Filed 2/21/18 P. v. Duenas CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. OSCAR ISRAEL DUENAS, Defendant and Appellant.	B266480 (Los Angeles County Super. Ct. No. VA137741)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger Ito, Judge. Reversed in part and affirmed in part; remanded for resentencing.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Oscar Israel Duenas appeals his convictions for assault with a deadly weapon and making criminal threats. He contends the evidence was insufficient to support a gang enhancement, and in light of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), admission of a gang expert's testimony violated his confrontation and due process rights. Both appellant and the People contend the trial court made sentencing errors. We conclude the trial court committed various sentencing errors, and accordingly reverse as to the sentence, and remand for resentencing. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *The offenses*

Carlos Galvan Sr. and his family, including his 19-year-old son, Carlos Galvan Jr., had lived in a home on East 59th Street in Los Angeles for 18 years. Appellant Duenas, who was 31 years old, lived several houses away. The Florencia 13 criminal street gang controlled the area. Gang graffiti was prevalent on the street and gang members frequented the area. The Galvans believed Duenas was a Florencia 13 gang member because of his tattoos and appearance. They knew his moniker was "Pollo" or "El Pol[l]o." Galvan Jr. was not a gang member.

A week before Thanksgiving 2014, Duenas stood outside the Galvans' home and screamed for Galvan Jr. to come outside. Frightened, Galvan Jr. declined to do so. Duenas said he had heard Galvan Jr. was " 'talking shit' " about him. A day or two later, Galvan Jr. began receiving "a bunch" of threatening text messages from an unknown source. One stated that if Galvan Jr. did not meet the sender at the liquor store, "they were eventually going to find [him] and kick [his] ass." Galvan Jr. believed the

messages were from Duenas. The Galvans had not had problems with Duenas until this incident.

On November 27, 2014, the Galvans hosted a Thanksgiving dinner at their home. At approximately 5:15 p.m. Galvan Sr. and Jr. were on the front porch. Duenas stood outside their property and yelled for Galvan Jr., saying, " 'Hey, come out, son of a bitch.' " Duenas indicated he wanted to fight. Galvan Jr. stated he did not want to fight, but would do so if that would "stop the death threats."

When Galvan Jr. exited the yard, Duenas hit him in the mouth and nose with a metal baseball bat, causing him to fall, hit his head, and briefly lose consciousness. Galvan Sr. and his brother, Julio[1]—who had just arrived—assisted Galvan Jr. Duenas jumped up and down on the hoods of cars parked in the Galvans' driveway. He then returned to his own house.

Minutes later Duenas returned to the Galvans' home, armed with a Tech 9 submachine gun in his waistband and accompanied by codefendant Leandro Toro.[2] Toro was not wearing a shirt, and Duenas was either shirtless or wearing a "muscle" shirt. Both displayed multiple tattoos, which appeared to be gang-related. Duenas pointed the gun at Galvan Sr. and stated, " 'I'm going to kill you son of a bitch.' " Galvan Sr. believed Duenas would carry out his threat because he was a gang member. Duenas stated he did not want the Galvan family living on the block because he was the "boss" there. Galvan Sr.

---

[1] For ease of reference, and with no disrespect, we hereinafter refer to Julio Galvan by his first name.

[2] Toro was acquitted of assault with a deadly weapon and is not a party to this appeal.

believed this statement indicated Duenas was the "boss of the gang." Duenas also threatened that "they" were going to surround the Galvans' house. Duenas at one point said, " 'I'm going to kill all of you. That's on the hood.' " Galvan Jr. understood this to be a reference to Duenas's gang. Toro hit Julio in the back with a two-by-four. During the incident, a crowd of 30 to 40 people gathered in the street.

Police officers arrived and arrested Toro and Duenas. Officers did not find a gun on Duenas or in the area. An officer found the baseball bat on the front lawn of the house across the street from the Galvans' residence, and a wooden two-by-four in the backyard of that residence. Neither Galvan Sr. nor Jr. had a weapon. When arrested, Duenas had abrasions on his knees, back, elbows, hands, and head.

Galvan Jr. was treated at the hospital. The blow from the bat loosened one of his front teeth and bloodied his lip. At the time of trial he still suffered pain in his teeth and jaw, suffered from headaches, and had difficulty eating.

The Galvan family moved from the East 59th Street house after the incident. Galvan Jr. explained he moved because he was "scared" of "getting killed" by Duenas and Toro, because "they are gang members."

b. *Gang expert testimony*

Los Angeles County Sheriff's Department Detective Daniel Machuca testified as a gang expert for the People, as follows. The Florencia 13, a Hispanic gang, has approximately 2300 documented members in Los Angeles. It has a distinctive hand sign and claims territory bordered by Slauson Avenue, Central Avenue, State Street, and 92nd Street. The area where the offenses occurred is in the heart of the gang's territory. The

gang's primary activities include carjacking, robbery, burglary, extortion, assault, murder, and narcotics sales. The Florencia 13 gang is "extremely violent."

"Respect" is very important in the gang culture. Gangs make money through narcotics sales, extortion, and burglaries. It benefits a gang to have a reputation for violence. Gang members instill fear in the community by committing crimes and vandalizing the neighborhood. "Snitching" is not tolerated, and persons who cooperate with law enforcement can be assaulted or murdered.

Gangs have a hierarchy, with "OGs" at the top, shot callers in the middle, and "street soldiers" who actively "put in work," that is, commit crimes, at the bottom. One joins a gang by being "jumped in," committing crimes, or through family ties. Once a member, one cannot leave the gang, although some persons become inactive members.

Gang members show allegiance to the gang by displaying gang tattoos. Such tattoos are "earned," and a nongang member displaying Florencia 13 tattoos would be subject to "discipline" by the gang. Removal of tattoos does not demonstrate a person has distanced himself from the gang.

In Machuca's opinion, Duenas and Toro were Florencia 13 gang members. His opinion was based on his review of field identification (FI) cards and arrest reports, conversations with other deputies, and examination of the men's tattoos. FI cards examined by Machuca, prepared by nontestifying officers between 1998 and 2010, indicated Duenas had admitted his Florencia 13 membership on six or seven occasions. The FI cards also indicated Duenas had been observed in the company of other Florencia 13 gang members five or six times, and made note of

his gang-related tattoos. Machuca had also reviewed a series of photographs of Duenas's tattoos taken between 1998 and 2015, and had personally observed his tattoos shortly before trial. At various times, Duenas had "Florencia" tattooed on his left shoulder; "Maldicianos," which was the Spanish name for "Malditos," a Florencia 13 clique, on his chest; "Florencia" on the back of his head; "MLDS" on his face; "Malditos" on his right arm; "F13" on his right arm; "F13" on his abdomen; "MDS" on his lower back; and "SC" on his head, indicating "south central," where the gang originated. Some of these tattoos, including the "MLDS" on his face, had been removed. At the time of trial Duenas still sported four to five Florencia-related tattoos. Duenas's moniker was "Pollo."

FI cards prepared between 2008 and 2014 indicated Toro admitted his gang membership on three occasions, in 2008, 2009, and 2014. Machuca personally observed and reviewed photographs of Toro's gang-related tattoos, which included "Sureno" across his back, "F13" on the back of his head, "south side" on his chest, and "FX3" on his abdomen.

When given a hypothetical based upon the evidence presented, Machuca opined that the offenses would benefit the Florencia 13 gang and were committed in association with or at the direction of Florencia 13 gang members. The crimes showed "an association of two documented gang members of the Florencia 13 acting together." The crimes would enhance the gang's reputation as a "hardcore" gang, thereby instilling fear and intimidation in the community. This, in turn, would make it less likely the gang's crimes would be reported, facilitating the unfettered commission of future criminal activity.

In support of the Penal Code section 186.22[3] gang allegation, Machuca testified regarding two predicate crimes: a November 8, 2012 carjacking committed by Florencia 13 member Danny Ortega, and a May 30, 2012 felon-in-possession of a firearm conviction suffered by Florencia 13 gang member Robert Navarro.[4]

c. *Defense evidence*

Duenas presented the testimony of two neighbors who claimed to have observed portions of the altercation. Adriana Garcia, a former Florencia 13 gang member, lived across the street from the Galvan family and had known Duenas for 28 years. On Thanksgiving Day, she observed Galvan Sr. make an offensive remark to Duenas's mother, push Duenas, and then hit Duenas with a bat. When Garcia told Galvan Sr. not to hit Duenas, he replied, " 'I'll kill this dog.' " Garcia wrested the bat from Galvan Sr. and threw it in her yard. An individual with the moniker "Clown," a member of the 85th Locos gang and a relative of the Galvans', hit Duenas's mother, attempted to run over Duenas, and then drove off in a car full of persons Garcia described as "cholos."

According to neighbor Venita Orr, the Galvans and another man yelled at and argued with Duenas. One of the Galvans swung at Duenas with a four-by-four and the other hit him with a bat. Someone attempted to run over Duenas with a red vehicle.

---

[3] All further undesignated statutory references are to the Penal Code.

[4] We discuss this evidence in more detail where relevant below.

Both Garcia and Orr testified that Duenas did not have a bat or a gun and did not hit anyone. Neither saw Toro at the scene.

A gang expert testified for the defense that it is possible for a gang member to disassociate from a gang while still living in the gang's territory. Such persons may still have gang tattoos and wear gang attire, but they do not actively participate in gang activities. It is difficult for a gang member to cut all ties with his former gang unless he can afford to move away from the neighborhood. A gang member's removal of a gang tattoo is a big step in disassociating with the gang, because it shows disrespect for the gang. Tattoo removal is costly and beyond the means of many gang members. If a person had no contacts with law enforcement between 2010 and 2014, as indicated on FI cards, and the gang was still active in the area, this likely meant the person had disassociated from the gang.

2. *Procedure*

Trial was by jury. Duenas was convicted of assault on Galvan Jr. with a deadly weapon, a metal bat (§ 245, subd. (a)(1), count 1) and making criminal threats against Galvan Sr. (§ 422, subd. (a), count 2).[5] As to count 1, the jury found Duenas personally inflicted great bodily injury on Galvan Jr. (§ 12022.7, subd. (a)), but found the charged gang enhancement (§ 186.22, subd. (b)(1)(B)) not true. As to count 2, the jury found Duenas

---

[5] The jury also convicted Duenas of assault with a machine gun on Galvan Sr. (§ 245, subd. (a)(3), count 4). However, the trial court granted Duenas's motion for a new trial as to count 4 on the ground that the jury should have been instructed on the lesser included offense of assault with a firearm. The prosecutor declined to retry count 4, and the trial court dismissed the charge pursuant to section 1385.

personally used a firearm (§ 12022.5, subd. (a)), and committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(B)). The jury acquitted codefendant Toro of the single charge alleged against him, assault with a deadly weapon against Julio. After a bench trial, the trial court found Duenas had suffered a prior conviction of a serious felony (§§ 667, subds. (a) & (b)-(i), 1170.12). It denied Duenas's *Romero* motion[6] and sentenced him to 31 years in prison. It imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, and a criminal conviction assessment. Duenas appeals.

DISCUSSION

1. *The evidence was sufficient to prove the section 186.22 gang allegation*

Duenas contends the evidence was insufficient to support the jury's finding that he threatened Galvan Sr. for the benefit of, in association with, or at the direction of, the Florencia 13 criminal street gang. He is incorrect.

a. *Applicable legal principles and standard of review*

When determining whether the evidence was sufficient to sustain a criminal conviction or enhancement allegation, " ' "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104; *People v.*

---

[6] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

Johnson (2015) 60 Cal.4th 966, 988.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.) This standard applies to section 186.22 gang enhancements (*People v. Leon* (2008) 161 Cal.App.4th 149, 161; *People v. Augborne* (2002) 104 Cal.App.4th 362, 371), and to cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Brown* (2014) 59 Cal.4th 86, 106.) We consider all evidence admitted at trial without objection, even if some of the evidence was admitted erroneously. (*People v. Story* (2009) 45 Cal.4th 1282, 1296; *People v. Panah* (2005) 35 Cal.4th 395, 476; *People v. Lara* (2017) 9 Cal.App.5th 296, 328, fn. 17.)

Section 186.22, subdivision (b)(1) provides for a sentence enhancement when the defendant is convicted of an enumerated felony committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]" (*People v. Lara*, *supra*, 9 Cal.App.5th at p. 326.) " 'To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity.

[Citations.]' [Citation.] 'A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons. [Citations.]' " (*Id*. at pp. 326-327; *Sanchez*, *supra*, 63 Cal.4th at p. 698; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) The charged crime may serve as a predicate offense. (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 581; *Duran,* at p. 1457.) Not every crime committed by a gang member is committed for the gang's benefit. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

b. *The evidence was sufficient*

We discern no evidentiary insufficiency. Detective Machuca, the People's gang expert, testified that the Florencia 13 gang has approximately 2,300 members and uses a distinctive hand sign. Machuca, who had spoken with between 100 and 150 Florencia 13 gang members and served 20 search warrants regarding the gang, testified without objection that the gang's primary activities included carjacking, robbery, burglary, extortion, assault, murder, and narcotics sales, all of which are offenses enumerated in section 186.22, subdivision (e). Indeed, Duenas does not appear to dispute the sufficiency of the evidence to prove the Florencia 13 gang qualified as a criminal street gang within the meaning of the statute. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 [gang expert testimony sufficient to establish primary activities element].)

The evidence was likewise sufficient to establish that Duenas, a gang member, committed the section 422 offense for

the benefit of the Florencia 13 gang. The expert opined that Duenas and Toro were active Florencia 13 gang members. Both Galvans believed Duenas was a Florencia 13 gang member based on his tattoos and his appearance. (See *People v. Albillar*, *supra*, 51 Cal.4th at p. 62 [evidence of defendants' gang tattoos supported finding rapes were gang-related].) The incident occurred in the heart of Florencia 13 territory, where the gang's graffiti was prevalent. The confrontation between the Galvans and Duenas was witnessed by a crowd of neighbors. Duenas was either shirtless or clad in a muscle shirt, allowing for display of his gang tattoos. When threatening Galvan Sr. with the gun, Duenas stated he did not want the Galvan family living on the block because he was the "boss there," which Galvan Sr. took to mean Duenas was the boss of the gang in the area. According to Galvan Jr., Duenas at one point said, " 'I'm going to kill all of you. That's on the hood,' " which Galvan Jr. understood as a reference to Duenas's gang. Duenas also stated "they" would surround the Galvans' house. From the foregoing circumstances, the jury could reasonably infer Duenas intended to intimidate the Galvans and assert control over the area on the gang's behalf.

When given a hypothetical based on the evidence presented, Machuca opined that the charged crimes were for the benefit of the gang, because their commission would enhance the gang's reputation as a "hardcore" gang and intimidate the community. "An expert can properly 'express an opinion, based on hypothetical questions that track[] the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose.' " (*People v. Garcia* (2017) 9 Cal.App.5th 364, 375-376.) " '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." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; *People v. Albillar*, *supra*, 51 Cal.4th at p. 63.)

Finally, Machuca testified that Danny Ortega and Robert Navarro, who were both Florencia 13 gang members, had committed enumerated crimes (carjacking and felon in possession of a firearm) in 2012, as indicated by certified minute orders. This evidence was sufficient to establish the "predicate" offenses, that is, a pattern of criminal gang activity. (See *People v. Duran*, *supra*, 97 Cal.App.4th at pp. 1459-1463.) Duenas concedes that the crimes committed by Ortega and Navarro qualified as predicate offenses for purposes of section 186.22, and that their convictions were sufficiently proven through the certified minute orders. (See Evid. Code, § 452.5, subd. (b)(1); *Duran*, at p. 1458.) Machuca's testimony provided sufficient evidence the men were Florencia 13 gang members. As we discuss below, it is a reasonable inference from the record that Machuca's testimony regarding the men's gang membership was based on his own personal knowledge, rather than hearsay. Machuca's testimony, which was admitted without objection, was sufficient to establish both that Machuca had a factual basis for his statements[7] and to

---

[7] The expert testimony offered here is unlike that presented in *People v. Hunt* (1971) 4 Cal.3d 231, cited by Duenas. In *Hunt,* the defendant was found in possession of prescription vials of methedrine in a travel case. Acknowledging that an expert may opine that contraband is possessed for sale based on factors such as quantity, packaging, and normal usage, our Supreme Court concluded a "different situation" was presented when the narcotics had been purchased by prescription; there was no showing the officer had experience with prescription drug use. Thus, the officer's opinion did not constitute substantial evidence.

prove the men's gang membership. (See *People v. Miranda* (2016) 2 Cal.App.5th 829, 840-842 [pattern of criminal activity sufficiently proved by officer's testimony that two individuals had been convicted of predicate crimes while members of the gang]; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1120; *People v. Williams* (2009) 170 Cal.App.4th 587, 626.) Duenas's contrary arguments amount to an attack on the foundation for Machuca's expert testimony. But this challenge has been forfeited because he failed to object below. (Evid. Code, § 353; *People v. Jackson* (2016) 1 Cal.5th 269, 366 [defendant forfeited claim that officer's testimony lacked foundation by failing to object on this ground at trial]; *People v. Dowl* (2013) 57 Cal.4th 1079, 1087-1088.)[8] As we discuss below, Machuca's testimony was not objectionable under *Sanchez*.[9]

(*Id.* at pp. 237-238.) The facts of *Hunt* are entirely dissimilar to those here, and *Hunt* does not cast doubt on the substantial character of Machuca's testimony regarding Ortega's and Navarro's gang membership.

[8] To the extent Duenas argues his counsel provided ineffective assistance by failing to object, this contention fails. To prevail on an ineffective assistance claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. (*People v. Ray* (1996) 13 Cal.4th 313, 349.) Here the record suggests an obvious tactical reason for counsel's failure to object: the People could simply have elicited more information from Machuca demonstrating he had personal knowledge of Navarro's and Ortega's gang membership.

[9] Even if the evidence had been admitted in violation of *Sanchez*, this would not demonstrate an evidentiary insufficiency. It is settled that "expert testimony admitted at trial without

Duenas nonetheless contends the evidence was insufficient. First he asserts there was insufficient evidence he and Toro were active Florencia 13 gang members in November 2014.[10] He was 36 years old and some of his gang-related tattoos had been removed, and Machuca's testimony that a gang member could "never leave a gang" was speculative. His dispute with the Galvans was precipitated by his belief that Galvan Jr. was dating his sister and had disparaged the Duenas family. His threats were too "unsophisticated to have been gang-related" because the victims could easily have identified him; he did not use gang signs or challenges; and there was no showing of a "retaliatory gang motive" or any prior attempt at intimidation. The Galvans were not actually intimidated as they reported the crime to the police and testified at trial. These arguments amount to a request that this court reweigh the evidence and substitute our judgment for that of the trier of fact. This we cannot do. We resolve neither credibility issues nor evidentiary conflicts.

---

objection is 'competent' for purposes of considering on appeal whether sufficient evidence exists to support a finding." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 739-740, italics omitted; see *People v. Panah*, *supra,* 35 Cal.4th at p. 476; *People v. Bailey* (1991) 1 Cal.App.4th 459, 463 [" ' "Evidence technically incompetent admitted without objection must be given as much weight in the reviewing court in reviewing the sufficiency of the evidence as if it were competent" ' "].)

[10] Duenas also argues that because Toro was acquitted, the crime cannot have been committed in association with a fellow gang member. Assuming arguendo Toro's acquittal would preclude such a finding, the evidence was nonetheless sufficient to establish the criminal threats offense was committed for the benefit of the gang.

(*People v. Jackson* (2014) 58 Cal.4th 724, 749; *People v. Friend* (2009) 47 Cal.4th 1, 41; *People v. Cortes* (1999) 71 Cal.App.4th 62, 81 [where an appellant "merely reargues the evidence in a way more appropriate for trial than for appeal," we are bound by the trier of fact's determination]; *People v. Iboa* (2012) 207 Cal.App.4th 111, 117.)

Nor does Duenas's citation to *People v. Ramon* (2009) 175 Cal.App.4th 843, assist him. In *Ramon*, two gang members, in a stolen truck, were stopped by police, in territory claimed by their gang. A handgun was under the driver's seat. A gang expert testified that driving a stolen truck and possessing an unregistered gun could benefit the defendants' gang because they could commit crimes with the truck and the gun, thereby spreading fear and intimidation. (*Id.* at pp. 847-848.) The expert's testimony was improper opinion and did not provide substantial evidence supporting the gang enhancement; he simply informed the jury how he felt the case should be resolved. (*Id.* at p. 851.) There were no facts from which the expert could discern whether the defendants were acting on their own behalf or on behalf of the gang. (*Ibid.*) But the evidence and testimony presented in the instant matter contrasts with that in *Ramon.* The evidence showed Duenas provoked a physical confrontation with, and assaulted, Galvan Jr. He then threatened Galvan Sr. in language the jury could infer was gang-related. Under these circumstances, Machuca's testimony that the threats would enhance the gang's reputation and instill fear in the community was not speculative.

Duenas also mounts an attack on gang expert testimony in general, urging that it is based on "speculation, stereotype, hearsay, and unreliable sources" and to that extent cannot

constitute substantial evidence. He contends that information collected by officers regarding suspected gang members is "too subjective and biased to be the type of knowledge upon which experts may reasonably rely to *prove* gang membership or the elements of a gang enhancement." FI card information is derived from "unverifiable information" and "a variety of anonymous sources;" data gathered from officers and gang members may be self-serving and inconsistent; officers may exaggerate the extent of gang activity; admissions of gang membership, attire, and tattoos are unreliable indicators of gang membership; gang officers' testimony is based on a flawed methodology and data; and because gang officers are charged with suppressing gang activity, they are biased and should be disqualified from testifying. Duenas urges, based on the foregoing, that the admission of gang expert testimony "[']undercuts any presumption of innocence.' "

These arguments are unavailing. It "is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation," (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930), and such expert testimony may prove a section 186.22 gang enhancement. (See, e.g., *People v. Albillar*, *supra*, 51 Cal.4th at p. 63; *People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 324.) To the extent Duenas advocates for policy-based limits on gang expert testimony, his contentions are best directed to the Legislature, not this court. (See *People v. Fuentes* (2016) 1 Cal.5th 218, 231.) To the extent he believed Machuca's particular testimony lacked foundation or was otherwise unreliable, it was incumbent upon him to interpose specific objections in the trial court. Having failed to do so,

Duenas has forfeited any appellate challenge on these bases. (See *People v. Dowl*, *supra*, 57 Cal.4th at pp. 1087-1088; *People v. Miranda*, *supra*, 2 Cal.App.5th at pp. 837-838.)

2. *Admission of gang evidence*

Having addressed Duenas's sufficiency challenge, we turn to his contention that the gang evidence was inadmissible for three reasons: it was unduly prejudicial under Evidence Code section 352; the gang expert improperly testified to the ultimate issue in the case; and the evidence constituted testimonial hearsay under *Sanchez* and its admission violated his confrontation clause rights. We address these issues seriatim.

a. *Evidence Code section 352*

Duenas asserts that the gang evidence was unduly prejudicial and should have been excluded under Evidence Code section 352, and its admission violated his due process right to a fair trial. We disagree.

Gang evidence is admissible if it is logically relevant to some material issue in the case other than character, is not more prejudicial than probative, and is not cumulative. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) It is inadmissible if introduced only to show a defendant's criminal disposition. (*Avitia*, at p. 192.) Evidence of gang membership "is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) A trial court has broad discretion in determining whether evidence is relevant and whether Evidence Code section 352 precludes its admission. (*People v. Jones* (2017) 3 Cal.5th 583, 609; *People v. Mills* (2010) 48 Cal.4th 158, 195.) Rulings

regarding relevancy and Evidence Code section 352 are reviewed under the abuse of discretion standard. (*People v. Lee* (2011) 51 Cal.4th 620, 643; *People v. Hamilton* (2009) 45 Cal.4th 863, 929-930.)

The People are correct that, because Duenas did not object to the gang testimony below, he has forfeited his due process and Evidence Code section 352 claims. (Evid. Code, § 353, subd. (a); *People v. Gutierrez* (2009) 45 Cal.4th 789, 818; *People v. Valdez* (2012) 55 Cal.4th 82, 138; *People v. Partida* (2005) 37 Cal.4th 428, 433-435.) Duenas contends that if trial counsel's failure to object resulted in forfeiture, he received ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's deficient performance was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Brown*, *supra*, 59 Cal.4th at p. 109; *People v. Mai* (2013) 57 Cal.4th 986, 1009.) Because Duenas's contentions lack merit, as we discuss below, his ineffective assistance claim likewise fails. "Failure to raise a meritless objection is not ineffective assistance of counsel." (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90; *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836 ["Counsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance"].)

The People's theory was that Duenas was a gang member who was attempting to assert the gang's control over the neighborhood by intimidating the Galvans in the presence of numerous neighbors. The information included section 186.22, subdivision (b) gang allegations on all counts alleged against Duenas. To prove the gang enhancements, the People were

required to establish the existence of the gang, the predicate offenses, Duenas's intent, and that the crimes were committed in association with, or to benefit, the gang. To that end, evidence of the culture, habits, and violent nature of the gang was relevant and highly probative. (See *People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1050-1051, 1053.) Gang evidence is "relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related." (*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1167.) The expert's testimony was relevant to permit the jury to understand Duenas's motive and explain how his statements could induce fear in the victims, as well as demonstrate how he and Toro were working together to benefit the gang. (See *Hernandez*, at p. 1053.) Duenas's gang membership was also highly probative to establish the criminal threats offense; the fact a person threatening violence is a known gang member tends to support the conclusion a threat was specific and unequivocal and caused the victim to experience sustained fear. (See § 422.) " ' "[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." [Citations.]' " (*Samaniego*, at p. 1168.) The trial court did not abuse its discretion by admitting the gang evidence.[11]

---

[11] Duenas also argues Detective Machuca's "testimony was prejudicial" because Machuca "harbored actual bias against" him, in that Machuca's job as a gang investigator was to suppress criminal street gang activity. Thus, he had "every reason to implicate appellant as a gang member." Duenas offers no authority for the novel proposition that a law enforcement officer is biased, and his or her testimony must be excluded as prejudicial, simply because the officer's job involves crime

Nor has Duenas established admission of the gang evidence violated his due process rights. To make such a showing, a defendant must meet a "high constitutional standard." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229.) " 'Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.]" (*Ibid.*) We detect no such showing here. Contrary to Duenas's contentions, the evidence presented was not extraneous to the case. Unlike in *Albarran,* the gang evidence was relevant. (See *People v. Becerrada* (2017) 2 Cal.5th 1009, 1026.) The gang expert did not attempt to sensationalize the evidence. Although Duenas complains that the expert failed to provide details about the predicate crimes offered to prove the gang enhancement, in fact the gang expert's circumscribed testimony served to prevent additional, potentially inflammatory details from being disclosed. The evidence presented had a legitimate purpose and was not unduly inflammatory. (See generally *People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 31; *People v. Hunt* (2011) 196 Cal.App.4th 811, 818; *People v. Williams*, *supra*, 170 Cal.App.4th at p. 612.)

---

suppression. Taken to its logical conclusion, Duenas's argument would preclude the testimony of most law enforcement officers, a result not required by the law or common sense. To the extent Duenas believed Detective Machuca was biased, he was free to develop such evidence during cross-examination.

b. *Testimony regarding ultimate issues*

Duenas contends that by responding to a hypothetical question based on the evidence in the case, and opining that the offenses were committed for the benefit of the Florencia 13 gang, Machuca improperly opined on the ultimate issue to be decided by the jury. The defense made no objection to the hypothetical question or to this aspect of Machuca's testimony, and Duenas has therefore forfeited the point. (Evid. Code, § 353, subd. (a); *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 81-82; *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193.)

The claim fails on the merits as well. It is well settled that " '[t]estimony 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.]" (*People v. Vang*, *supra*, 52 Cal.4th at p. 1048.) Expert opinion that a crime was committed for the benefit of a criminal street gang, in response to a hypothetical question, is proper. (*Id*. at pp. 1048-1049.)

c. *Confrontation clause claim*

Duenas next attacks admission of the gang expert's testimony on hearsay and confrontation clause grounds. In particular, he challenges (1) Detective Machuca's reliance on FI cards prepared by officers who did not testify at trial as the basis for his opinion that Duenas and Toro were gang members, and (2) Detective Machuca's reliance on hearsay statements of other officers as evidence proving the predicate offenses. We conclude the FI cards were admitted in error, but the error was harmless beyond a reasonable doubt. Machuca's testimony regarding the predicate offenses was not hearsay, and therefore did not violate Duenas's confrontation clause rights under *Sanchez*.

(i) *Applicable legal principles and Sanchez*

The Sixth Amendment provides that an accused has the right to be confronted with the witnesses against him. (U.S. Const., 6th Amend.; *Sanchez*, *supra*, 63 Cal.4th at p. 679.) In the seminal case of *Crawford v. Washington* (2004) 541 U.S. 36, the high court overruled its prior precedent and held that the Sixth Amendment generally bars admission at trial of a testimonial out-of-court statement offered for its truth against a criminal defendant, unless the maker of the statement is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Id*. at p. 68; *Davis v. Washington* (2006) 547 U.S. 813, 821; *Sanchez*, at p. 680.) Although *Crawford* set forth a new standard for admissibility, the court declined to provide a comprehensive definition of "testimonial." (*Crawford*, at p. 68; *People v. Hill*, *supra*, 191 Cal.App.4th at p. 1134.)

Under state law, hearsay—that is, an out-of-court statement offered for the truth of its content—is inadmissible unless each level of hearsay falls within an exception to the hearsay rule. (*Sanchez*, *supra*, 63 Cal.4th at pp. 674-675.)

In *Sanchez,* the defendant was charged with drug and firearm offenses and active participation in the Delhi street gang, along with a section 186.22 gang enhancement. At trial, a gang expert relied upon a "STEP notice," police documents, and an FI card as the basis for his expert opinion. Those documents indicated Sanchez associated with, and had been repeatedly contacted by police while in the presence of, Delhi gang members. (*Sanchez*, *supra*, 63 Cal.4th at pp. 671-673.) The expert had never met Sanchez and had not been present during any of Sanchez's police contacts. Based on the information in the STEP notice, the police documents, and the FI cards, and the

circumstances of the offense at issue, the expert opined that Sanchez was a member of the Delhi gang and the charged crimes benefitted the gang. (*Id.* at p. 673.)

Sanchez held "the case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay under California law. They were recited by the expert, who presented them as true statements of fact, without the requisite independent proof. Some of those hearsay statements were also testimonial and therefore should have been excluded under *Crawford*. The error was not harmless beyond a reasonable doubt." (*Sanchez*, *supra*, 63 Cal.4th at pp. 670-671.) Accordingly, the court reversed the true findings on the street gang enhancements. (*Id.* at p. 671.)

The court drew a distinction between an expert's general knowledge and "*case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) Prior to *Sanchez,* California law allowed an expert to explain the "matter" upon which he relied, even if it was hearsay, if a limiting instruction was given. (*Id.* at pp. 678-679.) Overruling prior precedent, *Sanchez* concluded: "this paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion *must* be considered for its truth by the jury." (*Id.* at p. 679.) Accordingly, if "an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through

an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Id.* at p. 684, fn. omitted.)

Sanchez did not cast doubt on all gang expert testimony. "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so," that is, he or she may "relate generally" the "kind and source of the 'matter' upon which his opinion rests." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686.) "Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception." (*Id.* at p. 685.)

(ii) *Forfeiture*

We first address the People's contention that Duenas has forfeited his hearsay and confrontation clause claims because he failed to object to the evidence on these grounds below. (Evid. Code, § 353, subd. (a); *People v. Redd* (2010) 48 Cal.4th 691, 730; *People v. Dykes* (2009) 46 Cal.4th 731, 756.) However, more specific or additional confrontation clause objections would have been futile because at the time of trial, California law allowed an expert to testify to hearsay evidence that formed the basis of the expert's opinion. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 617-618, disapproved by *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13; *People v. Stamps* (2016) 3 Cal.App.5th 988, 995 [*Sanchez* occasioned a "paradigm shift" in the law]; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7 [prior to *Sanchez*, failure to object

on confrontation grounds would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert "basis" evidence did not violate confrontation clause], review granted Mar. 22, 2017, No. S239442, opn. ordered to remain precedential; *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1283 [because *Gardeley* was controlling authority at the time of trial, counsel was "not required to assert objections that would have been clearly, and correctly, overruled"]; *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507-508.) Accordingly, Duenas's claims have not been forfeited.

(iii) *Discussion*

To determine whether admission of Detective Machuca's testimony was prejudicial error we use the "two-step analysis" required by *Sanchez*. "The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Sanchez*, *supra*, 63 Cal.4th at p. 680.) An improperly admitted hearsay statement ordinarily constitutes statutory error under the Evidence Code. (*Id.* at p. 685.) Where the hearsay is testimonial and is admitted in violation of *Crawford,* the error is one of federal constitutional magnitude. (*Ibid.*)

A. *Background information*

The bulk of Machuca's testimony, including that regarding the Florencia 13's territory, hand signs, culture, and primary

activities; the importance of respect in gang culture; the requirements to join the gang and the difficulty of disassociating from it; and identification of tattoos as gang-related, was permissible as expert background testimony. (*Sanchez*, *supra*, 63 Cal.4th at p. 685; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1247; *People v. Meraz*, *supra*, 6 Cal.App.5th at p. 1175; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411-412.) For example, *Sanchez* explained that an expert's opinion that a particular tattoo indicated gang membership was background information. (*Sanchez*, at p. 677.) Here, the evidence does not suggest Machuca's knowledge of these background facts was based on testimonial hearsay. (See *Meraz*, at pp. 1175-1176.) And, Machuca's personal observations of Duenas's and Toro's tattoos were not hearsay.

B. *FI cards*

Machuca's testimony that FI cards prepared by nontestifying officers indicated Duenas and Toro had admitted membership in the Florencia 13 gang, had gang tattoos, and had been observed with other Florencia 13 gang members, was hearsay. This information was case-specific, offered for its truth, and intended to demonstrate Duenas's gang membership. (See *Sanchez*, *supra*, 63 Cal.4th at pp. 674-675; *People v. Meraz*, *supra*, 6 Cal.App.5th at p. 1176 [hearsay rules barred admission of officer's testimony on FI cards and arrest report completed by other officers outside his presence, which conveyed case-specific information]; *People v. Lara*, *supra*, 9 Cal.App.5th at p. 337.) The People argue that Duenas's admissions of his own gang membership were admissible as party admissions. (See Evid. Code, § 1220.) However, this does not account for the second

level of hearsay, that of the nontestifying officer who reported the statement on the FI card.[12]

It is unclear whether the FI cards contained testimonial hearsay. *Sanchez* concluded FI cards "may" be testimonial, but did not hold they always are. (*Sanchez*, *supra*, 63 Cal.4th at p. 697.) Statements made to officers in the course of informal interactions, and not gathered for the primary purpose of use in a later criminal prosecution, are not generally testimonial. (*People v. Ochoa*, *supra*, 7 Cal.App.5th at p. 585; *People v. Valadez* (2013) 220 Cal.App.4th 16, 35-36.) In contrast, if an FI card is "produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial." (*Sanchez*, at p. 697.) Duenas argues the FI card information here was testimonial because information obtained by officers is for the primary purpose of documenting subjects' gang affiliations, for later use in criminal prosecutions. Some evidence in the record suggests otherwise: Counsel for Toro elicited that the majority of FI cards are filled out during consensual encounters and "are more or less voluntary," although others are completed during the booking process. Machuca testified that he had consensual encounters with gang members on a daily basis, simply to gather intelligence and build rapport. But because there was no evidence regarding the circumstances under which

---

[12] The People argue that admission of Detective Machuca's testimony about the FI cards was harmless because the FI cards were admitted into evidence without objection. As we have explained, the failure to object below did not forfeit the confrontation clause challenge in light of the change in law wrought by *Sanchez*. As we understand Duenas's argument, he challenges all evidence of the FI cards.

the particular FI cards at issue were prepared, the record is insufficiently developed to allow us to determine whether the aforementioned statements were testimonial.

But even assuming arguendo that the FI cards were testimonial, their admission was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) There was no question Duenas and Toro had been Florencia 13 gang members in prior years; both had extensive tattoos so indicating, and both the defense and prosecution experts opined that non-gang members would be unlikely to get such tattoos. Among other tattoos Duenas had inked over the years were "Florencia," "F13," and "Malditos" (a Florencia 13 clique). Even had the FI card testimony been omitted entirely, Machuca would still have been able to testify that, based on his observations, four or five of the tattoos on Duenas's body at the time of trial indicated Florencia 13 membership. The only question was whether Duenas was still an active Florencia 13 gang member in November 2014. To this end, the FI card evidence actually *favored* the defense. The last FI card on Duenas was prepared in 2010. The defense expert testified that the absence of FI cards on a subject during a four-year period preceding the charged crime was an indication the person had disassociated from the gang. The evidence was thus harmless beyond a reasonable doubt.

C. *Predicate offenses*

To prove the requisite pattern of criminal gang activity the People must prove two predicate offenses. (§ 186.22, subd. (e).) A certified copy of a minute order falls within a statutory exception to the hearsay rule, and may provide such proof. (Evid. Code, §§ 452.5, subd. (b), 1280; *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1461.) Such minute orders are nontestimonial. (*People v.*

Meraz, *supra*, 6 Cal.App.5th at p. 1176, fn. 10; *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225 [records prepared to document acts and events relating to convictions and imprisonments are beyond the scope of *Crawford*]; *People v. Moreno* (2011) 192 Cal.App.4th 692, 708, 710-711 [section 969b packet documents regarding prior convictions were nontestimonial].)

As discussed above, to prove the Florencia 13 gang had engaged in a pattern of criminal activity, the People presented certified minute orders showing Ortega committed carjacking in November 2012, and Navarro committed the offense of being a felon in possession of a firearm in May 2012. The minute orders did not indicate Navarro or Ortega were Florencia 13 gang members or that their crimes were gang-related. Instead, their gang membership was proven by Detective Machuca's testimony that both men were gang members. Duenas argues that Machuca's testimony on this point was inadmissible testimonial hearsay. Not so. Detective Machuca testified that both Ortega and Navarro were gang members. Machuca did *not* state that his knowledge of their gang membership was based on his conversations with other detectives or review of FI cards. As far as the record shows, Machuca's testimony regarding the men's gang membership was based on his own personal knowledge. Machuca testified, for example, that he had "experience and knowledge" of the Florencia 13 gang and had spoken to between 100 and 150 Florencia 13 gang members. Also, as part of a special assignment team tasked with combating gangs, Machuca spoke with gang members daily. It is therefore a reasonable inference that Machuca's testimony that Navarro and Ortega were Florencia 13 gang members was based on his personal experience. Duenas has thus failed to show that Machuca's

testimony rested on hearsay, as opposed to information based upon his own personal knowledge. "On appeal, we assume a judgment is correct and the defendant bears the burden of demonstrating otherwise." (*People v. Thompson* (2016) 1 Cal.5th 1043, 1097, fn. 11.) In short, because the evidence cannot be characterized as testimonial hearsay, its admission was not error and did not violate Duenas's confrontation rights.

3. *Sentencing issues*

The People and Duenas contend the trial court made sentencing errors. Some of their contentions have merit.

a. *Additional facts*

As noted, the trial court sentenced Duenas to a term of 31 years in prison, configured as follows. The court selected count 2, the criminal threats offense against Galvan Sr., as the principal term. It imposed the high term of three years, doubled pursuant to the "Three Strikes" law, based on Duenas's "prior criminal history, the use of weapon, his prior poor performance on probation and parole," and the fact the victim was vulnerable. For the section 12022.5, subdivision (a) firearm enhancement, the court imposed an additional high term of 10 years, "based on [Duenas's] very poor performance on prior history [*sic*], the indication of some degree of a vulnerable victim in this case, and the defendant's overall history of gang membership and the instance of violence." It further imposed a consecutive 10-year term on the section 186.22, subdivision (b) gang enhancement, "because the underlying felony, the [section] 422, has . . . become a violent felony as it's defined under [section] 667.5, subdivision (b)."

On count 1, assault with a deadly weapon on Galvan Jr., the subordinate term, the court imposed a consecutive term of

one-third of the midterm, or one year, doubled pursuant to the Three Strikes law, plus a consecutive three-year term for the section 12022.7 great bodily injury enhancement.

b. *Discussion*

(i) *Imposition of both the gang and the 10-year firearm enhancement was improper*

Duenas argues, and People agree, that the court erred by imposing both a 10-year gang enhancement and a 10-year firearm enhancement on count 2, criminal threats. Section 12022.5, subdivision (a) provides that any person who personally uses a firearm in the commission of a felony shall be punished by an additional and consecutive term of three, four, or ten years, unless firearm use is an element of the offense. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 505.)

Section 186.22, subdivision (b)(1) provides for additional punishment when a crime is committed to benefit a criminal street gang, with "increasingly harsh levels of punishment" for various circumstances. (*People v. Rodriguez*, *supra*, 47 Cal.4th at p. 505.) Section 186.22, subdivision (b)(1)(C) provides that: "If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." (*Rodriguez*, at p. 505.) Criminal threats is a violent felony when, as here, it is charged and proved that the defendant used a firearm under section 12022.5. (§ 667.5, subd. (c)(8).)

Section 1170.1, subdivision (f) prohibits the imposition of more than one enhancement for using a firearm in the commission of a single offense. Instead, only the greatest of those enhancements shall be imposed. (*People v. Rodriguez*, *supra*, 47 Cal.4th at p. 508.) Where, as here, a defendant is eligible for the 10-year section 186.22 punishment only because he used a

firearm, section 1170.1, subdivision (f) applies. "Because the firearm use was punished under two different sentence enhancements provisions, each pertaining to firearm use, section 1170.1's subdivision (f) requires imposition of 'only the greatest of those enhancements' with respect to each offense." (*Rodriguez*, at p. 509.)

The parties disagree as to whether the enhancement must be stricken entirely. The People contend the gang enhancement must be reduced to a five-year term, whereas Duenas argues it must be stricken. The People have the better argument. Section 186.22, subdivision (b)(1)(B) provides that if the underlying offense "is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years." Section 1192.7, subdivision (c)(38) provides that "criminal threats, in violation of Section 422" is such a serious felony. Thus, the criminal threats offense qualifies as a serious felony without regard to Duenas's firearm use, and a five-year enhancement is proper.

People v. Le (2015) 61 Cal.4th 416, is distinguishable. There, the defendant was convicted of assault with a semiautomatic firearm (§ 245, subd. (b)) with a section 12022.5 firearm allegation. (*Le*, at p. 420.) Our Supreme Court concluded section 1170.1, subdivision (f) prohibited imposition of both a gang enhancement under section 186.22, subdivision (b)(1)(B), and the firearm enhancement. (*Id.* at p. 429.) The court found *Rodriguez* applied, because under the relevant statutory provisions and the facts of the case, defendant's crime qualified as a serious felony "solely because it involved a firearm." (*Id.* at pp. 425, 429.) Therefore, the *Le* defendant's "section 186.22 gang enhancement . . . , regardless of whether it qualified as a serious

or violent felony under subdivision (b)(1)(B) or (b)(1)(C) [of section 186.22], is an enhancement 'imposed for being armed with or using . . . a firearm.' [Citation.]." (*Ibid.*) Moreover, the use of a semiautomatic firearm was a necessary element of the underlying crime. Without the firearm-use element, the crime would have constituted simple assault, a nonserious felony. Accordingly, the firearm element elevated the crime beyond simple assault and caused it to be listed as a serious felony, which, in turn, qualified the conduct for the five-year section 186.22 enhancement. (*Id.* at pp. 427-428.)

Neither of these circumstances is present in the instant case. Making criminal threats in violation of section 422 is a serious felony regardless of whether a firearm is used. The offense itself does not require the use of a firearm. Thus, unlike in *Le,* Duenas was not exposed to two different sentence enhancements based on firearm use. (See *People v. Le*, *supra*, 61 Cal.4th at p. 428.)[13]

---

[13] Duenas argues that the People did not allege the criminal threats offense was a serious felony pursuant to section 1192.7, subdivision (c)(38) "for purposes of imposing a five-year gang enhancement." This is incorrect. The information alleged the gang enhancement as to the criminal threats offense and specifically cited "Penal Code section 186.22(b)(1)(B)." Duenas also points out that the information alleged his use of a firearm caused the offense to become both a serious felony and a violent felony. In *Le*, the prosecutor argued that because the section 186.22 enhancement did not specifically allege the crime was a violent felony under subdivision (b)(1)(C), it was not based on use of a firearm and a 10-year firearm enhancement could be imposed. (*People v. Le*, *supra*, 61 Cal.4th at p. 421.) That argument is irrelevant here, and nothing in the information suggests *Le* applies.

The proper remedy is not to strike one of the enhancements, but instead to reverse the judgment and remand the matter for resentencing. (*People v. Rodriguez*, *supra*, 47 Cal.4th at p. 509.) "Remand will give the trial court an opportunity to restructure its sentencing choices in light of our conclusion that the sentence imposed here violated section 1170.1's subdivision (f)." (*Ibid.*) This is especially true here, where we conclude other sentencing errors require modifications to the overall sentence, as explained below. "When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.]" (*People v. Hill* (1986) 185 Cal.App.3d 831, 834; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258.)

Duenas also argues, in supplemental briefing, that he is entitled to the benefit of a new amendment to section 12022.5. Effective January 1, 2018, the Legislature amended section 12022.5 to give trial courts authority to strike a section 12022.5 firearm enhancement in the interests of justice. (Sen. Bill No. 620 (2017-2018 Reg. Sess.), Stats. 2017, ch. 682, § 1.) As amended, section 12022.5 provides in pertinent part: "(c) The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." Prior to the amendment, imposition of a section 12022.5 enhancement was mandatory and the trial court lacked discretion to strike it. (See former § 12022.5, subd. (c), Stats. 2011, ch. 39, § 60.)

As the People correctly concede, the amendment to section 12022.5 applies retroactively to cases, such as Duenas's, that were not final when the amendment became operative. Under *In re Estrada* (1965) 63 Cal.2d 740, we presume that, absent contrary evidence, an amendment reducing punishment for a crime applies retroactively to all nonfinal judgments. (*Id.* at p. 745; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Vieira* (2005) 35 Cal.4th 264, 305-306 [judgment is not final, for purposes of retroactivity analysis, until time for petitioning United States Supreme Court has expired].) The *Estrada* rule has been applied to penalty enhancements, as well as to amendments giving the court discretion to impose a lesser penalty. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) Moreover, amended section 12022.5 expressly states that the trial court has discretion to strike a section 12022.5 enhancement when resentencing occurs pursuant to any other law. This language suggests the amendment applies to crimes committed prior to the amendment's effective date, that are now before the court for resentencing for other reasons. As we are remanding for resentencing to ensure compliance with section 1170.1, subdivision (f), amended section 12022.5 applies.[14]

---

[14] The People argue remand is unnecessary because no reasonable trial court would exercise discretion to strike the firearm enhancement in Duenas's case, and the trial court's sentencing choices indicate it would not have done so here. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [remand to consider striking a prior conviction pursuant to *Romero* unnecessary when the record demonstrated the court would not have exercised its discretion to impose a lesser sentence].) But we need not decide whether remand would be necessary due to

For the trial court's guidance on remand, we address the parties' other contentions regarding sentencing error.

(ii) *Great bodily injury enhancement on count 1*

The parties agree that the trial court erred by imposing a full term for the great bodily injury enhancement on count 1, the subordinate term. Instead, the court should have imposed one-third of the midterm, or one year. (*People v. Sasser* (2015) 61 Cal.4th 1, 9; § 1170.1, subd. (a) ["The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses"].) On remand, the trial court is directed to correct this error if it exercises its discretion to again treat count 1 as the subordinate count.

(iii) *Failure to impose serious felony enhancement*

The trial court failed to impose a section 667, subdivision (a) serious felony enhancement. The parties agree that this error resulted in an unauthorized sentence. When charged and proven, a section 667, subdivision (a) enhancement is mandatory, and the failure to impose it results in an unauthorized sentence. (*People v. Turner* (1998) 67 Cal.App.4th 1258, 1269; *People v. Dotson*

---

the amendment of section 12022.5 alone. We are remanding for resentencing in any event, and the trial court may reconsider all its sentencing choices. Because section 12022.5 applies to Duenas's nonfinal case, the trial court has discretion to consider striking the firearm enhancement. We offer no opinion on how it should exercise its discretion under section 12022.5, subdivision (c).

(1997) 16 Cal.4th 547, 553.) On remand, the trial court is directed to impose the section 667, subdivision (a) five-year serious felony enhancement.

(iv) *Imposition of upper terms, consecutive term and purported failure to consider mitigating evidence*

Duenas argues the trial court abused its discretion by imposing the upper term on the base count and the firearm enhancement, plus a consecutive second strike sentence on count 1, given that, in his view, only one valid aggravating factor existed. The remaining factors, he urges, were "insufficient, duplicative, misweighed, and/or imposed in violation" of his right to a jury trial under *Cunningham v. California* (2007) 549 U.S. 270. He also contends the trial court failed to consider mitigating circumstances.

A. *Forfeiture*

The People urge, correctly, that because Duenas failed to raise these objections below, he has forfeited his appellate challenge. (*People v. Scott* (1994) 9 Cal.4th 331, 356.) The forfeiture doctrine applies "to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*Id.* at p. 353.) However, because Duenas contends his trial counsel provided ineffective assistance by failing to object, and for the court's guidance on remand, we consider the merits of his arguments.

B. *Relevant legal principles*

When a statute specifies three possible terms, the choice of the appropriate sentence rests within the trial court's broad discretion. (*People v. Jones* (2009) 178 Cal.App.4th 853, 862; *People v. Moberly* (2009) 176 Cal.App.4th 1191, 1196; § 1170, subd. (b).) The court may consider aggravating and mitigating circumstances, "and any other factor reasonably related to the sentencing decision" (Cal. Rules of Court, rule 4.420(b)), and may rely on the record in the case, the probation report, statements in mitigation or aggravation, and any further evidence introduced at the sentencing hearing. (*People v. Towne* (2008) 44 Cal.4th 63, 85; *People v. Shenouda* (2015) 240 Cal.App.4th 358, 368.) We review the trial court's sentencing decisions for abuse of discretion, which will be found only when its decision is irrational or arbitrary, or when it relied on circumstances that were irrelevant or otherwise constituted an improper basis for the decision. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847; *People v. Carmony* (2004) 33 Cal.4th 367, 376.) The burden is on the party attacking the sentence to clearly show the sentencing decision was irrational or arbitrary. (*Carmony*, at p. 376; *Jones*, at p. 861.)

Although a single fact may be relevant to more than one sentencing choice, the dual or overlapping use of sentencing factors is prohibited in a variety of circumstances. (*People v. Scott*, *supra*, 9 Cal.4th at p. 350; *People v. Moberly*, *supra*, 176 Cal.App.4th at p. 1197.) A fact charged and found true as an enhancement may be used as a reason for imposing the upper term only if the court strikes the punishment for the enhancement. (§ 1170, subd. (b); *Scott,* at p. 350; *People v. Jones*, *supra*, 178 Cal.App.4th at p. 862; Cal. Rules of Court, rule

4.420(c).) A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term. (*Scott*, at p. 350; *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1292; Cal. Rules of Court, rule 4.420(d).) Nevertheless, the "dual use of a fact or facts to aggravate both a base term and the sentence on an enhancement is not prohibited." (*Moberly*, at p. 1198.)[15]

Similarly, a court has discretion to consider aggravating and mitigating factors when deciding whether to impose consecutive rather than concurrent sentences. (Cal. Rules of Court, rule 4.425(b).) However, a court may not impose a consecutive sentence based on consideration of a fact used to impose the upper term, a fact used to otherwise enhance the defendant's sentence, or a fact that is an element of the crime. (*Ibid.*) " '[O]ne relevant and sustainable fact may explain a series of consecutive sentences.' " (*People v. Moberly*, *supra*, 176 Cal.App.4th at pp. 1197-1198.)

The existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term. The same is true of the choice to impose a consecutive sentence. (*People v. Black* (2007) 41 Cal.4th 799, 813; *People v. Osband* (1996) 13 Cal.4th 622, 728-729.) " 'Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate

---

[15] Duenas points to contrary language in *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1516, footnote 12 ["The same fact cannot be used to impose an upper term on a base count and an upper term for an enhancement"].) However, *Moberly* has been cited favorably on this point by our Supreme Court. (*People v. Chism* (2014) 58 Cal.4th 1266, 1336.)

resentencing if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error." ' [Citation.]" (*Osband*, at p. 728.)

Under *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Cunningham v. California*, *supra*, 549 U.S. 270, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*People v. Towne*, *supra*, 44 Cal.4th at pp. 74-75.) Thus, an upper term cannot be imposed based on facts that were neither admitted nor found true by a jury.

C. *Imposition of upper terms and consecutive sentence*

Here the trial court made three sentencing choices that Duenas contends had to be supported by separate aggravating factors: (1) imposition of the upper term on the criminal threats offense; (2) imposition of the upper term on the firearm enhancement; and (3) imposition of a consecutive term on the assault offense in count 1. As the court could rely on the same factor to impose an upper term on an offense and on an enhancement, only two aggravating factors were necessary to support the trial court's sentencing choices.

To support selection of the upper term on the criminal threats offense, the court cited Duenas's prior criminal history, his use of a weapon, his poor performance on probation or parole, and the victim's vulnerability. To support its selection of the upper term on the firearm enhancement, the court cited Duenas's poor performance on probation or parole, victim vulnerability, his history of gang membership, and the fact the offense involved violence. It did not give reasons for its selection of the consecutive term on the subordinate count.

Some of the factors cited by the court were improper. Duenas is correct that the trial court could not rely on the victim vulnerability factor because this fact was neither admitted nor found true by a jury. (*People v. Boyce* (2014) 59 Cal.4th 672, 728 [reliance on victim vulnerability factor improper where the fact was neither admitted nor found true by the jury, and error was not harmless]; *People v. Sandoval*, *supra*, 41 Cal.4th at pp. 837-838.) As the People concede, the trial court erred by relying on Duenas's use of a firearm as an aggravating circumstance because a court may not impose an upper term based on a fact found true as an enhancement, unless the enhancement is stricken. (§ 1170, subd. (b); *People v. Scott*, *supra*, 9 Cal.4th at p. 350; *People v. Jones*, *supra*, 178 Cal.App.4th at p. 862; Cal. Rules of Court, rule 4.420(c).) The same appears to be true in regard to Duenas's gang membership, given that the section 186.22 enhancement was imposed because he committed the criminal threats offense for the benefit of the Florencia 13 gang. (§ 1170, subd. (b); *Scott*, at p. 350.)

But at least two of the factors cited by the court were proper. First, the court could rely on the circumstance of Duenas's criminal history as an aggravating factor. Imposition of an upper term sentence is permissible under *Cunningham* when based upon the aggravating circumstance of the defendant's criminal history, including the fact that his convictions are numerous or of increasing seriousness. (*People v. Towne*, *supra*, 44 Cal.4th at pp. 75-76; *People v. Wilson* (2008) 44 Cal.4th 758, 811-812; *People v. Black*, *supra*, 41 Cal.4th at pp. 819-820; Cal. Rules of Court, rule 4.421(b)(2).) Duenas's probation report lists sustained juvenile petitions for assault, receiving stolen property, and narcotics possession. His adult history includes convictions

for possession of marijuana for sale, narcotics and marijuana possession, driving without a license, and, in 2009, second degree robbery. Thus, the trial court did not err or run afoul of *Cunningham* by relying on Duenas's criminal history as an aggravating factor.[16]

Likewise, Duenas's performance on probation supported the trial court's sentencing choices. Duenas's probation report indicates he was on probation at the time of the instant offenses. A "trial court's conclusion that the charged offense was committed while the defendant was on probation or parole, like a finding of a prior conviction, does not require judicial factfinding regarding the charged offense." (*People v. Towne*, *supra*, 44 Cal.4th at p. 81.) "When a defendant's prior unsatisfactory performance on probation or parole is established by his or her record of prior convictions, it seems beyond debate that the aggravating circumstance is included within the *Almendarez-Torrez* exception and that the right to a jury trial does not apply."[17] (*Id.* at p. 82.) The trial court therefore could properly

---

[16] Duenas argues that his 2009 robbery conviction cannot be taken into account because it was the basis for his Three Strikes sentence. But the Three Strikes law is not an enhancement; it is an alternative sentencing scheme. (*People v. Frutoz* (2017) 8 Cal.App.5th 171, 174, fn. 3.) Thus the prohibition in section 1170, subdivision (b) on using the fact of an enhancement to impose an upper term is inapplicable. Duenas provides no authority holding otherwise.

[17] *Almendarez-Torres v. United States* (1998) 523 U.S. 224.

rely on the fact Duenas was on probation when he committed the current offenses as an aggravating factor.[18]

D. *Purported failure to consider mitigating factors*

At sentencing, Duenas presented four letters written by his family and friends. He argues the trial court erred by failing to consider these materials. However, as he acknowledges, the sentencing criteria enumerated in the rules of court "will be deemed to have been considered unless the record affirmatively reflects otherwise." (Cal. Rules of Court, rule 4.409.) Sentencing courts have wide discretion in weighing mitigating and aggravating factors, and a court may minimize or disregard mitigating factors without stating its reasons. (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1258; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583; *People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637.) Here, the court did not indicate any reluctance to consider the letters, and nothing in the record shows it failed to do so. Of course, the trial court has discretion to reconsider any mitigating or aggravating factors on remand.

---

[18] Duenas points out that the probation report also indicates he violated probation as a juvenile in 1996. He argues that the nature of the violation cannot be ascertained from the record and therefore a jury finding was required. (See *People v. Towne*, *supra*, 44 Cal.4th at p. 82 [where a finding of unsatisfactory performance on probation can be established only by facts other than the defendant's prior convictions, the right to a jury trial applies].) But assuming Duenas is correct, this is of no moment; the trial court could rely on the fact that the defendant was on probation at the time of the instant offense.

DISPOSITION

The judgment is reversed as to the sentence only, and is otherwise affirmed. The matter is remanded for resentencing in accordance with the views expressed herein.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BACHNER, J.*

We concur:

EDMON, P.J.

LAVIN, J.

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.