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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. FERNANDO HERNANDEZ, Defendant and Appellant.	B233440 (Los Angeles County Super. Ct. No. TA109824)

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

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, Shawn McGahey Webb and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Fernando Hernandez, appeals his conviction for murder, premeditated attempted murder (2 counts), possession of a firearm by a felon, dissuading a witness, and aggravated assault, with firearm and gang enhancements (Pen. Code, §§ 187, 664/187, 12021 (former), 136.1, subd. (c)(1), 245, 12022.53, 186.22).[1] Hernandez was sentenced to state prison for a term of 205 years to life.

The judgment is affirmed as modified and remanded with instructions.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *The shooting.*

Rosemary Avalos and Anthony Castillo were members of the Dog Patch gang. On March 17, 2008, Avalos and Castillo went "cruising" together; Castillo was driving a borrowed Pontiac Grand Prix with flash rims and Avalos was driving her mother's Dodge van. Castillo noticed an older, dark blue Camry or Nissan Sentra pass him going the opposite direction. He later told police he recognized the driver as defendant Hernandez, a member of the rival Compton Varrio Tortilla Flats gang. Castillo had known Hernandez from around the neighborhood for about five years. Castillo had "banged on him one time."

Unaware the blue car had made a U-turn and was now coming up behind him, Castillo pulled over on Elburg Street to talk to his friend Paul in front of Paul's house. Avalos drove up alongside Castillo and said: "Hey, there are some guys coming." In his rear view mirror, Castillo noticed the blue car had stopped in a driveway on Elburg, a few houses down from the corner of Elburg and Downey Avenue. Then Castillo heard gunshots. Avalos slumped in her seat, and the van rolled forward and hit a parked car. Castillo went to her aid.

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[1] All further references are to the Penal Code unless otherwise specified.

Dave Arellano lived on Elburg. He saw a white minivan and a dark, late model car with fancy rims drive down the street. A minute and a half later, an older, four-door Camry pulled into Arellano's driveway, backed up slightly and then stopped. There were at least two people in the front and three people in the back. Someone rolled down the front passenger window and Arellano saw a hand with a gun in it. The gun, a revolver, fired three or four times. Castillo said "the person pulling the trigger took his time," and the Camry stayed still with its engine running during the shooting.

Paul's father told police he heard two gunshots and someone yell "Tortilla Flats." At trial he acknowledged having said this to the police, but also testified that had been a mistake and, actually, he did not hear anybody yell anything.

Avalos survived the shooting, but a bullet had lodged in her spine and rendered her a quadriplegic. Thereafter, she required a ventilator to breathe. After her hospitalization, Avalos was cared for by her family at home, where she died in January 2009 when her ventilator tube became dislodged as she was sleeping.

2. *Hernandez's arrest.*

A week after the shooting, Hernandez was spotted by police officers on the street. He jumped a fence and fled, but they caught him. Officer Kasey Woodruff retrieved a .357-caliber Ruger revolver Hernandez had tossed away during the chase.

On February 10, 2009, Woodruff arrested Steven Guzman in an unrelated matter. Guzman said he had information about the Avalos/Castillo shooting. Woodruff took a statement and contacted the detectives who were investigating the case. In October 2009, while Guzman was being held in a jail cell pending his testimony at Hernandez's trial, Hernandez and several others assaulted Guzman.

3. *Forensic evidence.*

At the shooting scene, officers found Avalos's van about 15 to 20 feet away from the Pontiac Grand Prix. The back window of the van had been shattered by a bullet. This bullet had passed through the rear seat headrest and then the driver's seat headrest before hitting Avalos. A police diagram of the crime scene estimated that the distance between

the Camry and the van when the bullet hit the van's rear window was approximately 250 feet.

The van was towed from the scene on a flatbed truck, which had to position the van at a steep angle during the towing. Criminalist Tracy Peck subsequently examined the van at the tow yard and found a bullet jacket on the driver's side floorboard. Peck concluded this bullet jacket had been fired from the gun Hernandez tossed away when the officers were chasing him.

After the shooting, there was a new half-inch hole in the left rear bumper of the Pontiac Grand Prix that Castillo had been driving.

4. *The jailhouse phone conversations.*

During a March 26, 2009, recorded jailhouse phone conversation between Hernandez and his girlfriend, Evelyn Lopez, she cautioned him about "sticking to a story." Their conversation included the following colloquy:

"[Lopez]: . . . [W]hy did you tell your attorney that you were at your aunt's house smoking dope when I had told you what happened the day [*sic*]?

. . . . . .

. . . . . .

"[Hernandez]: I was, I was right there at Marcie's house . . . smoking dope.

"[Lopez]: See, you're, you're not keeping to a, you're not sticking to a story, Fernando. Your mom knows the story, I know the story, and you know the story. So you don't have to . . . .

"[Hernandez]: Huh?

"[Lopez]: You're getting yourself into, you're . . . fucking digging yourself into a hole."

Lopez also advised Hernandez that someone named Cartoon needed to talk to him. Cartoon was a Tortilla Flats gang member.

During a subsequent phone conversation with Lopez on May 7, 2009, Hernandez said he needed to talk to his homie Clavo and Lopez told him: "My uncle already talked to Clavo about Steven. My uncle . . . he's a main dude Fernando." Clavo was a Tortilla Flats shot caller.

Hernandez also told Lopez to "break" his cell phone "and throw it in the trash" because it had pictures of "tagging on it." Hernandez belonged to a graffiti tagging crew before joining the Tortilla Flats gang.

5. *Gang evidence.*

Deputy Sheriff Daniel Morris testified as a gang expert. The Tortilla Flats gang had about 500 members and their primary activities included murder, robbery, carjacking, drug trafficking, possession of firearms, and vandalism. Hernandez belonged to this gang. In 2007, Hernandez had been the victim of a shooting while in the company of Steven Guzman, another Tortilla Flats gang member. Hernandez and Guzman both lived in Paramount, territory which was claimed by the rival Dog Patch gang. As such, they could expect to be challenged by any Dog Patch members they encountered. Asked what risks that would entail, Morris testified: "Well, unless you have some type of rapport with the shot caller in that gang, you're living in rival territory. You're going to get banged on, and you're . . . living in jeopardy essentially. It's dangerous."

Morris opined the Avalos/Castillo shooting had been carried out for the benefit of Tortilla Flats for a number of reasons. The Tortilla Flats members were driving in Dog Patch territory with a gun in their car, and both Castillo and Avalos belonged to the rival Dog Patch gang. Someone yelled "Tortilla Flats" during the incident. Castillo recognized Hernandez as "being a Tortilla Flats gang member that he had banged on in the past, clearly a sign of disrespect banging on this other individual." Gang members would disapprove of any fellow gang member who failed to defend the gang's honor after having been disrespected in this way: "[Y]ou'd be considered ranking out. You're not standing up for your gang. You're not showing that you are willing to . . . put in work or defend your territory or defend the name of your gang. If you do not do something in

retribution for somebody disrespecting your gang, you're going to be looked down upon by members of your gang."

Morris opined the jail beating of Guzman had been for the benefit of the Tortilla Flats gang because Guzman was being punished for snitching. Responding to a hypothetical question which assumed only that Guzman had given unspecified information to the police about the Avalos/Castillo shooting, Morris testified Guzman would have been viewed as a snitch merely for meeting with the police in this situation.

6. *The defense.*

Hernandez did not present any evidence at trial.

CONTENTIONS

1. There was insufficient evidence to sustain Hernandez's conviction for the attempted murder of Castillo.

2. The trial court erred by denying a new trial motion based on ineffective assistance of counsel.

3. The trial court erred by denying a new trial motion based on prosecutorial misconduct.

4. The vicarious firearm use enhancement based on gang participation is unconstitutional.

5. Hernandez is entitled to an additional day of presentence custody credit.

6. Hernandez was improperly convicted of both a greater and a lesser included offense. [Issue raised by the Attorney General.]

7. A sentencing error must be corrected. [Issue raised by the Attorney General.]

DISCUSSION

1. *There was sufficient evidence Hernandez attempted to murder Castillo.*

Hernandez contends there was insufficient evidence to sustain his conviction for the attempted murder of Castillo. This claim is meritless.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

" 'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].' [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the

crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, it is not enough for the defendant to simply contend, 'without a statement or analysis of the evidence, . . . that the evidence is insufficient to support the judgment[] of conviction.' [Citation.] Rather, he must *affirmatively demonstrate* that the evidence is insufficient." (*Ibid.*)

An attempt to commit a crime consists of (1) the specific intent to commit the target crime, and (2) a direct but ineffectual act done towards its commission. (*People v. Swain* (1996) 12 Cal.4th 593, 604.) Specific intent must often be inferred from circumstantial evidence. (*People v. Cole* (1985) 165 Cal.App.3d 41, 48.)

People v. Anderson (1968) 70 Cal.2d 15, a murder case, discussed the following types of premeditation and deliberation evidence[2]: "The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing – what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in

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[2] "We do not distinguish between attempted murder and completed first degree murder for purposes of determining whether there is sufficient evidence of premeditation and deliberation. [Citation.]" (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462, fn. 8, disapproved on other grounds in *People v. Mesa* (2012) 54 Cal.4th 191, 198.)

a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2). [¶] Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*Id*. at pp. 26-27.)

b. *Discussion*.

The evidence that Hernandez was guilty of the attempted murder of Castillo was more than sufficient as all three *Anderson* factors were present. The motive evidence was strong because, not only were the victims from a rival gang, but Castillo had "banged on" Hernandez during a prior encounter and Hernandez was honor-bound to avenge this insult. The "planning activity" included driving into enemy gang territory with a loaded weapon and then making a U-turn upon spotting the victims. The "manner of killing" was a typical drive-by shooting: Hernandez positioned the Camry in Arellano's driveway and kept the car still so the gunman would have a good shot at the two rival gang members who were a fair distance down the street; evidence showed the gunman took very deliberate aim before firing. The shooting did not arise out of any immediately-prior confrontation; rather, the attackers snuck up on the victims and essentially ambushed them. The shooting was not a " 'mere unconsidered or rash impulse hastily executed.' " (*People v. Anderson, supra,* 70 Cal.2d at p. 27.)

Pointing to the fact Castillo told police he did not think the gunman had been trying to kill him, Hernandez argues: "The physical evidence supported his statement. Officers . . . found the . . . Grand Prix within fifteen to twenty feet of the Avalos van, west of the van, ahead of it, closer to Anderson.[3] The only damage to the [Grand Prix] was a small hole in . . . the bumper . . . [whereas the] back window of the Avalos van had

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[3] The shooting occurred on Elburg Street, between Anderson and Downey. Arellano's house was fairly close to Downey, and Paul's house was closer to the middle of the block. Anderson was the next cross street on Elburg after Downey.

been blown out." Hernandez asserts this evidence shows "[t]he intended victim was Avalos, not Castillo."

We are not persuaded by this theory the intended victim was Avalos and that Castillo just happened to be in the way. Indeed, the evidence tended to show the opposite scenario was far more likely. Castillo was driving a loud car with flashy rims, which was more likely to have attracted the perpetrators' attention in the first place than the van Avalos was driving. Hernandez, in particular, had a special reason for wanting to kill Castillo. The fact the gunman managed to "blow out" the van's rear window, but only nick the bumper of the Grand Prix, does not necessarily infer anything different. (See *People v. Smith* (2005) 37 Cal.4th 733, 741 [that victim may have escaped death due to gunman's poor aim does not establish less culpable state of mind].) The fact Castillo himself may not have believed the gunman was trying to kill him did not trump other inculpatory evidence (see, e.g., *People v. Renteria* (1964) 61 Cal.2d 497, 499 [store clerk's testimony he did not give robber money out of fear was not binding on prosecution because other evidence showed this was untrue]), particularly given the overall incredible nature of Castillo's testimony (see *post*).

A police diagram indicated the Camry in Arellano's driveway had been approximately 250 feet away from the van when the shooting occurred. This distance renders the 10 to 15 foot gap between the van and the Grand Prix negligible, even ignoring the fact the victims' vehicles apparently moved some distance after being hit by the gunfire. In addition, the jurors had been instructed on implied malice murder based on the natural and probable consequences doctrine, and it would have been quite rational for them to have concluded the attackers intended to shoot Castillo and only hit Avalos because of her proximity to him.

There was sufficient evidence to prove Hernandez was guilty of the attempted murder of Castillo.

2. *There was no ineffective assistance of counsel.*

Hernandez contends the trial court erred by denying his new trial motion based on a claim of ineffective assistance of counsel for not adequately cross-examining the prosecution's ballistics expert. This claim is meritless.

a. *Legal principles.*

"In *People v. Fosselman* (1983) 33 Cal.3d 572 . . . , the Supreme Court established for the first time that 'in appropriate circumstances' the issue of trial counsel's effectiveness should be presented to the trial court on a motion for new trial, even though the new trial statute (Pen. Code, § 1181) does not include this as one of the enumerated grounds for the motion. [Citation.] [¶] It has been stated often that a motion for new trial is addressed to the sound discretion of the trial court and that its decision will not be reversed unless a clear abuse of discretion is shown. [Citations.] While this rule undoubtedly is correct in the context of a statutory motion for new trial, the proper scope of review of the trial court's ruling on a nonstatutory motion based upon an allegation of denial of constitutional rights is not so simple. We find the analogy to the procedures on motions to suppress evidence pursuant to Penal Code section 1538.5 compelling, and we hold that a similar two-step process is appropriate in these cases. [¶] In the first step, the trial court must find the relevant facts . . . . On appeal, all presumptions favor the trial court's exercise of its power to judge the credibility of witnesses, resolve any conflicts in testimony, weigh the evidence, and draw factual inferences. The trial court's factual findings, express or implied, will be upheld if they are supported by substantial evidence. [Citation.]" (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724.)

"In the second step of the process, the trial court will have decided whether, on the facts which it has found, the defendant was deprived of his right to adequate assistance of counsel, that is, whether the defendant has shown that . . . 'his counsel failed to perform with reasonable competence and that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings. [Citations.]' [Citation.] . . . [¶] To the extent that these are questions of law, the appellate court is not bound by the substantial evidence rule, but has ' "the ultimate

responsibility . . . to measure the facts, as found by the trier, against the constitutional standard . . . ." [Citation.] On that issue, in short, the appellate court exercises its independent judgment.' [Citations.]" (*People v. Taylor, supra,* 162 Cal.App.3d at pp. 724-725; accord *People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225, fn. 7 [it is proper to review denial of new trial motion de novo when claims of constitutional magnitude are raised].)

A claim of ineffective assistance of counsel has two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] [¶] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness.' [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391 [146 L.Ed.2d 389].)

In evaluating a claim that defense counsel should have presented particular evidence, "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within

the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (*Strickland v. Washington* (1984) 466 U.S. 668, 689 [80 L.Ed.2d 674].)

b. *Background*.

Hernandez's new trial motion claimed defense counsel had been ineffective in cross-examining Tracy Peck, the prosecution's ballistics expert. To resolve this claim, the trial court held an evidentiary hearing at which Hernandez presented expert testimony from criminal defense attorney Nancy Sperber.

Sperber opined defense counsel's performance had been deficient because he did not adequately challenge Peck's conclusion the bullet jacket found in the van matched Hernandez's gun. Sperber's primary criticism was that defense counsel failed to question Peck about a 2008 report from the National Research Council (NRC), an arm of the National Academy of Sciences, challenging the accuracy of ballistics identification procedures. Sperber testified defense counsel should have utilized this report and asked other technical ballistics questions.

The trial court denied Hernandez's ineffective assistance of counsel claim, saying: "The defendant identifies no exculpatory or impeachment evidence that counsel could have revealed by further questioning of prosecution witnesses or examination of defense experts that would have produced a more favorable result at trial. Such claims must be supported by declarations or other proffered testimony establishing both the substance of the admitted evidence and its likelihood for exonerating the accused. [¶] You did proffer something. You put on Ms. Sperber. But . . . these matters are normally left to counsel's discretion and rarely implicate inadequacy of representation. Now, *I thought . . . for a moment that Ms. Sperber was going to testify that ballistics evidence was just unreliable as such. And she didn't say that. Basically what she said is* – and I'll put it in common parlance. *If I cross examined him, I could have done a better job.* I would have asked

him this. I would have asked him that. I would have gone into other things. That's basically what she said in reference to this report. I'm looking at . . . the other things that counsel did. He specifically objected . . . to the chain of custody. He . . . cross examined Ms. Peck and also I believe the tow yard owners on the issue of the chain of custody and the bullet not being found immediately at the scene but found at the tow yard and whether or not the path of travel through two headrests and the bullet not being found immediately on the scene . . . might have undermined the reliability of Ms. Peck's testimony on there being a match."

c. *Discussion.*

Hernandez now argues that if defense counsel "had used the NRC report material, he could have elicited an admission that firearm identification is not an exact science, and its efficacy has been questioned. The 'impeachment evidence' Ms. Sperber identified was showing the jury that a ballistics expert could not opine with certainty that a particular gun fired a particular bullet." Hernandez asserts trial counsel's inadequate cross-examination "was prejudicial because the gun evidence was crucial to the prosecution's case. Anthony Castillo was equivocal. He recanted his identification of appellant at trial." We are unpersuaded.

As the Attorney General argues: "Sperber's testimony established nothing more than a difference of opinion in trial strategy. [¶] . . . Unlike Ms. Sperber's strategy choice, which was to challenge the science of tool marking, trial counsel chose to challenge the chain of custody of the test bullet jacket by putting forth the theory that anyone could have put the bullet jacket in Avalos's minivan because it was recovered three days after the shooting while it sat unlocked in a tow yard evidence bay. [¶] Counsel also chose to challenge the reliability of Criminalist Peck's finding by cross-examining her on the multitude of guns from which the bullet jacket could have been fired, and the existence of scratches and markings on the bullet jacket from impact with glass, metal, wood, and steel." The Attorney General is echoing a point made in *Strickland*: "Even the best criminal defense attorneys would not defend a particular client in the same way." (*Strickland v. Washington, supra,* 466 U.S. at p. 689.)

Moreover, as the trial court pointed out, Sperber did not purport to believe the NRC report entirely undermined the field of fired-bullet comparisons. Rather, citing *U.S. v. Taylor* (D.N.M. 2009) 663 F.Supp.2d 1170, Hernandez merely asserts the NRC report "has been expressly recognized by at least one federal court to mean that forensic science, in its present state of development does not allow an expert to state with absolute certainty that a particular gun fired a particular bullet," and therefore some courts have held "ballistics experts must be limited so that they do not state a match to an absolute certainty." But in this case the ballistics evidence was neither the only, nor even the strongest, evidence placing Hernandez at the crime scene. Hence, defense counsel was not ineffective for challenging the expert's opinion on other grounds, particularly because Peck's conclusion, even if downgraded to "less than absolutely certain," would still have been very incriminating when considered in conjunction with the other inculpatory evidence.

Finally, even if defense counsel had been deficient, which we doubt, there was no resulting prejudice because, entirely apart from the ballistics evidence, there was overwhelming proof of Hernandez's involvement in the drive-by shooting. Castillo was acquainted with Hernandez and identified him as the driver. There was an extremely strong gang motive arising out of the past personal relationship between Hernandez and Castillo. Hernandez's incriminating jailhouse phone conversations and the beating of Steven Guzman in jail constituted strong circumstantial evidence supporting Hernandez's guilt.

As for Hernandez's assertion Castillo recanted his eyewitness identification at trial, we conclude that, as the following examples amply show, Castillo's testimony lacked all credibility. Castillo testified he did not know how to make a Dog Patch hand sign, did not know what the term "snitch" meant, and did not know what it meant to "gang bang on somebody" Asked, "[I]s it a good thing to be cooperative with police or a bad thing as far as you know in [the] Dog Patch gang?", Castillo testified: "I wouldn't know." He claimed he did not remember the day Rosemary Avalos had been shot, or that he had been in a Pontiac Grand Prix right next to her at the time. Asked, "Is there any

reason why you don't recall Rosemary Avalos getting shot in the back of the neck?", Castillo testified: "Maybe it happened too quick for me to remember." He denied having talked to the investigating detectives and, after hearing a recording of his police interview, denied it was his voice. In sum, Castillo's trial testimony was so incredible no reasonable jury would have believed his alleged recantation.

The trial court did not err by denying Hernandez's new trial motion based on his claim of ineffective assistance of counsel.

3. *There was no prosecutorial misconduct.*

Hernandez contends the trial court erroneously denied his new trial motion based on prosecutorial misconduct during closing argument. These claims are meritless.

a. *Legal principles.*

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights – such as a comment upon the defendant's invocation of the right to remain silent – but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action ' "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' [Citations.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 298.)

" ' "[T]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom." ' [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 752.) "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] 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, disapproved on another ground

in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "[C]onduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

b. *Discussion*.

(1) *The "burden of proof" issue.*

(a) *Background.*

Hernandez contends the prosecutor committed misconduct by arguing to the jury that Hernandez was "obligated to put on a defense." We disagree.

During closing argument, the prosecutor suggested the cross-examination of Deputy Woodruff, the officer who recovered the gun, had gone "down the path of police conspiracy" by implying Woodruff "found" the gun in order to frame Hernandez. The prosecutor asked, "Why would counsel ask Deputy Woodruff if he was involved in the March 17th, 2008 shooting? Were you working that day? Did you respond to the scene? Because he's the one that found the murder weapon."[4]

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[4] On cross-examination, Woodruff testified he had not taken part in the investigation of the Avalos/Castillo shooting. Despite this answer, defense counsel proceeded to ask:

"Q. Didn't respond to the scene?

"A. I was not on that night. No.

"Q. Prior to March 25th, 2008 had you done any investigation into the shooting of Ms. Avalos?

"A. No.

"Q. Did you know of a shooting?

"A. Yes.

"Q. Your station at Lakewood was handling the investigation of the shooting, correct?

"A. Wasn't Lakewood Station. It was OSS [the gang unit]."

The prosecutor continued:

"And I'm bringing this up to you because I don't hide from arguments of police conspiracy . . . . [i]f I see it happening in court and I see the defense trying to back door that argument. And I'm addressing it right now so he can respond to it. If it's truly a case of police conspiracy, find that man not guilty. . . . If you find . . . that the [bullet] jacket was planted, that the gun was planted, that the evidence of ballistics was made up, find him not guilty. But if at the end of the day this gun, the defense could have requested that the weapon be tested, the defense expert to confirm –

"[Defense counsel]: Objection. Misstates the defense burden and also vouching for the evidence, Your Honor.

"The Court: That's overruled. Go ahead.

"[The prosecutor]: *Let there be no mistake. I have the burden of proof.* But if you're going to . . . back door the argument of police conspiracy or back door the argument that this is not the gun, then have your analyst test the gun. Then have your analyst look at the jacket. Have your analyst come into court and say this is not a match. That didn't happen. Why? Because talk is cheap. . . . [¶] . . . [¶] There's a book out there that's called '*The Defense Never Rests.*'. . . And you know why? *Because the defense has an obligation to put on a defense*. If you have a video of the crime, they're going to contest that. If you have a taped confession with a video, you're going to contest that. If you have a hundred witnesses saying that's the person, you're going to contest that."

(b) *Discussion.*

"*Griffin* [*v. California* (1965) 380 U.S. 609 (14 L.Ed.2d 106)], forbids argument that focuses the jury's attention directly on an accused's failure to testify and urges the jury to view that failure as evidence of guilt." (*People v. Avena* (1996) 13 Cal.4th 394, 443.) "A prosecutor may not directly or indirectly comment on a defendant's failure to testify in his or her own defense. [Citation.] But the prosecutor may comment on the state of the evidence, including the failure of the defense to introduce material evidence or to call witnesses." (*People v. Mincey* (1992) 2 Cal.4th 408, 446.) "A prosecutor is

permitted . . . to comment on a defendant's failure to introduce material evidence or call logical witnesses. [Citation.] By directing the jury's attention to the fact defendant never presented evidence that he was somewhere else when the crime was committed, the prosecutor did no more than emphasize defendant's failure to present material evidence. He did not capitalize on the fact defendant failed to testify." (*People v. Brown* (2003) 31 Cal.4th 518, 554.)

The prosecutor's argument that the defense could have had the gun tested by their own expert was a proper comment on a failure to produce logical evidence, and Hernandez's objection to this argument was properly overruled by the trial court. Hernandez did not object to the prosecutor's subsequent remark that "the defense has an obligation to put on a defense," and a defendant who fails to object at trial "waive[s] any error or misconduct emanating from the prosecutor's argument that could have been cured by a timely admonition." (*People v. Wrest* (1992) 3 Cal.4th 1088, 1105.) Particularly given the prosecutor's previous statement – "Let there be no mistake. I have the burden of proof" – a timely objection could have allowed the prosecutor to explain he had merely become entangled in his *The Defense Never Rests* metaphor, and that he did not intend to contradict his acknowledgment of the correct burden of proof.

(2) *The Guzman issue.*

A pretrial hearing was held on the question of what evidence could be admitted to prove the charge of dissuading a witness (§136.1, subd. (c)(1)) which arose out of Steven Guzman's beating in jail. The prosecutor told the trial court Guzman had given the following story to the police. Guzman was a friend of Hernandez's and a fellow Tortilla Flats gang member. On the day of the Avalos/Castillo shooting, Guzman said "he was hanging out with some shot callers from Tortilla Flats when [Hernandez] returned with three or four others. When they returned, they're bragging about the shooting and that [Hernandez] went to the shot caller and said 'Here's your gun. The mission is done.' The shot caller told [Hernandez], 'No, you've earned it. Keep it.' Meaning the weapon. [¶] And other statements to the effect that there were people bragging about the shooting and how brave [Hernandez] was and so forth."

According to Hernandez's opening brief, his "first trial ended in a hung jury on September 17, 2009. Steven Guzman was not called as a witness at either the preliminary hearing or appellant's first trial. He was subpoenaed for the second trial but failed to appear, was arrested, and wound up in lock-up on October 14, 2009 . . . . On that date, he was assaulted by appellant and others in the holding cell. Mr. Guzman was not available in the instant trial because he was murdered on December 1, 2009."

The jury heard nothing about either Guzman's murder or what information he gave the police about the Avalos/Castillo shooting. The jury knew only that Guzman had spoken to the police about the shooting.

During closing argument, defense counsel countered the witness intimidation charge by pointing out there was no evidence of what Guzman said to the police. Defense counsel suggested Hernandez had probably assaulted Guzman for some reason unrelated to the Avalos/Castillo shooting, and hinted that if Guzman had had anything incriminating to say the prosecution would have called him as a witness: "Steven Guzman has never testified in this matter. He's unavailable now. Fine. But what about in May of last year? We were all here. Same parties here. Where was he? We know he was in jail. So he could have easily been brought over . . . . There was a trial in September of '09. Where was Steven Guzman? He wasn't here. We know that he was around. Well, we know he was in jail what? In October? He was in the area last year. Have we heard one thing he had to say regarding anything here?"

The prosecutor responded by telling the jury:

"[The prosecutor]: Steven Guzman did not testify at the preliminary hearing. Steven Guzman didn't testify in September. Steven Guzman is not here to testify. The defense didn't call him to testify at the preliminary hearing. He was available. The defense.

"[Defense counsel]: Objection, Your Honor, misstates defense burden here. It's not our job to prove anything here. [¶] . . . [¶] The defense does not have a burden to call any witnesses or put on any evidence, Your Honor, and we rested on the state of the evidence.

"The Court: I'll allow that. You brought that issue up. [¶] Go ahead.

"[The prosecutor]: The defense didn't call him. And I'm telling you once again don't speculate as to why Steven Guzman wasn't called here. If you want to find out about why, we'll talk after the trial. Okay. If you want to find out what he said to detectives, we'll talk after the trial."

This did not constitute prosecutorial misconduct. The prosecutor was fairly responding to defense counsel's suggestion the People never called Guzman because they knew he would not have incriminated Hernandez. The evidence, including the gang expert's testimony, shows the mere fact Guzman spoke to the police, even if what he told them was unknown, would have been considered a breach of gang ethics. Hernandez complains "the prosecutor knew that Steven Guzman was dead and could not be called by either side." But the record demonstrates both sides were steering clear of Guzman's present unavailability and talking only about the fact he could have been called as a witness at some earlier point in time.

This did not constitute prosecutorial misconduct.

4. *Gang-related vicarious firearm use enhancement did not violate equal protection.*

Hernandez contends the 25-year-to-life terms imposed pursuant to section 12022.53, subdivision (e)(1), must be reversed because imposition of a gang-related vicarious firearm use enhancement violated his right to equal protection. This claim is meritless.

a. *Legal principles.*

"It is a fundamental principle that, '[t]o succeed on [a] claim under the equal protection clause, [a defendant] first must show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' [Citations.] 'In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment . . . we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. [Citations.] Classifications based on race or national

origin . . . and classifications affecting fundamental rights . . . are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. [Citations.]' [Citations.]" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.)

" 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199.) "Under the equal protection clause, we do not inquire 'whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' [Citations.]" (*Id*. at pp. 1199-1200.) "If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.)

b. *Discussion*.

Hernandez contends subdivision (e)(1) of section 12022.53 violates equal protection by imposing vicarious firearm enhancements on gang aiders and abettors, but not on aiders and abettors who are not gang members. This claim is meritless.

Subdivision (e)(1) of section 12022.53 provides: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22 [the gang enhancement statute]. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

This statute imposes a vicarious firearm enhancement on an aider and abettor if a criminal street gang allegation has been pled and proved. "Section 12022.53, subdivisions (d) and (e)(1)(B) when read together require the trial court to impose a consecutive 25-years-to-life sentence enhancement when a defendant is convicted of murder for the benefit of a criminal street gang and '*[a]ny* principal in the offense' 'personally and intentionally discharges a firearm and . . . causes . . . death, to any person other than an accomplice.' (Italics added.) Under this sentencing regime an aider and

abettor who is found guilty of murder is subject to the 25 years to life enhancement even though he or she did not personally and intentionally discharge a firearm causing death if the murder was committed for the benefit of a criminal street gang and 'any principal' in the offense personally and intentionally discharged a firearm causing death. In all other killings subject to section 12022.53, subdivision (d) – that is, killings not for the benefit of a criminal street gang – a principal, including an aider and abettor, is only subject to the 25-year enhancement if he or she personally and intentionally discharged a firearm causing death." (*People v. Hernandez* (2005) 134 Cal.App.4th 474, 480, fns. omitted.)

The same legal argument Hernandez makes has been rejected elsewhere. (See *People v. Gonzales* (2001) 87 Cal.App.4th 1, 13 [defendant not "similarly situated" because "[u]nlike other aiders and abettors who have encouraged the commission of a target offense resulting in a murder, defendants committed their crime with the purpose of promoting and furthering their street gang in its criminal conduct"]; see also *People v. Hernandez, supra,* 134 Cal.App.4th at pp. 481-482 [even if criminal street gangs are similar to drug cartels or terrorist organizations, Legislature is not required to outlaw all possibly comparable crimes].) We agree with the reasoning of these cases.

Citing *People v. Olivas* (1976) 17 Cal.3d 236, Hernandez argues these cases were wrongly decided. But Hernandez has ignored our Supreme Court's subsequent opinion in *People v. Wilkinson, supra,* 33 Cal.4th at pp. 837-838, which said: "The language in *Olivas* could be interpreted to require application of the strict scrutiny standard whenever one challenges upon equal protection grounds a penal statute or statutes that authorize different sentences for comparable crimes, because such statutes always implicate the right to 'personal liberty' of the affected individuals. Nevertheless, *Olivas* properly has not been read so broadly. . . . [A] broad reading of *Olivas*, as advocated by defendant here, would 'intrude[] too heavily on the police power and the Legislature's prerogative to set criminal justice policy.' " (See also *People v. Ward* (2008) 167 Cal.App.4th 252, 258 ["the California Supreme Court has subsequently rejected the argument that the *Olivas* decision means that strict scrutiny is applied 'whenever one challenges upon equal protection grounds a penal statute or statutes that authorize different sentences for

comparable crimes, because such statutes always implicate the right to "personal liberty" of the affected individuals.' [Citation.] Instead, the Supreme Court has said that the rational basis test applies to equal protection challenges based on sentencing disparities."].)

There was no equal protection violation.

5. *Presentence custody credits were miscalculated.*

As the Attorney General properly concedes, Hernandez's presentence custody credits were miscalculated. "A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered. [Citation.]" (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647; see also *People v. Acosta* (1996) 48 Cal.App.4th 411, 428, fn. 8 ["The failure to award an adequate amount of credits is a jurisdictional error which may be raised at any time."].)

Hernandez was arrested on February 24, 2009, and he remained in custody until his sentencing on May 17, 2011. For this period of time, he was entitled to 813 actual days of presentence custody credit, not the 812 days he was awarded. (See *People v. Morgain* (2009) 177 Cal.App.4th 454, 469 ["defendant is entitled to credit for the date of his arrest and the date of sentencing"]; *People v. Browning* (1991) 233 Cal.App.3d 1410, 1412 [day of sentencing counted for presentence custody credits even though it was only partial day].) We will order the judgment modified to correct this error.

6. *Hernandez was improperly convicted of a lesser included offense.*

The Attorney General properly points out Hernandez's conviction on count 2 (attempted murder of Avalos) must be reversed because this was a necessarily lesser included offense of his count 1 conviction for murdering Avalos.

Multiple convictions may not be based on necessarily included offenses. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) "In most cases 'this court has . . . affirmed multiple convictions for a single act or indivisible course of conduct,' leaving it to the sentencing court to determine whether to stay execution of sentence on one or more convictions pursuant to section 654 in order to avoid multiple punishment for the same act. [Citation.] A defendant, however, cannot be convicted of both an

offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act. [Citation.]" (*People v. Sanchez* (2001) 24 Cal.4th 983, 987, disapproved on other grounds by *People v. Reed* (2006) 38 Cal.4th 1224, 1228.)

"Attempted murder is a lesser included offense of murder." (*People v. Davidson* (2008) 159 Cal.App.4th 205, 210; see also *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 609 ["attempt is a lesser included offense of any completed crime"].)

We will vacate the conviction and sentence on count 2.

7. *Improper minimum parole eligibility term imposed on count 4.*

The Attorney General correctly points out the trial court erred by using the gang enhancement statute (§ 186.22, subd. (b))[5] to impose a 15-year minimum parole eligibility term on Hernandez's count 4 conviction for the attempted murder of Castillo.

Subdivisions (b) through (d) of section 12022.53 impose enhancements on defendants who personally use a firearm during the commission of an enumerated offense. Subdivision (e)(1) of that section extends these enhancements to any defendant who is also found guilty under the gang enhancement statute if a principal used a firearm. However, subdivision (e)(2) of section 12022.53 then provides: "An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense."

As *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282, explained: "[W]here section 186.22 [the gang enhancement] has been found to be applicable, in order for section 12022.53 to apply, it is necessary only for a principal, not the accused, in the commission of the underlying felony to personally use the firearm; *personal* firearm use by the accused is not required under these specific circumstances.

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[5] Section 186.22, subdivision (b)(5), provides: "Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served."

However, as a consequence of this expanded liability under section 12022.53, subdivision (e), the Legislature has determined to preclude the imposition of an additional enhancement under section 186.22 in a gang case unless the accused *personally* used the firearm."

Here, the trial court imposed a 15-year minimum parole eligibility term on count 4 despite the fact Hernandez was not found to have personally used a firearm. This parole eligibility term must be stricken.

DISPOSITION

The judgment is affirmed as modified and remanded with instructions. Hernandez is entitled to one additional day of actual presentence custody credit, for a total of 813 days. The conviction and sentence on count 2 are vacated. The 15-year minimum parole eligibility term imposed in connection with count 4 is vacated. The clerk of the superior court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.