (*Avila*, *supra*, 38 Cal.4th at pp. 562-563.) Avila identified Larrimore as the driver in a six-pack photographic lineup shown to him after the shooting, and made a subsequent in-court identification of Larrimore at trial. Cahee told the police that both Banks and Larrimore called him within a few days of the shooting and admitted their involvement in the crime. Rental receipts for the vehicle used in the shooting were recovered in Larrimore's motel room at the time of his arrest. Under these circumstances, Larrimore cannot show any prejudice in the alleged instructional error. For these same reasons, we reject Larrimore's argument that the trial court's failure to give accomplice instructions violated his federal constitutional right to due process and a fair trial. (*People v. Lewis* (2001) 26 Cal.4th 334, 371; *People v. Arias* (1996) 13 Cal.4th 92, 143.)

V. *Griffin* Error

Larrimore contends that the prosecutor committed prejudicial misconduct during closing arguments by commenting on his failure to testify in violation of *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*). We conclude that Larrimore has forfeited this argument on appeal by failing to object to the prosecutor's comment in the trial court. We further conclude that Larrimore has failed to demonstrate a reasonable probability

that the outcome of his trial would have been different had his trial counsel made a timely objection to the alleged *Griffin* error.

During closing argument, the prosecutor stated as follows: "We know that Kerry Cahee was right about Laron Larrimore. He is Boogie from the Black P Stones. Again, not only did Kerry Cahee tell us, not only did Jonathan Banks tell us, but we know that when he's arrested, his moniker is right in the room he's arrested in. [¶] He's arrested, a gun that's coincidentally the same type and make that was used in the murder -- not the gun, it's not the gun that was used -- but the same size and type -- and in his room is the name 'Boogie Stone.'" The prosecutor then stated: "Again, if Laron Larrimore, through his counsel, wants to stand here and tell you he's not Boogie, then he ought to explain what the odds are that Kerry Cahee, who has known him since childhood, tells the police he's Boogie, and he's arrested in the room with 'Boogie' or 'Boogie Stone,' the name in there, a Black P Stones member; and then Jonathan Banks takes the stand and tells us, yeah, he is Boogie." Larrimore's trial counsel did not object to the prosecutor's statement.

"[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (*Griffin*, *supra*, 380 U.S. at p. 615.) "Pursuant to *Griffin*, it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf. [Citations.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 371-372.) The *Griffin* prohibition, however, "does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses." (*People v. Brady* (2010) 50 Cal.4th 547, 566.) "'[A]s a general principle, prosecutors may allude to the defense's failure to present exculpatory evidence' [citation], and such commentary does not ordinarily violate *Griffin* or erroneously imply that the defendant bears a burden of proof [citations]." (*People v. Lewis* (2004) 117 Cal.App.4th 246, 257.)

Larrimore claims that the prosecutor improperly commented on his failure to testify by referring to Larrimore by name and implying that, unless he came forward to

testify, the jury should believe the witness identifications of him as "Boogie" from the Black P. Stones. However, to preserve a claim of prosecutorial misconduct for appeal, a defendant must object in a timely fashion in the trial court and request that the jury be admonished to disregard the impropriety. (*People v. Jones* (2003) 29 Cal.4th 1229, 1262; *People v. Ayala* (2000) 23 Cal.4th 225, 284.) This requirement repeatedly has been applied to claims of *Griffin* error, and it is only waived in cases where an objection would have been futile or ineffective to cure the harm. (*People v. Lancaster* (2007) 41 Cal.4th 50, 84; *People v. Turner* (2004) 34 Cal.4th 406, 421; *People v. Stewart* (2004) 33 Cal.4th 425, 505.) There is nothing in the record here to suggest that a timely objection by Larrimore's counsel would have been futile or that a prompt admonition by the trial court would have been ineffective to cure any potential prejudice. Accordingly, Larrimore forfeited his claim of *Griffin* error by failing to object in the trial court.

Alternatively, Larrimore argues that his trial counsel's failure to object to the prosecutor's comment as *Griffin* error constituted ineffective assistance of counsel. As discussed, to establish an ineffective assistance claim, Larrimore must demonstrate that his counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. (*Strickland, supra*, 466 U.S. at pp. 686-687; *People v. Ledesma, supra*, 39 Cal.4th at pp. 745-746.) In this case, the prosecutor's comments came perilously close to constituting *Griffin* error because the jury reasonably could have interpreted the prosecutor's statement that "he ought to explain" the evidence as referring to Larrimore's failure to testify that he was not "Boogie" from the Black P. Stones, rather than his counsel's failure to counter the evidence of Larrimore's gang membership. However, even assuming that trial counsel was deficient in failing to object to the prosecutor's comment, Larrimore's ineffective assistance of counsel claim must be rejected because he has not demonstrated a reasonable probability that the outcome of his trial would have been different absent the alleged *Griffin* error.

The prosecutor's comment was brief and directed at Larrimore's gang membership rather than at his guilt on the substantive charges. The evidence of Larrimore's guilt on

the substantive charges was strong. Avila identified Larrimore as the driver based on his personal observation of Larrimore at the scene of the shooting, and not on Larrimore's gang moniker. Larrimore's identity as the driver was confirmed both by Cahee in his statement to the police and by Banks in his testimony at trial. Indeed, Larrimore's defense by the end of the trial was not that some other person named "Boogie" from the Black P. Stones was the driver, but that Larrimore lacked any knowledge of his companion's criminal intent when he stopped his vehicle beside Avila's car. Considering the totality of the evidence, defense counsel's failure to object to the prosecutor's comment did not result in prejudice to Larrimore.

VI. Cumulative Error

Larrimore asserts that the cumulative effect of the claimed errors deprived him of due process of law and a fair trial. We disagree. Whether considered individually or for their cumulative effect, none of the errors alleged by Larrimore affected the process or accrued to his detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565.) As our Supreme Court has observed, a defendant is "entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) In this case, Larrimore received a fair trial. There was no cumulative error requiring reversal.

VII. Sufficiency of the Evidence on the Firearm Enhancement

In his appeal, Banks challenges the sufficiency of the evidence supporting the jury's true finding on the firearm enhancement (§ 12022.53, subd. (d)) alleged as to the attempted murder of Cassey. Banks specifically contends that the enhancement must be stricken because there was no evidence that Cassey sustained a great bodily injury during the shooting. This contention lacks merit.

Section 12022.53 mandates a 25-year-to-life sentence enhancement for the personal discharge of a firearm causing death or great bodily injury. Subdivision (d) of the statute specifically provides: "Notwithstanding any other provision of law, any person who, in the commission of a [specified] felony . . . personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice, shall be punished by an additional and consecutive term

of imprisonment in the state prison for 25 years to life." (§ 12022.53, subd. (d).) Murder and attempted murder are among the specified felonies. (§ 12022.53, subd. (a)(1), (18).)

We agree with the Attorney General that the resolution of this issue is controlled by the decision in *People v. Oates* (2004) 32 Cal.4th 1048 (*Oates*). In *Oates*, the defendant fired two shots into a group of five people, striking and seriously injuring only one of them. The defendant was convicted of five counts of attempted premeditated murder with a true finding as to each of the five counts that the defendant personally discharged a firearm causing great bodily injury during the commission of the crime. (*Oates, supra*, at pp. 1053-1054.) The Supreme Court held that the imposition of multiple enhancements under section 12022.53, subdivision (d) was proper based on the single injury. (*Oates, supra*, at pp. 1055-1057; see also *People v. Frausto* (2009) 180 Cal.App.4th 890, 903 [where defendant was convicted of one count of murder and two counts of attempted murder, the death of the murder victim supported the imposition of section 12022.53 enhancements on all three counts]; *People v. Mason* (2002) 96 Cal.App.4th 1, 11 [where defendant was convicted of one count of murder and six counts of robbery or attempted robbery, the trial court properly imposed a section 12022.53 enhancement on each of the robbery and attempted robbery counts, "even though the victims of those crimes did not themselves suffer great bodily injury or death"].)

As the Supreme Court explained in *Oates*, "by its terms, the subdivision (d) enhancement applies to 'any person' who, 'in the commission of' a specified felony, 'personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, *to any person other than an accomplice*.' . . . Based on the single injury to [one victim], the requirements of a subdivision (d) enhancement are met as to *each* of defendant's five attempted murder convictions, including those not involving the attempted murder of [the injured victim]. . . ." (*Oates, supra*, 32 Cal.4th at p. 1055.) As the Supreme Court further observed, "[h]ad the Legislature wanted to limit the number of subdivision (d) enhancements imposed to the number of injuries inflicted, or had it not wanted subdivision (d) to serve as the enhancement applicable to each qualifying

conviction where there is only one qualifying injury, it could have said so." (*Id.* at p. 1056.) "Here, there is no evidence of a contrary legislative intent." (*Id.* at p. 1057.)

As in *Oates*, Banks discharged a firearm multiple times during the commission of the shooting. The first two shots struck Avila causing him great bodily injury, and the third shot struck Kaitlyn causing her death. The great bodily injury to Avila and the death of Kaitlyn thus constituted a sufficient factual predicate to support the imposition of a section 12022.53, subdivision (d) enhancement as to the attempted murder of Cassey, regardless of whether Cassey also suffered a great bodily injury.

VIII. Exclusion of Videotape Evidence

Banks argues that the trial court violated his federal due process right to a fair trial and to present a defense when it refused to admit into evidence a videotape of Banks's police interview to show his demeanor. We conclude that the trial court did not abuse its discretion or violate due process in excluding the videotape evidence.

At Banks's retrial, the trial court allowed the prosecution to read into the record a transcript of Banks's prior testimony from the joint trial with Larrimore as part of its case-in-chief. In that testimony, Banks recounted that he had told the police in an interview following his arrest that there were four individuals in Larrimore's vehicle at the time of the shooting and that "Little Marky Boy" was the person in the front passenger seat with the gun. Banks did not testify on his own behalf at the retrial, but his defense counsel sought to introduce the videotape of Banks's police interview to the jury to show his demeanor. Defense counsel reasoned that Detective Evans had testified that he decided to arrest Banks rather than Smith for the shooting based, in part, on their demeanor during their police interviews, and that the prosecution had been allowed to present the videotape of Cahee's police interview to show his demeanor. The trial court found that the videotape of Banks's police interview was inadmissible hearsay, and that even if it was relevant to showing his demeanor, its probative value was substantially outweighed by the risk that the jury would improperly consider the content of Banks's statement to the police. The trial court thus excluded the entirety of the videotape.

A trial court generally has broad discretion concerning the admission of evidence. (*People v. Cole* (2004) 33 Cal.4th 1158, 1197; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "'[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question. . . .' [Citation.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.) "'[The] fundamental rule [is] that relevant evidence whose probative value is outweighed by its prejudicial effect should not be admitted.' [Citation.]" (*People v. Cardenas* (1982) 31 Cal.3d 897, 904.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. . . .' [Citation.]" (*Rodrigues, supra,* at pp. 1124-1125.)

Here, the trial court did not abuse its discretion in excluding the videotape evidence as inadmissible hearsay. The videotape of Banks's statement to police that he was present in the vehicle but was not the shooter was an out-of-court statement that constituted hearsay if offered for its truth. Banks argues that the videotape was offered for the non-hearsay purpose of showing his demeanor, which was particularly relevant in this case because there was conflicting testimony about whether Banks cried throughout the interview. It is true that crying and other emotional displays depicted in a videotaped police interrogation are, "'*by themselves, . . .* nonassertive conduct, and thus not within the hearsay rule.'" (*People v. Williams* (2006) 40 Cal.4th 287, 318.) However, where a defendant's nonassertive conduct is intertwined with statements made to the police denying culpability, the trial court may properly exclude the entirety of the recorded interview as inadmissible hearsay. (*Ibid*.; see also *People v. Jurado* (2006) 38 Cal.4th 72, 129-130 [trial court did not abuse its discretion in refusing to admit videotape of defendant's police interrogation to show demeanor because statements made during interrogation were hearsay].) Banks also asserts that the videotape of his police interview should have been admitted to show his demeanor because trial court allowed the prosecution to present the videotape of Cahee's police interview for the same purpose.

However, unlike Banks, Cahee testified at trial that he either never made certain statements to the police during the interview or lied when he made such statements in order to get help in his own criminal case. Banks did not testify at his retrial and the content of his statement to the police was not admitted for purposes of impeaching him.

The trial court also acted well within its discretion in determining that the prejudicial effect of the proffered evidence outweighed its probative value under Evidence Code section 352. As the trial court explained, if the entirety of the videotaped interview was introduced, it likely would cause juror confusion about the proper use of such evidence. The trial court reasonably determined that there was an undue risk that the jury would not only consider Banks's demeanor in the interview, but also would consider the inadmissible content of his statement. (See *People v. Cruz* (1968) 264 Cal.App.2d 350, 358 [trial court properly excluded tape recorded statement to police as inadmissible hearsay where jury would have difficulty distinguishing nonassertive aspects of tape from defendant's repeated assertions of innocence].) As the trial court also recognized, Banks's decision not to testify at retrial precluded him from being cross-examined about the content of his statement to the police, creating further risk of undue prejudice. On this record, we cannot conclude that the trial court's decision to exclude the videotape under Evidence Code section 352 was an abuse of discretion.

Banks's claim that the exclusion of the evidence deprived him of his federal constitutional right to present a defense likewise fails. As our Supreme Court has long observed, "[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Hall* (1986) 41 Cal.3d 826, 834; see also *People v. Snow* (2003) 30 Cal.4th 43, 90 ["Application of the ordinary rules of evidence, such as Evidence Code section 352, generally does not deprive the defendant of the opportunity to present a defense."].) Rather, a trial court retains "a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]" (*People v. Hall*, *supra*, at p. 834.) In this case, Banks was able to present his defense that he was a mere passenger in the car and that the shooter was Smith, a Black P. Stones

member who resembled Banks and who was identified by a witness shortly after the shooting. The exclusion of evidence of Banks's demeanor during his police interview did not impermissibly infringe on his right to present this defense. Under these circumstances, there was no constitutional error in excluding the videotape evidence.

IX. Sentencing Error

Banks contends, and the Attorney General concedes, that the trial court erred in failing to award him any credit for his actual days in presentence custody. Banks was arrested on October 10, 2006, and sentenced on January 29, 2010. He is therefore entitled to presentence custody credit of 1,208 days. Banks's abstract of judgment must be modified accordingly.

DISPOSITION

As to Larrimore, the true findings on the gang enhancements (§ 186.22, subd. (b)) are reversed. The gang enhancements (§ 186.22, subd. (b)) and the firearm enhancements (§ 12022.53, subds. (d), (e)(1)) imposed on counts 1 and 2 are stricken. The judgment is otherwise affirmed. As to Banks, the true findings on the gang enhancements (§ 186.22, subd. (b)) are reversed and the gang enhancements imposed on counts 1 through 3 are stricken. The judgment is further modified to award Banks a total of 1,208 days of presentence custody credit. As modified, the judgment is otherwise affirmed. The superior court is directed to prepare amended abstracts of judgment as to both appellants, and to forward certified copies to the Department of Corrections and Rehabilitation.

ZELON, J.

We concur:

PERLUSS, P. J. WOODS, J.