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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GILBERT SALAZAR, Defendant and Appellant.	B280129 (Los Angeles County Super. Ct. No. TA137533)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura R. Walton, Judge. Affirmed as modified; remanded for further proceedings.

Danalynn Pritz, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Gilbert Salazar appeals his conviction of one count of first degree murder (Pen. Code,[1] § 187, subd. (a)), one count of attempted willful, deliberate, premeditated murder (§§ 664/187, subd. (a)), and one count of shooting at an occupied motor vehicle (§ 246, subd. (a)). As to all counts, the jury found true that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)), and as to counts 1 and 2, the jury found true firearm allegations (§ 12022.53, subds. (b)-(e)(1)). On appeal, defendant contends (1) he received ineffective assistance of counsel; (2) insufficient evidence supports the murder and attempted murder counts; (3) insufficient evidence supports the gang and firearm enhancements; (4) remand is required for the trial court to strike the firearm enhancement; and (5) his custody credits must be corrected. We affirm the judgment as modified to correct defendant's custody credits, and remand for the trial court to exercise its discretion under section 12022.53, subdivision (h), whether to strike or dismiss the firearm enhancement imposed under that section. Otherwise we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. *The Shooting of Corona*

On November 9, 2012, sometime in the early afternoon, Jose Corona, his girlfriend Michelle Ruiz, and their friend Luis Rivera went to a Walgreens on Imperial Highway and Atlantic in Lynwood. Corona

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[1] All statutory references herein are to the Penal Code unless otherwise noted.

had just picked Ruiz up from a doctor's appointment and they were at Walgreens to buy some prenatal vitamins for Ruiz, who was about two months pregnant.

Corona, Ruiz and Rivera parked in front of the Walgreens in Corona's grey Avalanche. It was going to take about 20 minutes to fill Ruiz's prescription, so the three waited in the Avalanche.

Both Corona and Rivera were members of the Lynwood Tiny Locos gang. Corona was known as "Termite" and Rivera's moniker was "Crow." Defendant was a member of a rival gang, the "Young Crowd." The Walgreens was in Lynwood Tiny Locos Territory.

While waiting in the Avalanche, Rivera saw defendant walk by with his girlfriend Susie Sandoval. Rivera noticed defendant's tattoo and suggested to Corona that they "go hit him up" (ask defendant about his gang affiliation). Corona walked up to defendant and spoke to him. Ruiz could not hear what they were saying. Rivera got out of the truck. Defendant and his girlfriend walked away, and Corona walked back to the Avalanche and said, "let's go inside."

Corona and Ruiz went back inside the Walgreens and got in line, and Ruiz observed that Corona was "visibly nervous." Back inside the pharmacy, while they waited in line, Rivera called Corona several times on his cell phone. Corona said, "let me go see what's up with Crow cuz he's tripping." Corona left the Walgreens, and Ruiz remained in line. Corona called Ruiz and told her that he was going to drive around the block a few times and come back and pick her up. That was the last time Ruiz spoke to him.

Ruiz called Corona and texted him, but he did not respond. Around this time, Marqueshia Thompson was buying gas at the Arco station nearby at the intersection of Wright and Imperial Highway. She saw a red truck pull up alongside a Chevy Avalanche that was stopped at the red light. She heard four shots and saw Corona lying in the street. The Avalanche had gone into reverse and hit a parked car.

Ruiz heard sirens and saw police and an ambulance. She ran in the direction of the sirens and saw Corona's truck. The driver's side door was open, and Corona's bloody clothes were in the middle of the street. Corona was being attended to by Fire Department personnel. Ruiz went up to one of the police officers at the scene, who asked her if she knew the driver of the truck. She lied and said she did not. The police took her to the hospital where Corona had been transported.

Corona succumbed to his wounds. He suffered three gunshot wounds to his back. Two of the wounds (one of which pierced his heart) were fatal.

2. *Sheriff's Department Investigation*

Sheriff's deputies investigating the shooting found three nine-millimeter shell casings in the street near the Avalanche. There were three bullet holes in the front passenger side window, blood on the seat and an expended bullet casing in the truck. The bullets were all fired from a nine-millimeter Makarov, an unusual eastern European/Russian weapon. Sheriff's deputies compared the bullet cases to a national database to see if the gun was in the system, but they did not find a match.

Surveillance videos obtained from several nearby businesses showed Corona's Avalanche in the middle lane of Wright Road stopped at a red light. The Avalanche was stuck in traffic, about three or four cars back from the light. A red pickup truck pulled up next to the Avalanche in the far-right hand lane. The shooting was not visible on the video, but the video depicted the immediate aftermath: the Avalanche rolling backwards, the door opening, Rivera standing over Corona's body lying body in the street, and then Rivera following after the vehicle.

In the back of the Walgreens, Sheriff's deputies found fresh gang graffiti left by the Lynwood Tiny Locos gang.

Deputies investigating the case found "Crow" (Rivera) through a search of gang databases. They brought Rivera in for questioning, but he was extremely uncooperative. Rivera had on the back of his neck a tattoo that stated "Termite, RIP" with the date of Corona's death, November 9, 2012.

3. *The Undercover Informant*

Once Sheriff's deputies determined that defendant was a suspect, they decided to run a so-called *Perkins*[2] operation. Deputy Todd Anderson explained at trial, "You choose someone of the same race, you pay them $1,500, and you put them in a cell. . . . [Y]ou have them wired up with a recording device, and have them dress down in blues, just like they're inmates, and have them in there and let them start talking.

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[2] *Perkins v. Illinois* (1990) 496 U.S. 292.

And that's what we did." Detective Anderson used an informant who was in custody on another case. He did not give the informant any details about the defendant's case, but only told him that he was being put in a cell with someone from Young Crowd.

Defendant had been taken into custody on an auto theft charge. He was placed in a cell with the informant, who played the role of a gang member being held for a serious charge ("I've been here for like a week, fool. I don't even know, fool. I think they're gonna—I think I'm fucked no matter though, you know? . . . They're gonna try to wash me up."

While in the cell with the informant, in the course of their conversation, defendant described the shooting. The conversation was recorded, and the recording was played for the jury with a transcript for assistance.

Defendant told the informant that he and his girlfriend, Sandoval, were homeless and were on their way to a shelter when they stopped at Walgreens. There, Corona and Rivera "disrespected" them. Corona and Rivera asked defendant where he was from, and defendant responded Young Crowd. Corona and Rivera told defendant he was lucky he was with his girlfriend, or he would have "caught a fade [fight]." Defendant "told them fools, man, fuck you, homey, you know? Like, I walked away."

Defendant told the informant that he sent Sandoval away, and met with his "homies," including Jose Bueno, a fellow Young Crowd gang member known as "Blade", who had a car. They planned to go back to Walgreens and "fuck them niggas up." Defendant said, "I gotta

do what I gotta do. I went back. And, fuckin', I told the homies let's go—go head up with these fools real quick. Fuckin', then homey end up bustin' on them fools." According to defendant, Bueno "pulled out a heat. . . . And that's what—that's what happened. I told that fool, man—I go, why you do that for? No. We just—we were gonna fuck these fools up, fool. That's when I'm, like, fuck it, fool. It is what it is, fool, and fuckin' took off."

At another point, defendant told the informant that he and Bueno drove to the area of the Walgreens. Defendant saw Corona's vehicle stopped at a red light, stuck in traffic. Corona and Rivera ("them fools") were inside. According to defendant, Bueno was asking "is it that fool? Is that him? I was, like, it was the car. It was the ride. Yeah, it is him." Bueno "rolls the window. And them fools were just, like, looking straight ahead, I guess. . . . So if we just, like, pow, pow, pow, pow, pow, pow, pow, pow, pow, pow. We took off, fool."

Afterwards, defendant "got rid of everything." At the time of the shooting, there was a "peace treaty" in Lynwood, but defendant believed Corona and Rivera violated the treaty.

Deputy Anderson determined that "Blade" was Jose Bueno, Salazar's accomplice. Bueno had a "YC" tattoo on his neck, which stood for "Young Crowd." Deputy Anderson arranged to put defendant and Bueno in a cell together while they were awaiting hearings. Anderson "primed" Bueno by telling him that Bueno was implicated in the shooting of Corona. Their conversation was taped. During this conversation, Bueno and defendant speculated on how the authorities

connected Bueno to the shooting, and agreed Sandoval had not said anything.

4. *The Gang Evidence*

Deputy Carolina Roman testified as the prosecution gang expert. She specialized in Lynwood gangs. The parties stipulated that defendant was a member of "Young Crowd" and that Young Crowd was a criminal street gang within the meaning of section 186.22. According to Deputy Roman, Young Crowd was a rival of Lynwood Tiny Locos, and the Walgreens was in Lynwood Tiny Locos territory. Gangs claim certain territories, and are free to roam in their own territory. The graffiti advertises that the territory belongs to the particular gang writing the graffiti.

Deputy Roman testified that "gang members will put tattoos, like—let's say we saw the graffiti on the photo you put up with a 'TLS,' so [it is] Tiny Locos. A gang member will put that on his body to show everyone, 'this is where I'm from,' to show loyalty and respect to his gang. And also if he is walking around town, everybody is going to know that that guy is a gang member. They also, like, put tattoos of their homeboys who have been shot and killed on their body just to show respect to their fellow gang member."

In response to a hypothetical question describing defendant's first encounter with Corona and Ramirez at Walgreens and the later shooting at the stoplight, Roman opined that the shooting was done for the benefit of and in association with a criminal street gang. "My opinion, the crime benefits a gang and is done in association with it.

Why is that? Gang A and Gang B had a verbal confrontation. And then shortly after, you said about 20 minutes later, the members from Gang B then shoot and kill a member from Gang A. The shooting sounds like it's going to be related to the first confrontation. Where—where Gang B is showing their authority, and showing Gang A, "'hey, this is us. You can't mess with us,'" and they did it through a violent crime and the—the ultimate crime, the crime where they actually killed a gang member from Gang A. So they're pretty much showing their authority and showing they're to be respected and not to be messed with."

Defendant presented no evidence.

The jury found defendant guilty of first degree murder (count 1), attempted willful, deliberate, premeditated murder (count 2), and shooting at an occupied motor vehicle (count 3). On all counts, the jury found the special gang allegations true, and on counts 1 and 2 found the firearm allegations true. The trial court sentenced defendant to an aggregate of 85 years to life, consisting of 25 years to life on count 1, plus a consecutive 25 years for the firearm enhancement under section 12022.53, subdivision (d), a consecutive term of 15 years to life on count 2, plus 20 years for the firearm enhancement under section 12022.53, subdivision (c), and stayed sentence on count 3. The trial court awarded 557 days of presentence custody credits.

DISCUSSION

I. *Appellant Did Not Receive Ineffective Assistance of Counsel*

A. *Defense Counsel's Concessions to the Jury Did Not Amount to Ineffective Assistance*

Defendant contends that his defense counsel rendered ineffective assistance in closing argument by (1) conceding appellant was "guilty of malice aforethought," (2) conceding appellant was guilty of the attempted murder of Rivera, and (3) engaging in a discussion of how gang members are terrorists who commit drive-by shootings. We disagree that counsel was ineffective.

1. *Factual Background*

The prosecution's theory was that defendant aided and abetted Bueno in the shooting, and was guilty of first degree murder and premeditated attempted murder. Defense counsel's theory was that defendant did not know that Bueno was going to shoot at the victims, that defendant lacked the intent to kill, and that at most, he was guilty of voluntary manslaughter and attempted voluntary manslaughter on a theory of provocation and heat of passion, or unreasonable self-defense.

Near the beginning of his closing argument, defense counsel told the jury: "Before I sit down, I will not tell you to find my client not guilty. I am not going to say that. Because he's guilty. The question is what is he guilty of? Is he a gang member? No doubt about that. [¶] He's guilty of malice aforethought. That's what he's guilty of. And he's guilty of attempted manslaughter. The attempted manslaughter goes to Luis Rivera, who was in the car with Jose Corona."

Defense counsel then argued that Corona and Rivera precipitated the shooting by confronting defendant when he was with his girlfriend ("Got to be real brave, two guys together and bang and hit up one guy who is with his girlfriend"). He continued: "Like [the prosecutor] is saying, it is not like the old days, you know, you get in a bar fight, guy wants to fight you. You go out and get in a fight. You do whatever you've got to do, and, usually, it's with fists. You don't have the guns. You don't have the knives. You don't have the chains. It is just fists. The way it used to be. Gang bangers, you don't have that. They have no guts. They just do drive-bys. Stick the gun out the window and shoot. Well, if they're so brave, do drive-bys, go to Iraq and do the drive-by. Let's see how tough you are. So what did my client also say? What did he tell these guys that are trying to bang on him, these Mexican Mafia members? He says: 'I told them fools, 'Man, fuck you, homie.' You know, like, I walked away."

Defense counsel then explained, "Most of us, we don't have that. We don't live in a place where, you know, gangs control where you live. They control everything. And you can't go into that area without their okay or they're gonna bang on you. You know, gang members are terrorists. That's all they are. [¶] My client—my client's a gang member. Did he cause this shooting? No. Just think. Jose and Crow do not go banging on my client and give him a bad time. Did [*sic*] anything happen? No. Jose would still be alive."

Describing defendant's recruiting of Bueno, defense counsel argued, "And then he goes over and he gets his buddy Bueno. Why did

he get his buddy Bueno? Very simple. He's out numbered. . . . Now we got two on two. You want to fight, let's get it on."

Interpreting defendant's statements to the informant as showing defendant was surprised that Bueno shot at the victims, defense counsel argued: "And then Bueno pulls out a gun and shoots. And my guy says, 'What you do that for, man?' That wasn't the plan. The plan's go back and let's go get them, take them on one-on-one, not to use a gun. My client didn't have any intent to kill anybody. Didn't know Bueno had the gun. Didn't know Bueno was gonna shoot. Bueno did that all on his own. And because of that, my client's not guilty of murder, but he's guilty of manslaughter, at best. Then, let me address a couple issues. And because of that, my guy wasn't the shooter. Didn't know Bueno had a gun. Didn't tell him to go shoot or anything. He had no intent to kill, okay."

Finally, defense counsel reiterated that defendant was "only guilty of manslaughter. He is not guilty of murder. First degree, second degree, forget that. He didn't shoot anybody. No intent to kill. Didn't know if Bueno had the gun and/or was gonna shoot."

2. *Discussion*

The right to effective assistance of counsel derives from the Sixth Amendment. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-694 (*Strickland*); see also Cal. Const., art. I, § 15.) To demonstrate ineffective assistance, defendant must show (1) counsel's conduct was deficient when measured against the standards of a reasonably competent attorney, and (2) prejudice resulting from counsel's

performance "'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 784; *People v. Centeno* (2014) 60 Cal.4th 659, 674.) Prejudice is shown where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*In re Harris* (1993) 5 Cal.4th 813, 832-833.)

Our review of counsel's performance is deferential, and strategic choices made after a thorough investigation of the law and facts are "virtually unchallengeable." (*In re Cudjo* (1999) 20 Cal.4th 673, 692.) "In some cases . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal. [Citation.] Otherwise, appellate courts would become engaged 'in the perilous process of second-guessing.'" (*People v. Pope* (1979) 23 Cal.3d 412, 426, fn. omitted.) The question of ineffective assistance of counsel more appropriately is resolved by a petition for writ of habeas corpus, which permits the opportunity to present additional evidence regarding trial counsel's reasons for acting or omitting to act. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

(a) *Statement Regarding Malice Aforethought*

Appellant contends that defense counsel's statement that appellant was "guilty of malice aforethought" was an unreasonable tactic because in the remainder of his argument, counsel asked the jury to return a verdict of manslaughter.

Assuming that the comment defendant was "guilty of malice aforethought" was accurately reported,[3] it was clearly a minor misstatement, not a comment reflecting an unreasonable tactical decision or a misunderstanding of the law. As clearly explained in the remainder of counsel's argument, his theory of the case was that appellant lacked intent to kill (malice) because he was unaware of Bueno's plan to shoot into Corona's vehicle. (*People v. Rios* (2000) 23 Cal.4th 450, 460 ["defendant who commits an intentional and unlawful killing but who lacks malice is guilty of . . . voluntary manslaughter"].) Thus, it is clear that defense counsel's misstatement that defendant was "guilty of malice aforethought" did not result from an unreasonable tactic founded on confusion or a misunderstanding of the law.

Furthermore, it is not reasonably probable that in the absence of defense counsel's misstatement, a different result would have been reached. Given that the bulk of counsel's argument, coming after this misstatement, was directed towards voluntary manslaughter (it was not defendant's plan to shoot anybody, and defendant did not know Bueno

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[3] Given the odd phrasing ("guilty of malice aforethought"), and given that other than this comment defense counsel consistently argued that defendant was guilty only of voluntary manslaughter, it is not unreasonable to conclude that the court reporter may have misheard counsel's statement "guilty of manslaughter," and reported it as "guilty of malice aforethought."

planned to shoot anyone), and that the jury received complete instructions on voluntary manslaughter,[4] it is highly unlikely that counsel's misstatement influenced the jury. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1221 [prosecution's misstatement regarding definition of implied malice harmless in light of prosecution's argument as a whole and instructions given to jury].) We find no ineffective assistance of counsel in this isolated misstatement.

(b) *Concession of Guilt, Attempted Manslaughter*

Appellant argues that defense counsel unreasonably and inexplicably conceded that appellant was guilty of count 2, the attempted murder of Rivera. He is mistaken. Counsel did not argue that appellant was guilty of attempted murder. Rather, he stated that defendant was guilty of attempted manslaughter: "And he's guilty of attempted manslaughter. The attempted manslaughter goes to Luis Rivera, who was in the car with Jose Corona."

This argument was consistent with the well-recognized strategy to concede guilt on one charge—particularly one which carries a lighter sentence—in an effort to build goodwill with the jury and concentrate on more serious charges. (*People v. Gurule* (2002) 28 Cal.4th 557, 612.) Partial concessions of culpability are a legitimate tactical choice by defense counsel where the incriminating evidence is strong. (See, e.g.,

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[4] The jury was instructed pursuant to CALCRIM Nos. 570 (Voluntary Manslaughter: Heat of Passion), 571 (Voluntary Manslaughter: Imperfect Self Defense), 603 (Attempted Voluntary Manslaughter: Heat of Passion), and 604 (Attempted Voluntary Manslaughter: Imperfect Self Defense).

People v. Hart (1999) 20 Cal.4th 546, 631; *People v. Bolin* (1998) 18 Cal.4th 297, 334-335.)

Appellant further argues that defense counsel's decision was not a reasonable tactic because there was insufficient evidence that Rivera was in the Avalanche. However, the inference that Rivera was in the Avalanche was compelling. According to Michelle Ruiz, while she and Corona were in the Walgreens, Rivera called Corona several times on his cell phone from outside the store. Corona told Ruiz that he was going to see "what's up with [Rivera] cuz he's tripping." Shortly afterward, Corona called Ruiz and said that he was going around the block a couple of times, and would come back.

Defendant's statements to the informant regarding the shooting were at times ambiguous as to whether there was more than one occupant in the Avalanche (he said one point "It was like it was just one fool"), but he repeatedly referred to Corona's vehicle as having more than one occupant at the time of the shooting ("And them fools are—and they got at a red light"; "[S]o we're turning like this. And then they're like the third or fourth one"; "And them fools they were just, like, looking straight ahead, I guess." Moreover, one of the surveillance videos depicted the immediate aftermath of the shooting: the Avalanche rolling backwards, the door opening, Rivera standing over Corona's body lying in the street, and then Rivera following after the vehicle.

This evidence painted a clear picture: Corona left the Walgreens in his Avalanche with Rivera, who had called him several times and who was "tripping" about the earlier confrontation with defendant, who

was a rival gang member; Corona and Rivera drove off in the Avalanche (Rivera as the passenger) to look for defendant; when defendant and Bueno came upon the Avalanche, defendant observed Corona and Rivera ("these fools" from the prior confrontation) in the vehicle; and in the immediate aftermath of the shooting, Rivera could be seen in the surveillance video standing over Corona's body because he had just gotten out of the vehicle, which began rolling backward after Corona's body fell out of the open driver's door.

In short, defense counsel's concession that defendant was guilty of the attempted voluntary manslaughter of Rivera simply reflected the reality of the evidence, and the recognition that to argue Rivera was not in the Avalanche would likely damage counsel's credibility with the jury. Thus, it was a reasonable tactical decision. (*People v. Gurule, supra*, 28 Cal.4th at p. 612.) For the same reasons, appellant cannot show prejudice from counsel's decision, because it is not reasonably probable that in the absence of counsel's concession, defendant would have received a better verdict. (See *Strickland, supra*, 466 U.S. at pp. 693-696.)

(c) *Discussion of Behavior of Gang Members and Drive-By Shootings*

Appellant contends counsel's discussion of gang members suggested that gang members are "terrorists" who commit shootings, and that therefore, because appellant was a gang member, it necessarily followed that appellant committed the shooting at issue. Defendant misconstrues the import of counsel's argument. There was

no doubt that defendant participated in the shooting. The point of counsel's comments was that defendant's response to Corona and Rivera' provocation (wanting to return and confront them with Bueno, who, according to counsel, unexpectedly produced a gun and fired) was the reflexive action of a gang member immersed in gang culture, not a premeditated response of someone who intended to kill. This argument was a reasonable extension of defense counsel's overall theory: defendant lacked express malice and as a result could be guilty only of manslaughter and attempted manslaughter. Counsel's argument reflects a reasonable tactical decision. Further, properly construing the argument, it is not reasonably probable that if counsel had omitted the comments, a different result would have been reached.

B. *Defense Counsel's Failure to Object to the Prosecution's Arguments Did Not Constitute Ineffective Assistance*

Defendant argues that defense counsel failed to object to numerous instances of prosecutorial misconduct in the prosecution's closing argument. He contends the prosecution argued matters outside the evidence, appealed to the passions and prejudices of the jury, and misstated the law in a manner that lowered the prosecution's burden of proof. We disagree.

During argument, it is improper for the prosecutor to misstate the law and to attempt to absolve the prosecution of its prima facie obligation to overcome reasonable doubt on all elements of the crime charged. (*People v. Cortez* (2016) 63 Cal.4th 101, 130.) To establish misconduct, defendant need not show that the prosecutor acted in bad

faith, but must show that, in the context of the entire argument and the jury instructions, there was a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. "If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.' [Citation.]" (*Cortez*, *supra,* 63 Cal.4th at p. 130.)

"[A]rguments of counsel 'generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.' [Citation.]" (*People v. Mendoza* (2007) 42 Cal.4th 686, 703.) "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 717.)

1. *Nazi Analogy to Perkins Operation*

During closing argument, to address the possibility that the jurors might find the use of an informant distasteful, the prosecution analogized the situation to Nazi Germany. The prosecution told the jury that just as families in Germany lied if they were helping Jews hide from the Nazis, or Jews wanting to leave Nazi Germany would hire

a smuggler with a criminal record to get them out, the *Perkins* operation made use of a similar deception and a criminal to accomplish a greater purpose.

Appellant contends this analogy was "designed to invoke the jury's passions and feelings of hatred," and placed "the weight of one of the world's greatest atrocities at the feet of the jury." As a result, "[w]hat juror could possibly be skeptical of the confidential information, or of the *Perkins* operation, following such a dramatic comparison—it would be like rallying for Hitler during deliberations if a juror were to call the [*Perkins*] operation into question."

Defendant exaggerates the prosecutor's comments. They were not objectionable, and therefore defense counsel was not ineffective for failing to object. The circumstances of the Holocaust, and the courage of those who lied to authorities to save innocent lives or used unsavory characters to help innocent persons escape, is common knowledge. It is not misconduct for the prosecution to refer to matters not in evidence, if such matters are common knowledge, to illustrate a point. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026.) That the prosecutor's analogy was not directly apt does not convert it into misconduct—counsel are allowed wide latitude in argument in referring to matters of common knowledge (*People v. Williams* (1997) 16 Cal.4th 153, 221)—and the notion that the prosecutor incited the jurors' passions against Nazi Germany to obtain an unthinking acceptance of the information elicited by the informant is an overstatement.

2. *Cancer Analogy to Explain Defendant's Willingness to Talk to Informant During Perkins Operation*

The prosecution analogized defendant's willingness to speak to the confidential informant, a complete stranger, to the willingness of a person suffering from cancer to share private information with a fellow cancer patient. ("Consider that you've just been diagnosed with cancer. . . . Who are you willing to confide in? Someone who is facing the same threat. . . . We all know there are other situations that you can draw on your life experience where it's easy to confide and open up to a complete stranger in ways that you wouldn't open up to someone you know well because the stranger is in the same situation, and you know that they get it. And that was the situation Gilbert Salazar found himself in when he was in that jail cell with the informant. . . . You see the defendant giving up a little . . . and then realizing, 'This guy gets it. He's with me.'")

Defendant contends this argument improperly refers to facts outside the record. However, as we have explained, it is not misconduct for the prosecution to refer to matters of common knowledge and experience, such as situations (as in the case of a cancer patient) in which a person feels comfortable sharing details about an event or experience he or she would not share with others. The comment was not objectionable, and defense counsel was not ineffective for failing to object. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1026.)

3. "*Malice Train*"

The prosecution made the following argument to try to explain malice to the jury: She asked jurors to imagine a train, with a "malice car" on the train. She then described heat of passion and imperfect self-defense as "a caboose . . . that [would] drop us down to malice aforethought. We still have malice, okay, we just attached something to the back of [the train] and dragged it down to manslaughter. Or we still have malice and it got pulled up to first degree. But in all cases, we have malice."

Defendant contends this language improperly stated that manslaughter involves malice. We agree that the prosecutor's argument was misleading.

Criminal homicide is divided into two types: murder and manslaughter. "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) The mens rea element required for murder is a state of mind constituting either express or implied malice. (*People v. Beltran* (2013) 56 Cal.4th 935, 942.)

A person who kills without malice does not commit murder. (*People v. Beltran, supra,* 56 Cal.4th at p. 941.) Voluntary manslaughter is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter. Heat of passion arises if, ""'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than

from judgment.'"" (*People v. Beltran, supra,* 56 Cal.4th at p. 942.) "Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation." (*Ibid.*) Unlawful killing constitutes voluntary manslaughter, as opposed to murder, where one of two circumstances precludes the formation of malice: (1) the defendant kills in a sudden quarrel or heat of passion, or (2) the defendant kills in an actual but unreasonable belief in the need for self-defense. (*Ibid.*; *People v. Elmore* (2014) 59 Cal.4th 121, 133–134.)

Thus, the prosecution's augment here that "in all cases" of a killing, whether manslaughter or murder, "we [still] have malice" was an incorrect statement of the law. Manslaughter, by definition, rests on the absence of malice. However, the comment was a stray remark in a much longer argument in which the prosecutor did not mention manslaughter again, and argued in support of a conviction of first or second degree murder. In his closing argument, as we have explained, defense counsel concentrated on arguing that defendant was guilty only of manslaughter and attempted manslaughter, and the jury was properly instructed on these theories. Thus it is not reasonably probable that had counsel objected to the prosecutor's a single stray remark that manslaughter included the element of malice ("but in all cases," including when the attached "caboose . . . drop[s it] down to manslaughter" "we have malice"), a different result would have been reached.

4. *Manslaughter as "Cutting Someone a Break"*

In her rebuttal argument, the prosecutor analogized manslaughter to a hypothetical situation in which a motorist driving 90 miles an hour is stopped by the Highway Patrol: "Voluntary manslaughter is essentially this: . . . [Y]ou're doing 90 on the freeway in the middle of the night. . . . You are coming back from Vegas. You've got to get home. . . . CHP pulls you over. The officer comes up. Once he realizes that you are not under the influence of anything, he says, 'Sir, Ma'am, you were doing 25 miles an hour over the speed limit.' And you say, 'I know officer, but there was no one around. . . .' Divided highway. Nobody is going to get hurt except possibly you. There's no rain. There's no dangerous conditions." In the prosecutor's hypothetical, the officer explains, "I could cite you for the misdemeanor crime of excessive speed as opposed to regular speeding because you [were] so far over the limit, but I'm not going to do that." Given the conditions, the officer decides to issue a "regular speeding ticket," which will allow the driver to go to traffic school. According to the prosecutor, by analogy, the law of voluntary manslaughter "says, I know that you intended to kill, but I will cut you a break because the law says I can. Here's what it says." The prosecutor then accurately summarized the theory of sudden quarrel or heat of passion, and explained in detail, with reference to the evidence at trial, why the prosecution had proved that the theory did not apply.

Defendant contends that this argument misplaced the burden of proof, because manslaughter exists where the prosecution has failed to prove malice; manslaughter is "not cutting someone a break."

Provocation and imperfect self-defense are "mitigating circumstances [that] reduce an intentional, unlawful killing from murder to voluntary manslaughter 'by *negating the element of malice* that otherwise inheres in such a homicide [citation].'" (*People v. Rios, supra,* 23 Cal.4th at p. 461.) "Thus, where the defendant killed intentionally and unlawfully, evidence of heat of passion, or of an actual, though unreasonable, belief in the need for self-defense, is relevant . . . to determine whether *malice has been established*, thus allowing a conviction *of murder*, or *has not been established*, thus precluding a murder conviction and limiting the crime to the lesser included offense of voluntary manslaughter." (*Ibid.*) Accordingly, where "the issue of provocation or imperfect self-defense is . . . 'properly presented' in a murder case [citation], the People must prove beyond *reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice. [Citations.]" (*Id.* at p. 462.)

When alleged prosecutorial misconduct involves argument to the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970.)

Here, comparing a conviction of manslaughter to the issuance of a lesser traffic citation was not particularly enlightening, but it was not

misconduct. Nor was it misconduct for the prosecutor to characterize a conviction of voluntary manslaughter as giving a killer a "break." (*People v. Najera* (2006) 138 Cal.App.4th 212, 220 [court "excused as vigorous argument" the prosecutor's reference to manslaughter as giving defendant "a break" based on heat of passion and as throwing defendant "a bone"].) Thus, defense counsel was not ineffective for failing to object.

Further, although the prosecutor did not expressly refer to the prosecution's burden of proof, the bulk of her rebuttal argument focused on why the evidence proved defendant's act was not the product of provocation or heat of passion. Also, the jury was properly instructed on the prosecution's burden of proof regarding voluntary manslaughter pursuant to CALCRIM Nos. 570 and 571.[5] Under these circumstances, it is not reasonably probable that the jury was misled. In sum, defense counsel was not ineffective for failing to object to the cited remarks.

5. *An Aider and Abettor is "Equally Guilty"*

The prosecutor argued the evidence proved that defendant possessed a deliberate, premeditated intent to kill Corona and Rivera, and that he aided and abetted Bueno in the shooting with that intent. After discussing the evidence, she explained: "'So how are we going to hold him responsible for the murder when it was Jose Bueno . . . who

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[5] In relevant part, those instructions told the jury that the People had the burden of proving beyond a reasonable doubt that defendant "did not kill as the result of a sudden quarrel or in the heat of passion," and that he was not acting "in imperfect self defense."

fired the shots?' . . . The aiding and abetting law is this. Jose Bueno fired the bullets that killed Jose Corona and could easily have killed Luis Rivera. If you find that the defendant . . . knew that Jose Bueno intended to fire those bullets, if you find that the defendant intended to aid and abet him by instigating, facilitating, aiding, and encouraging him to kill Jose Corona and Luis Rivera, and that he not only intended to aid and abet, but he did, in fact, aid and abet, then he is as guilty for the murder as the shooter. That's the law of aiding and abetting." The prosecutor then discussed the evidence showing that defendant encouraged and facilitated the killing, and ended her discussion by saying, "That is the very definition of aiding and abetting. *And it is the reason the law holds the aider and abettor as guilty as the actual shooter*." (Italics added.)

Isolating out of context a single portion of a single sentence (the italicized sentence, above), defendant contends that the prosecutor misstated the law by saying, "the law holds the aider and abettor as guilty as the actual shooter." The reason: the prosecutor failed to explain that an aider and abettor can be convicted of a lesser crime or degree of crime than the actual perpetrator.

The contention obviously rests on a misleading characterization of the prosecutor's argument. It is true that an aider and abettor may be found guilty of a different crime or degree of crime than the perpetrator, if the aider and abettor and the perpetrator do not have the same mental state. (See, e.g., *People v. McCoy* (2001) 25 Cal.4th 1111, 1115–1116; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1577.) But that the prosecutor did

not mention this principle does not transform her argument into misconduct as a misstatement of the law. The whole point of the prosecutor's argument was that the evidence proved defendant *did* possess the same mental state as Bueno, and that defendant's conduct was therefore "the very definition of aiding and abetting. And it is the reason the law holds the aider and abettor as guilty as the actual shooter." The prosecutor was simply arguing what the evidence proved under the relevant law. The prosecutor did not misstate the law of aiding and abetting, and did not lighten the prosecution's burden of proof. There was nothing objectionable in the prosecutor's comments, and hence defense counsel was not ineffective for failing to object.

C. *Cumulative Error*

Defendant argues that the closing arguments of both parties, either singly or in combination, had a substantial prejudicial effect on the jury and lowered the prosecution's burden of proof, denying appellant a fair trial. (See *People v. Hill* (1998) 17 Cal.4th 800, 844-845 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].) For the reasons we have explained, none of the errors defendant has alleged, to the extent they were errors and considered cumulatively, deprived him of a fair trial. Accordingly, we reject defendant's claim of cumulative error.

II. *Substantial Evidence Supports the Murder and Attempted Murder Counts*

Appellant contends that insufficient evidence supports his convictions for murder and attempted murder based on an aider and abettor theory because the evidence does not establish that appellant knew Bueno had a gun before the shooting, or that he shared Bueno's specific intent to kill. We disagree.

A person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense; and (3) by act or advice aids, promotes, encourages, or instigates, the commission of the crime. (*People v. Johnson* (2016) 62 Cal.4th 600, 630.) "Although [a] defendant's '"mere presence alone at the scene of the crime is not sufficient to make [him or her] a participant,"' his [or her] presence in the car '"may be [a] circumstance[ ] that can be considered by the jury with the other evidence in passing on his [or her] guilt or innocence."' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055 [substantial evidence supported the defendant's conviction for aiding and abetting attempted murder based on evidence that the defendant was in the shooter's car, which passed the victim's car, waited in a parking lot, then pulled out to pursue the victim's car].)

Under the applicable standard of review, viewing the entire record in the light most favorable to the judgment, and drawing all inferences in its favor (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44), it could

reasonably be inferred that defendant aided Bueno in the shooting with the intent to kill. Defendant had suffered disrespect at the hands of Corona and Rivera in the confrontation at the Walgreens, and wanted revenge. His statements to the informant were somewhat ambiguous as to precisely when he realized that Bueno had a gun. But the jury was not required to accept the interpretation that he did not know Bueno had a gun until the shooting occurred. Rather, the jury could reasonably interpret his statements as a whole, and in light of the entire record, as showing that at the time of the shooting, he knew Bueno intended to shoot at Corona's vehicle with the intent to kill the occupants, and that defendant shared that intent. As defendant said at one point, "We went over there. We were barely over there. Like, we were barely going . . . and we're tryin' to go look for them fools, and them fools were coming like this. . . . And we were looking at where to leave. . . . [Informant]: Pull up on them? [Defendant]: Yeah. Pow, pow, pow, pow, pow. [Informant]: Gave it to them? [Defendant]: And then took off."

At another point, defendant told the informant: "I'm, like, hey, fool, there they go right there. And that fool [Bueno] just like—he rolls the window. And them fools they were just, like, looking straight ahead, I guess. [Informant]: Not even paying attention? [Defendant]: It was like it was just one fool. It's, like, is it that fool? Is that him? I was, like, it was the car. It was the ride. Yeah, it is him. So if we just, like, pow, pow, pow, pow, pow, pow, pow, pow, pow, pow. We took off, fool. We're taking off."

From these statements (in which defendant described the shooting as if both he and Bueno acted together with the same purpose), and from the rest of the evidence, the jury could reasonably infer that defendant helped Bueno hunt down Corona and Rivera, pointed out Corona's vehicle, and shared Bueno's intent to kill when Bueno shot. In short, substantial evidence supported defendant's conviction of first degree murder and premeditated attempted murder on an aiding and abetting theory.

III. *Substantial Evidence Supports the Gang and Firearm Enhancements*

Defendant argues the gang enhancement is not supported by substantial evidence, and therefore the gang and firearm enhancements must be reversed. He contends the evidence is insufficient to establish (1) that he and Bueno were members of the same gang, or (2) that the gang to which he belonged and the gang that purportedly benefitted from the crimes were one and the same.

A gang enhancement applies where the crime 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); *People v. Albillar* (2010) 51 Cal.4th 47, 59.)

There are three distinct alternatives by which the gang-related element of section 186.22, subdivision (b)(1), may be proven: that the crime was committed (1) for the benefit of a gang, (2) at the direction of a gang, or (3) in association with a gang. Since the gang-related prong

is in the disjunctive, even in the absence of evidence that the commission of the crime benefited the gang or was directed by the gang, liability may be imposed if there is substantial evidence that the crime was committed in association with a gang. (*People v. Leon* (2008) 161 Cal.App.4th 149, 162.)

"In order to prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047–1048.) "'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support [a] gang enhancement." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) While an expert may render an opinion assuming the truth of facts set forth in a hypothetical question, the "hypothetical question must be rooted in facts shown by the evidence." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Indeed, an "expert's opinion may not be based 'on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors.'" (*People v. Richardson* (2008) 43 Cal.4th 959, 1008.)

A. *The Evidence Established that Defendant and Bueno ("Blade") Were Both Members of Young Crowd*

Here, defendant argues that the expert never testified that "Gang B" was the Young Crowd. (See *People v. Prunty* (2015) 62 Cal.4th 59.) He argues that, although the parties stipulated that defendant was a member of the Young Crowd gang and that the gang was a criminal

street gang within the meaning of section 186.22 and the gang expert here testified that the crime benefitted "Gang B," he did not testify that Gang B was the Young Crowd.

People v. Prunty, supra, 62 Cal.4th 59 held that the criminal street gang that is shown to exist under section 186.22, subdivision (f) must be the same criminal street gang with which the defendant acted in association or sought to benefit in the commission of his crimes. (*Id.* at pp. 72–76.) Here, sufficient evidence supported a finding defendant was a member of Young Crowd: defendant told the victims he was from Young Crowd; he told the confidential informant the victims had violated a peace treaty between Young Crowd and Tiny Locos; and Blade had a Young Crowd tattoo on his head.

Further, to the extent defendant argues that Gang B was not connected to the Young Crowd, we disagree. The expert's factual testimony was directly based on the facts of the case—defendant's confrontation with the victims at the Walgreens, defendant's conscription of Blade to assist with the later confrontation after he left Sandoval, and the shooting was related to the first confrontation. Given that the parties stipulated defendant belonged to Young Crowd, it was not difficult for the jury to connect the dots and conclude that Gang B was Young Crowd.

B. *The Offenses Benefitted the Young Crowd Gang*

Defendant contends there is no evidence that the shooting benefitted the Young Crowd, relying on *People v. Franklin* (2016) 248 Cal.App.4th 938, 950 (*Franklin*), where the court rejected as insufficient

the gang expert's testimony that the crimes benefitted the gang because they were committed in gang territory, and *People v. Ramirez* (2016) 244 Cal.App.4th 800, 819 (*Ramirez*), where the court held expert testimony that when a gang member shoots someone, the gang as a whole benefits was insufficient to support a gang enhancement because there was no evidence the dispute involved had anything to do with any gang.

We disagree. First, as the gang expert explained, the shooting benefitted the gang by increasing its stature in the gang community. There was ample evidence the shooting at Corona's Avalanche was gang-related. Rivera saw defendant's tattoo and suggested they "hit him up" to inquire about his gang affiliation. Rivera and Corona belonged to the Lynwood Tiny Locos, while defendant belonged to the "Young Crowd," a rival gang. Corona had "Lynwood" tattooed on his stomach. In the recording of defendant's conversation with the jailhouse informant, defendant told the informant that when confronted by Corona and Rivera, he was asked where he was from, and responded "Young Crowd." He told the informant the people shot at were from "Tiny Locos." This evidence establishes the shooting was within section 186.22. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1171 ["a driveby shooting by a gang member of a rival gang member is a prototypical example of a gang-related crime"].)

Second, the cases defendant cites are distinguishable. In *Franklin, supra,* 248 Cal.App.4th 938, the only evidence to support the gang enhancement was that the defendant belonged to a gang and the crime was committed in gang territory. On the other hand, the bulk of

the evidence established that the offenses (burglary, criminal threats, false imprisonment, attempted extortion) were personal in nature as they related to the defendant's breakup with his girlfriend, who was not a gang member. (*Id.* at pp. 944–947.) There was no evidence any other gang members were aware of the offenses; the false imprisonment of the girlfriend was accomplished with the help of members of other gangs, but without the showing that they acted in affiliation; and the false imprisonment was in fact carried out in non-gang territory. (*Id.* at pp. 950–951.) *Ramirez* similarly involved non-gang member victims, lacked customary displays of gangs (gang signs, gang names, or gang attire) and hence lacked support for a gang enhancement. (*Ramirez, supra,* 244 Cal.App.4th at p. 819.)

IV. *Remand to Permit the Trial Court to Exercise its Discretion to Strike the Firearm Enhancement is Required*

Appellant received a sentence of 25 years for the firearm enhancement under section 12022.53, subdivision (d), on count 1 and 20 years for the firearm enhancement under section 12022.53, subdivision (c) on count 2. Pursuant to Senate Bill No. 620, which became effective January 1, 2018, trial courts now have discretion to strike such firearm enhancements.

Section 12022.53, subdivision (h), which became effective January 1, 2018, provides: "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." Defendant correctly contends that he is entitled to the benefit of this new law, as the amendment to section 12022.53 applies retroactively to defendant's case. (See *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506–507.) Because nothing in the record suggests how the trial court would have exercised its discretion, remand is necessary.

V. *Defendant's Custody Credits Must Be Corrected*

Defendant contends that he is entitled to 594 days of presentencing custody credit, which is 37 days more than the 557 days of credit he received. Respondent concedes that the calculation of defendant's custody credits was erroneous.

A defendants is entitled to credit against his or her term for all actual days of confinement prior to sentencing. (§ 2900.5, subd. (a); *People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) The parties do not dispute, and the record discloses, that defendant was arrested on May 30, 2015 and sentenced on January 12, 2017, a total of 594 days.

Accordingly, the trial court is directed to issue an amended abstract of judgment crediting appellant for 594 days of actual custody credit.

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DISPOSITION

The judgment is affirmed as modified to correct defendant's custody credits to 594 days. The trial court is directed to forward certified copies of the correct abstract of judgment to the Department of Rehabilitation and Corrections. The matter is also remanded to the trial court for the limited purpose of permitting the trial court to exercise its discretion to strike the section 12022.53, subdivision (d) enhancement.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.