Filed 1/16/18 P. v. Combs CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DAYVION DEANDRE COMBS et al., Defendants and Appellants.	B270594 (Los Angeles County Super. Ct. No. TA136745)

APPEAL from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Affirmed in part and reversed in part with directions.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant Dayvion Deandre Combs.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant Cedric Octavia Harris.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant Paul Demetrius Allen, Jr.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Noah P. Hill and Nima Razfar, Deputy Attorneys General for Plaintiff and Respondent.

Seeking to avenge the death of a friend, Londale McNeil (McNeil), Dayvion Deandre Combs (Combs), Cedric Octavia Harris (Harris) and Paul Demetrius Allen, Jr., (Allen) drove into a rival gang's territory looking for the man they believed was responsible for their friend's death—Keiun Harris.[1] When they could not find Keiun, the four drove deeper into the gang's territory. McNeil and Combs then opened fire on another vehicle they spotted. Two men—Leroy Bernardez (Bernardez) and Diallo O'Quinn (O'Quinn)—occupied the vehicle. McNeil, who stood in front of Combs, fired a single shot from his .357-caliber revolver. Combs fired 15 shots, one of which fatally struck McNeil.

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[1] Keiun Harris is not related to Cedric Harris. We refer to Keiun Harris by his first name for the sake of clarity, intending no disrespect.

Combs, Harris, and Allen were subsequently charged with conspiracy to commit murder, as well as the murder of McNeil, the attempted murder of Bernardez and O'Quinn, and shooting at an occupied vehicle. The People also charged defendants with various firearm and gang enhancement allegations. A jury convicted Combs on all counts and found all the firearm and gang allegations to be true. The jury convicted Harris on all counts but did not find every firearm and gang allegation to be true. The jury convicted Allen of the conspiracy and murder charges, but acquitted him of the remaining counts. The jury found the gang allegations to be true with respect to Allen but rejected the firearm allegations. Combs, Harris and Allen raise numerous issues on appeal, four of which require reversal or remand to the trial court for resentencing.

First, we hold that insufficient evidence supported Allen's two convictions. Thus, with respect to Allen, we reverse the judgment on counts 1 and 2 as well as the accompanying gang enhancement allegations.

Second, we hold that the sentencing enhancements imposed in Combs's case pursuant to Penal Code[2] section 12022.53, subdivisions (b) and (c), must be stricken because the information did not specifically allege that Combs personally used and discharged a firearm and the jury did not make such findings. Furthermore, because the jury

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

found only that "a principal" used and discharged a firearm—instead of finding that Combs personally used and discharged a firearm—section 12022.53, subdivision (e)(2), prohibits imposition of the firearm enhancements in addition to the gang enhancement. We therefore vacate Combs's sentence and remand the matter for resentencing.

Third, on remand, Harris's sentence must be modified to reflect the trial court's oral pronouncement at sentencing, which imposed a 10-year sentence under section 12022.53, subdivision (b), rather than the 20-year sentence (imposed under section 12022.53, subdivision (c)) as indicated on the abstract of judgment. On remand, the parties must also confirm that Harris has now received the correct amount of custody credits.

Fourth, we remand so that the trial court can exercise its new discretion under section 12022.53, subdivision (h), and determine whether any of Harris's remaining firearm enhancements should be stricken.

We affirm the trial court in all other respects.

BACKGROUND

Combs, Harris and Allen were charged with conspiracy to commit murder (§ 182, subd. (a)(1); count 1). The conspiracy count listed five overt acts: McNeil and Combs armed themselves with firearms in order to murder Keiun; McNeil and Combs enlisted Harris and Allen to assist with Keiun's murder; McNeil, Combs, Harris and Allen got into a vehicle to murder Keiun; McNeil, Combs, Harris and Allen went into rival gang territory to murder Keiun; and McNeil,

Combs, Harris and Allen attempted to locate and murder Keiun. Combs, Harris and Allen were also charged with the murder of McNeil (§ 187, subd. (a); count 2), and the attempted willful, deliberate, and premeditated murder of Bernardez and O'Quinn (§§ 664, 187, subd. (a); counts 3 & 4), as well as shooting at an occupied vehicle (§ 246; count 5).

The information also alleged that, as to counts 1 through 4, a principal personally used a firearm within the meaning of section 12022.53, subdivision (b) and (e)(1), and that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c) and (e)(1). The information also alleged that, as to counts 1 through 5, a principal personally and intentionally discharged a firearm which proximately caused great bodily injury and death to McNeil, Bernardez and O'Quinn within the meaning of section 12022.53, subdivision (d) and (e)(1); that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1); and that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e).[3]

The information further alleged pursuant to section 186.22, subdivision (b)(1)(C), (counts 1–4) and 186.22, subdivision (b)(4), (count 5) that the offenses were committed for the benefit of, at the direction of, and in association with

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[3] The prosecution later withdrew the subdivision (d) firearm allegation.

a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members.[4]

PROSECUTION EVIDENCE

I. The shooting

Combs, Harris, and Allen belonged to the 88 Avalon Garden Crips (AGC), a gang based near the Avalon Gardens public housing projects in Los Angeles.[5] All three were friends with McNeil, a fellow member of the AGC. At the time of the crimes in question, the AGC's main rival were the 87 Gangster Crips, which claims an area just west of the AGC's territory. Several years earlier, McNeil had been struck in his hand by a bullet and his fellow gang member and best friend, Kirk Kirby (Kirby), was killed in McNeil's presence. McNeil believed Keiun, a member of the rival 87 Gangster Crips, had perpetrated the homicide.[6] McNeil

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[4] The information also alleged that Combs, Harris and Allen had each suffered a prior conviction that qualified as a strike (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and a serious felony (§ 667, subd. (a)(1)). All three defendants waived jury trial on the prior conviction allegations and the court subsequently found the allegations to be true.

[5] Combs was nicknamed "Buddha." Harris was nicknamed "Box." Allen was nicknamed "Set Trip." McNeil was nicknamed "Tiny Fish" or "T.F."

[6] McNeil's cousin, O'Quana Pleasant, saw Keiun shortly after Kirby's funeral. Keiun drove near her and asked Pleasant if she was on " 'some Avon shit?' "—Avon being a derogatory term referring to the AGC. McNeil told

later memorialized Kirby by getting a tattoo near his right eye—a tear drop and the letters "I.S." which stood for Kirby's nickname, "Infant Solo."

McNeil and his fellow gang members vowed retaliation for Kirby's death. On October 25, 2014, McNeil and Combs told Harris that Keiun was at Roscoe's House of Chicken and Waffles, a restaurant in rival 87 Gangster Crips territory. McNeil and Combs picked up guns at an associate's house and Harris then drove McNeil, Combs, and Allen in his SUV to Roscoe's. They arrived at Roscoe's but Keiun was not there. They continued driving in 87 Gangster Crips territory until they spotted a Monte Carlo near 88th Place and Wall Street. O'Quinn drove the Monte Carlo while Bernardez sat in the front passenger seat. Bernardez had actually observed the SUV moments before and told O'Quinn that "it looked like some Avalons" inside the SUV.[7]

O'Quinn, traveling northbound on Wall Street, stopped at the intersection of 88th Place and Wall Street. Harris's SUV, just past the intersection, faced eastbound on 88th Place. McNeil and Combs exited the SUV and began firing at the Monte Carlo. McNeill stood in front of Combs and fired a single shot from his .357-caliber revolver. Combs

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Pleasant about his personal rivalry with Keiun and that he believed Keiun was trying to kill him.

[7] Bernardez was an 87 Gangster Crips gang member and was nicknamed "Termite." O'Quinn was affiliated with another gang which was friendly with the 87 Gangster Crips.

fired 15 shots, one of which fatally struck McNeil in the back of the head. The bullet entered the back of McNeil's head and exited at a slightly higher level, through his forehead. McNeil collapsed to the ground. O'Quinn sped away as McNeil and Combs fired at the Monte Carlo, while Bernardez ducked in his seat. Several bullets struck the passenger side of the Monte Carlo, blew out a tire, and shattered the side and rear windows. Combs got back into the SUV and fled with Harris and Allen. After driving for several blocks, O'Quinn abandoned the Monte Carlo near 87th Street and Broadway. A friend then picked up O'Quinn and Bernardez and they left the area.

II. After the shooting

Police responded to the scene at approximately 6:11 p.m. McNeil's body lay face up on the southeast corner of 88th Place and Wall Street. A .357-caliber revolver rested near his hand. The revolver contained five live rounds and one casing from an expended round. Police gathered 15 expended .40-caliber casings spread throughout the southeast and northeast corners of 88th Place and Wall Street. The casings had been fired from the same .40-caliber handgun. Police later located and secured the abandoned Monte Carlo. The car had three bullet fragments—two inside the trunk and one in the rear tire. The bullets had been fired at a roughly 45 degree angle and traveled from the right side of the car—the passenger side—to the left. All three projectiles came from the same .40-caliber handgun.

A. EYEWITNESSES TO THE SHOOTING

P.S. was nearby when the shooting took place. She heard gunshots around 5:30 p.m. and witnessed a young black male near an SUV shooting in a northwestern direction. She turned her attention away briefly and then watched the shooter enter the passenger side of the SUV and drive away eastbound on 88th Place. Once the SUV drove away, she noticed McNeil's body lying near the southeast corner with a gun next to his hand. She called "911." She declined to provide too many details during the call, stating that she did not "want to be a snitch and get [her] fucking house blow[n] up." P.S. did not get a good look at the shooter's face and could not identify him.

S.G. heard the shooting as she walked up the stairs to her apartment. When she glanced in the direction of the gunshots, she saw a young black male walking diagonally from 88th Place toward the northeast corner of the intersection as he fired shots in a westerly direction at the Monte Carlo. S.G. saw the shooter's face but could not recall how he looked. However, she recognized her neighbor Bernardez as the driver of the Monte Carlo. S.G. also noted that Bernardez had a passenger inside the Monte Carlo who ducked in his seat during the shooting. As the shots rang out, Bernardez stopped the car, hit a curb, and drove away as the shooter stepped backward and continued shooting.

B. ADMISSIONS BY THE DEFENDANTS

1. *By Harris to Waldean Bowling*

McNeil's mother, Waldean Bowling (Bowling), lived in the Avalon Gardens housing projects. She had known Combs his entire life and had known Harris and Allen for about seven years. Combs and McNeil were close friends. Around the time of McNeil's funeral, Harris approached Bowling as she walked home. Harris said he wanted to tell Bowling what happened to her son, recognizing he could get killed for talking to her. Harris said that before the shooting, both McNeil and Combs told him that Keiun was at Roscoe's. Soon after that, Harris drove McNeil, Combs, and Allen in his SUV to Roscoe's in order to find Keiun. McNeil and Combs were armed with handguns they had retrieved from a friend's house just before leaving in Harris's SUV. When they arrived at Roscoe's, and learned that Keiun was not there, they drove to 88th Place and Wall Street where they spotted the Monte Carlo. McNeil and Combs exited the SUV and fired at the Monte Carlo. Harris sped away but came back after the shooting to pick up Combs. When Combs got inside the SUV, Harris saw McNeil lying motionless on the ground. Combs told Harris that Termite (Bernardez) was shooting at them. Harris drove away from the location. Harris had Combs and Allen get out of his SUV before arriving at Avalon Gardens so that

neither Officer Jesse Pineda nor people in the projects would know they were together.[8]

2. *By Combs to Waldean Bowling*

In January 2015, Combs saw Bowling waiting at the bus stop and gave her a ride home. Combs discussed some of the details surrounding McNeil's death. Combs admitted that he and McNeil had approached Harris about going to look for Keiun at Roscoe's. Combs said that he and McNeil got out of the SUV when they saw the Monte Carlo. Combs recognized one of the occupants as Termite (Bernardez). But Combs insisted that he was on a different street when he heard shots fired between McNeil and the occupants of the Monte Carlo. According to Combs, the Monte Carlo then drove past McNeil and headed toward Combs. Combs fired at the Monte Carlo and immediately got back into the SUV, fleeing the location with Harris and Allen. Combs claimed that the individuals in the Monte Carlo shot McNeil.

3. *By Allen to O'Quana Pleasant*

When McNeil's cousin, O'Quana Pleasant, learned that McNeil had been shot, she went to the crime scene near 88th Place and Wall Street. Pleasant spoke with an officer at the scene but was told that the victim did not match McNeil's description. She then went to Avalon Gardens where she found Allen and Harris. When she asked them where McNeil was, Allen vouched: " 'That's on Avalon. That's T.F.

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[8] Los Angeles Police Department (LAPD) Officer Pineda knew Harris and was also familiar with Harris's SUV.

[McNeil] laid out over there. It was me, him, Box [Harris], and Buddha [Combs].' " Pleasant knew McNeil, Combs, Harris and Allen were all members of the AGC and believed Allen since he swore "on Avalon" that he was telling the truth.

4. *By Harris to O'Quana Pleasant*

Pleasant later saw Combs, Harris and Allen at a service for McNeil. During the event, she overheard Harris describing the shooting. Harris admitted that as he drove away, he looked in his rearview mirror, saw McNeil's body drop, and kept driving.

III. Gang expert testimony

Officer Pineda testified as the prosecution's gang expert. He detailed his training and experience with gangs, including his familiarity with both the AGC and its rival the 87 Gangster Crips. AGC began in the Avalon Gardens housing projects and has about 110 to 120 active gang members. Members display the colors green and blue to signify their association with Avalon Gardens and their allegiance to the Crips. They often wear hats and clothing depicting sports teams with the letter "A," such as the Atlanta Braves or the Oakland A's. The AGC's primary activities include narcotics sales, street robberies, burglaries, shootings, attempted murders, and murders. Officer Pineda identified two AGC gang members who were convicted of possession of a firearm by a felon and another gang member who was convicted of murder.

According to Officer Pineda, gangs thrive on fear, intimidation, and respect. Gang members earn respect and status within the gang by committing violent crimes. Committing a violent act against a rival gang member shows that a gang member is willing to put his life on the line and instill fear in their rivals, which increases respect for both the gang and gang member and allows the gang to expand its territory. Creating fear in the community allows the gang to operate and commit crimes with impunity in its neighborhood. As the community becomes more fearful of the gang, it becomes less willing to cooperate with police or report gang-related crimes. Indeed, being labeled a "snitch" by cooperating with police often brings violent consequences. Officer Pineda added that gang members usually access guns from "safe houses," where they store weapons without the risk of a police search. Gang members who travel into rival territory are expected to be armed since there is a strong likelihood they can be shot or killed if confronted by a rival.

Based on a hypothetical mirroring the facts elicited at trial, Officer Pineda opined the crimes were committed for the benefit of, at the direction of, or in association with the AGC. The crimes were indicative of a "mission," where gang members join forces with trusted fellow members to seek out an enemy in order to shoot or kill him. Such a team would divide the duties among a driver, shooters, and a lookout. A gang that shoots rivals in rival territory benefits from the attack because it instills fear into the rival gang by showing

that the gang does not back down from a fight and is willing to retaliate if they are "messed with."

DEFENSE EVIDENCE

LAPD Officer George Chavez testified he received information from the watch commander reporting a possible suspect in an SUV with possible bullet holes. Officer Chavez did not know who originally relayed the information about possible bullet holes.

LAPD Officer Hector Beas testified about a field information (FI) card he had completed after interviewing P.S.[9] The card noted that the shooter had fired in an eastward direction. Officer Beas said he assumed that when P.S. looked in an eastward direction as she described the gunman, she meant the shooting also came from that direction. Officer Beas admitted he never actually asked P.S. in which direction the shooter fired his weapon.

Mario Guillen, who lived on the northeast corner of 88th Place and Wall Street, testified that he saw gunshots being fired from a yellow car traveling northbound on Wall Street. However, Guillen admitted that he remembered the car was yellow only after speaking to his cousin about it and did not independently remember the color of the car.

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[9] FI cards are short report forms that record an officer's contact with an individual. The card contains personal information, the date and time of contact, associates, nicknames, and may also record statements made at the time of the interaction. (*People v. Sanchez* (2016) 63 Cal.4th 665, 672 (*Sanchez*).)

VERDICTS AND SENTENCES

I. Combs's verdict and sentence

The jury convicted Combs on all counts and further found all the firearm and gang allegations to be true. With respect to count 1, conspiracy to commit murder, the jury found that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1). The jury also found that a principal used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1); that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1); that a principal personally used a firearm within the meaning of 12022.53, subdivision (b); and that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c).

With respect to count 2, murder, the jury found that the crime was willful, deliberate and premeditated. The jury also found that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members within the meaning of 186.22, subdivision (b)(1). The jury also found that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), and that a principal personally and intentionally discharged a firearm

within the meaning of section 12022.53, subdivisions (c) and (e)(1).

With respect to counts 3 and 4, attempted murder, the jury determined that the crimes were willful, deliberate and premeditated. The jury also found that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members within the meaning of 186.22, subdivision (b)(1). The jury also concluded that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), and that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1).

With respect to count 5, shooting at an occupied vehicle, the jury found that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members within the meaning of 186.22, subdivision (b)(1). The jury also decided that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), and that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1).

The trial court sentenced Combs to a total of 75 years to life, which included 25 years to life on count 1, doubled to

50 years to life as a second strike, plus an additional 20 years for the firearm enhancement (§ 12022.53, subd. (c)), as well as five years on the prior serious felony. The court imposed concurrent sentences on counts 2 through 4 and stayed sentence on count 5 pursuant to section 654.

II. Harris's verdict and sentence

The jury convicted Harris on all counts. With respect to count 1, the jury found that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1). The jury also determined that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1). However, the jury did not find that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1).

With respect to count 2, the jury did not find that the crime was willful, deliberate and premeditated. The jury did find that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1). However, the jury did not find that that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), or that a principal personally and intentionally discharged a

firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1).

With respect to count 3, the jury concluded that the crime was willful, deliberate and premeditated. The jury also found that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members within the meaning of 186.22, subdivision (b)(1). However, the jury did not find that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), or that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1).

With respect to count 4, the jury did not find that the crime was willful, deliberate and premeditated. The jury, however, determined that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members within the meaning of 186.22, subdivision (b)(1). The jury also concluded that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1). However, the jury did not find that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1).

With respect to count 5, the jury found that the offense was committed for the benefit of, at the direction of, or in

association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members within the meaning of 186.22, subdivision (b)(1). However, the jury did not find that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), or that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1).

The trial court sentenced Harris to a total of 65 years to life on count 1, which included 25 years to life, doubled to 50 years to life as a second strike, plus an additional 10 years for the firearm enhancement (§ 12022.53, subds. (b) & (e)(1)), as well as five years on the prior serious felony. The court imposed concurrent sentences on counts 2 through 4, and stayed sentence on count 5 pursuant to section 654.

III. Allen's verdict and sentence

The jury convicted Allen of counts 1 and 2, but acquitted him of the remaining counts. With respect to count 1, the jury found that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1). However, the jury did not find that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), or that a principal personally and

intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1).

With respect to count 2, the jury did not find that the crime was willful, deliberate and premeditated. The jury did find that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1). However, the jury did not find that that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), or that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1).

The trial court sentenced Allen to a total of 55 years to life on count 1, which included 25 years to life, doubled to 50 years to life as a second strike, plus an additional five years on the prior serious felony. The court imposed a concurrent term on the remaining count.

DISCUSSION

I. Admissions made by the defendants

On appeal, Combs, Harris and Allen challenge the statements they made to Bowling and Pleasant, which were admitted pursuant to the hearsay exception for declarations against interest. All three contend that the statements were

neither against their penal interests nor made under sufficiently trustworthy circumstances.[10] We disagree.

A. TRIAL COURT PROCEEDINGS

Before trial, the defense objected to the admission of any of the statements made to Bowling and Pleasant. Combs's attorney focused on the alleged unreliability of the statements as well as his inability to cross-examine Harris and Allen. According to Harris's attorney, Bowling's statements were unreliable because it was difficult to distinguish between what she actually heard from Harris and Combs and what she heard from other people on the streets. Harris's attorney argued that Allen's statement to Pleasant—in which he placed all three defendants at the scene of the shooting—was not truly against Allen's penal interest since he did not admit that a crime had taken place. Allen's attorney further argued that Bowling's statements were unreliable because she was biased—she sought closure and already believed that Combs had killed her son.

The trial court found that the statements made in a "confidential setting" by Combs, Harris and Allen were against their penal interest. The court noted it had to look to the totality of the circumstances, including "whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant, and anything else relevant to the inquiry." The

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[10] Harris and Allen join in most of Combs' arguments. We will address separate arguments raised by Harris and Allen when relevant and appropriate.

court then stated, "Well, if three alleged gang members wind up killing one of their own, there is a great degree of indicia of reliability when they make those statements to the mother and right at the funeral, it's, like, okay. We have to come clean. This is our buddy. He got killed. I'm going to tell his momma something about it to shed light on this. And they're all close friends. They were all close friends. So it's like we've got to get this off our chest. [¶] The timing as to one of the statements of one defendant, the timing of the funeral is very relevant. Somebody else made a statement some time later, but, again, it's to the mother. They're trying to come clean as to what happened. When someone says—when a murder occurs and then someone says to a cousin or relative of a deceased victim I know it's your cousin out there, that puts him there. You put yourself at the scene of the murder. And you're [a] member of the rival gang and that gang evidence comes in, that could be sufficiently against your penal interest also. That speaker is in a unique position to know something about what just happened, putting—and he would not know that Tiny Fish [McNeil] was out there dead unless he saw it and had personal knowledge of it and goes back tells the cousin, no. That's your cousin who's out there dead even though the police are telling you otherwise. I'm telling you it is. And he says it's on Avalon. It's like my saying it's on my 108-year-old grandmother's soul. They say that. 'On Avalon.' That's vouching to their own credibility and trustworthiness."

The court said it would be appropriate for the defense to cross-examine the witnesses as to whether the statements they heard were from their own recollection or were tainted by what other people had told them, including anything officers may have suggested during the police interviews. The court noted that the potential testimony served the nonhearsay purpose of explaining the effect on the listener and how such statements influenced the accuracy and believability of their testimony. The court said it would it caution the jury not to accept these statements for the truth but to "assess the credibility of the witness on the witness stand about the accuracy of what she heard."

B. APPLICABLE LAW

"Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.) "The proponent of such evidence must show that the declarant is unavailable, 'that the declaration was against the declarant's penal interest [when made] and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' "[11] (*People v. Lucas* (1995) 12 Cal.4th 415, 462.)

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[11] The declarants in this case were unavailable as witnesses because they were nontestifying codefendants. (See *People v. Fuentes* (1998) 61 Cal.App.4th 956, 961–962.)

Nevertheless, "declarations against penal interest may [also] contain self-serving and unreliable information" and, consequently, "an approach which would find a declarant's statement wholly credible *solely because* it incorporates an admission of criminal culpability is inadequate." (*People v. Campa (*1984) 36 Cal.3d 870, 883 (*Campa*).) As scholars have observed, " 'a self-serving statement lacks trustworthiness whether it accompanies a disserving statement or not.' " (*People v. Leach* (1975) 15 Cal.3d 419, 439, fn. 15 (*Leach*), quoting Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule (1944) 58 Harv. L.Rev. 1, 60.)

Moreover, that a hearsay statement may be facially inculpatory or neutral cannot always be relied upon to indicate whether it is "truly self-inculpatory, rather than merely [an] attempt[ ] to shift blame or curry favor." (*Williamson v. United States* (1994) 512 U.S. 594, 603 (*Williamson*).) Even a hearsay statement that is facially inculpatory of the declarant may, when considered in context, also be exculpatory or have a net exculpatory effect. (See, e.g., *People v. Coble* (1976) 65 Cal.App.3d 187, 191.) In the end, "whether a statement is self-inculpatory or not can only be determined by viewing it in context." (*Williamson*, at p. 603.)

In light of these concerns, the California Supreme Court has determined that "the hearsay exception should not apply to collateral assertions within declarations against penal interest." (*Campa*, *supra*, 36 Cal.3d at p. 882.) Thus,

Evidence Code section 1230's exception to the hearsay rule is "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant." (*Leach*, *supra*, 15 Cal.3d at p. 441, fn. omitted; accord *People v. Shipe* (1975) 49 Cal.App.3d 343, 354 ["a declaration against penal interest must be 'distinctly' against the declarant's penal interest"].) Under *Leach*, a hearsay statement "which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible." (*In re Larry C.* (1982) 134 Cal.App.3d 62, 69.)

We review a trial court's decision as to whether a statement is admissible as a declaration against penal interests for abuse of discretion. (*People v. Lawley* (2002) 27 Cal.4th 102, 153. Thus, the trial court's decision "'will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Brown* (2003) 31 Cal.4th 518, 534.)

C. MERITS

1. *Harris's statements to Bowling*

In his statements to Bowling, Harris outlined the group's decision to arm themselves and their initial plan to seek out Keiun. When they could not locate Keiun, they drove to 88th Place and Wall Street where they spotted the Monte Carlo. McNeil and Combs exited the SUV and fired at the Monte Carlo. Harris sped away but returned after the

shooting to pick up Combs. When Combs entered the SUV, Harris saw McNeil lying motionless on the street. Harris then drove away from the location and had Combs and Allen exit his SUV before arriving at Avalon Gardens. Harris's statements identified every member of the conspiracy, including his critical role as their driver, acknowledging his participation in crimes that no reasonable person would admit to unless they were true. Thus, the trial court did not abuse its discretion in admitting Harris's statements.

In *People v. Gordon* (1990) 50 Cal.3d 1223 (*Gordon*), the California Supreme Court considered statements made by an accessory, Rauch, who told law enforcement officers that he had provided the defendant, his nephew, with shelter and medical care after the defendant had been wounded in a robbery. Although Rauch's statement minimized his own role and portrayed his nephew in a much harsher light, the court ruled the statement admissible. "To be sure, Rauch did not *expressly* admit either intent or knowledge. But he impliedly admitted both by his suspicious conduct throughout the incident in question. [¶] Defendant argues to the contrary. He claims Rauch's statement should be considered untrustworthy in view of its substance. He says it must be characterized as neutral or exculpatory, and therefore unreliable, because it admits no more than it does. We cannot so characterize the statement. To be sure, the criminal liability that the statement risks is not the highest. But it is significant nonetheless." (*Id.* at p. 1252.) Therefore, the trial court "could have reasonably

concluded that at the time it was made, Rauch's statement so far subjected him to the risk of criminal liability that a reasonable person in his position would not have made it unless he believed it to be true." (*Ibid.*)

In *People v. Wilson* (1993) 17 Cal.App.4th 271 (*Wilson*), the defendant was convicted of two counts of attempted voluntary manslaughter based, in part, on statements his wife made to police in which she stated that, following the attempted homicides, her husband instructed her to retrieve from bushes near their residence the gun he had used in the attempted homicides and take it to his mother's house. Although the statement implicated the defendant in a far more serious offense, the court found the statement specifically disserved the wife's interest because it showed she was an accessory to the offense. (*Id.* at pp. 275–277.) "The fact that the statement is also disserving to [the nondeclarant] does not render the statement unreliable and inadmissible." (*Id.* at p. 276.)

People v. Greenberger (1997) 58 Cal.App.4th 298 (*Greenberger*) reached a similar result. In *Greenberger*, a declarant had been the driver in a kidnapping and murder for hire in which his codefendant had been a principal actor. Although the declarant's statements described his role as only the driver and smaller than his codefendant's, the statements were nonetheless sufficiently disserving of the declarant's penal interest that "a reasonable person in [the declarant's] position would not have made them unless he believed them to be true." (*Id.* at p. 337.)

Here, Harris's statements were sufficiently disserving of his penal interest to be deemed admissible pursuant to Evidence Code section 1230. Harris not only put himself at the scene of the crimes, he described his specific role in the offenses, making it clear he was there to assist the other defendants. He also clearly manifested understanding of the gravity of the group's conduct when he had the others leave the SUV before returning to Avalon Gardens. Harris's statements disserved his penal interest in a manner indistinguishable from the statements considered in *Gordon*, *Wilson* and *Greenberger*. As in those cases, Harris's inculpatory statements about himself were inextricably intertwined with statements that placed more responsibility on the nondeclarant defendants and were, therefore, nonetheless admissible. (See *People v Samuels* (2005) 36 Cal.4th 96, 121.)

Nevertheless, while statements that are specifically a disservice to the declarant may be admitted, the statements must also be made under circumstances that demonstrate they are trustworthy. (See *People v. Duarte* (2000) 24 Cal.4th 603, 612-614 (*Duarte*); see also *Greenberger*, *supra*, 58 Cal.App.4th at p. 337.) In determining trustworthiness, "[t]he trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry." (*Greenberger*, *supra*, 58 Cal.App.4th at p. 334.) "[T]he least

reliable circumstance is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others. 'Once partners in crime recognize that the "jig is up," they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.' [Citation.] However, the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." (*Id.* at p. 335.) Here, of course, Harris unarguably spoke in a noncoercive setting.

2. *Combs's statements to Bowling*

Combs admitted that he and McNeil had approached Harris about going to look for Keiun, thus confirming this portion of Harris's account. Combs also stated that he and McNeil exited the SUV when they saw the Monte Carlo, and that he recognized one of the occupants as Bernardez. But Combs claimed that he was on a different street when he heard shots fired between McNeil and the occupants of the Monte Carlo, and that the individuals in the Monte Carlo were responsible for killing McNeil. According to Combs, the Monte Carlo then drove past McNeil and headed toward Combs. Combs fired at the Monte Carlo and immediately re-entered the SUV, fleeing the location with Harris and Allen. Despite his attempt to minimize his role, Combs still confirmed that he and McNeil were armed and had planned to confront Keiun, that he got out of the SUV with McNeil after recognizing one of the Monte Carlo's occupants, that McNeil exchanged gunfire with the Monte Carlo's occupants,

and that he subsequently fired at the Monte Carlo.[12] Although Combs said he shot at the Monte Carlo in self-defense, Combs's statements were nonetheless sufficiently disserving of his penal interest that "a reasonable person in [his] position would not have made them unless he believed them to be true." (*Greenberger*, *supra*, 58 Cal.App.4th at p. 337.)

3. *Allen's statements to Pleasant*

When Pleasant asked Allen and Harris about McNeil's whereabouts after the learning about the shooting, Allen said, " 'That's on Avalon. That's T.F. [McNeil] laid out over there. It was me, him, Box [Harris], and Buddha [Combs].' " Although sparse, Allen's vouching statement did place the other defendants and himself at the scene of the crime and "specifically disserv[ed]" the declarant's penal interest. (*Greenberger*, *supra*, 58 Cal.App.4th at p. 335; *Duarte*, *supra*, 24 Cal.4th at p. 612; *Leach*, *supra*, 15 Cal.3d at p. 441.) The statement was also made in noncoercive setting that fostered uninhibited disclosures. (See *Greenberger*, *supra*, 58

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[12] We note that when attempting to exculpate himself, Combs incriminated the victims rather than a codefendant. Thus, this was not a case wherein one defendant admitted to some culpability in order to shift the bulk of the blame to another. We agree with the trial court's determination that the circumstances surrounding Combs's statement indicate it "was sufficiently reliable to warrant admission despite its hearsay character." (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) The trial court did not err in ruling the evidence was admissible under Evidence Code section 1230.

Cal.App.4th at p. 335.) Accordingly, the trial court did not abuse its discretion in admitting the statement.

4. *Harris's statements to Pleasant*

Pleasant later saw Combs, Harris and Allen at a service for McNeil. During the event, she overheard Harris describing the shooting. Harris acknowledged that as he drove away, he looked in his rearview mirror, saw McNeil's body drop, and kept driving. This admission corroborates the nearly identical admission Harris made to Bowling—that he saw McNeil lying motionless on the ground as he drove away from the crime scene—and was once again made in a noncoercive setting. The trial court did not abuse its discretion in admitting the statement.

II. Gang expert testimony

Combs, Harris and Allen challenge the admission of the gang expert's opinion that McNeil and Keiun had a personal rivalry, and that the AGC and 87 Gangster Crips had a general rivalry, contending that it constituted case-specific hearsay in violation of *Sanchez*, *supra*, 63 Cal.4th at pages 670–671. We disagree.

A. TRIAL COURT PROCEEDINGS

At a pretrial hearing, the prosecution's gang expert, Officer Jesse Pineda, testified that he knew of the specific rivalry between McNeil and Keiun. Officer Pineda said he learned of the dispute by speaking with officers investigating Kirk Kirby's homicide. Officer Pineda opined that the rivalry stemmed from McNeil's belief that Keiun had caused Kirby's death. Officer Pineda's opinion derived from the

investigating detective's informing him that McNeil was in the car with Kirby when Kirby was shot and killed.

The prosecutor also requested Officer Pineda to review the transcript of Bowling's and Pleasant's testimony in order to further support his opinion that there was a personal rivalry between McNeil and Keiun. The court allowed Officer Pineda to do so given that Bowling and Pleasant were already subject to cross-examination. In addition to allowing Officer Pineda to rely upon the transcripts when opining about the McNeil and Keiun rivalry, the court later allowed Officer Pineda to rely also upon his discussions with other officers. Additionally, Officer Pineda testified about the general rivalry between the AGC and 87 Gangster Crips—a rivalry he learned about through police-documented shootings and homicides between the gangs as well as his own personal involvement with some of the investigations and arrests made in those cases.

With respect to the specific rivalry between McNeil and Keiun, Officer Pineda testified during the prosecutor's direct examination at trial as follows:

"Q. Now, you reviewed some transcripts of Ms. Waldean Bowling and also Ms. O'Quana Pleasant; is that correct?

"A. That's correct.

"Q. Are you aware of a rivalry between Mr. Keiun Harris and Londale McNeil?

"[Counsel for Harris]: Objection. Foundation. Hearsay.

"The Court: Overruled.

"[Counsel for Harris]: May we approach, your Honor?

"The Court: Nope.

"By [the prosecutor]:

"Q. Are you aware?

"A. Yes.

"Q. And did you believe there was a rivalry between these two individuals on or prior to October the 25th, 2014?

"A. Yes.

"[Counsel for Harris]: Objection. Foundation. Hearsay.

"[Counsel for Combs]: Join.

"The Court: That's a continuing objection. Overruled.

"By [the prosecutor]:

"Q. I'm sorry. What was the opinion?

"A. Yes.

"Q. That there was a rivalry between these two?

"A. Yes, that there was a rivalry."

The prosecutor continued this line of questioning with Officer Pineda the next day:

"Q. Yesterday you gave an opinion about the rivalry between Londale McNeil also known as T.F. and Keiun Harris and you gave an opinion that there was a rivalry; is that correct?

"A. That's correct.

[¶] . . . [¶]

"Q. Were there any other factors that contributed to that opinion besides those two transcripts?

"A. As far as the gang rivalry? Is that what we're talking about?

"Q. The rivalry between Mr. McNeil and Mr. Harris, did you use other resources besides those transcripts to assist you in your opinion?

"A. Yes.

"Q. And were those other discussions with other officers as well?

"A. Yes, they were.

"Q. And so that also helped assist you; is that correct?

"A. That's correct.

"Q. And your opinion is still that there was a rivalry between Mr. McNeil otherwise known as T.F. and [Keiun], correct?

"A. Correct.

With respect to the general rivalry between the AGC and 87 Gangster Crips, Officer Pineda testified during the prosecutor's direct examination as follows:

"Q. Now, yesterday I asked you—you said there was a rivalry also between 87's and Avalon Gardens; is that correct?

A. That's correct.

Q. And we saw a bunch of photos showing the rivalry on part of the Avalons with 87's. Is that fair to say?

"A. Yes.

"Q. This rivalry—when did this rivalry begin? In what year?

"A. In 2003.

"Q. So your opinion is that since 2003 there has been a rivalry between Avalon Gardens and 87's; is that correct?

"A. That's correct.

"Q. And what's the basis of that opinion? Without going into the details of the reports, what's the basis of the opinion?

"A. It's—

"[Counsel for Allen]: I will object. Asked and answered.

"[Counsel for Combs]: Join.

"The Court: Overruled.

"The Witness: From speaking with other officers and also reading gang history books."

B. APPLICABLE LAW

In *Sanchez*, *supra*, 63 Cal.4th 665, the defendant was charged with drug and firearm offenses and active participation in the Delhi street gang, along with a section 186.22 gang enhancement. At trial, a gang expert relied upon a "STEP notice," police documents, and an FI card as the basis for his expert opinion.[13] Those documents

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[13] A STEP notice provides the recipient information regarding potential penalties for gang-related criminal activity. The issuing officer also records the date, time, statements made at the time of the interaction, and

indicated Sanchez associated with, and had been repeatedly contacted by police while in the presence of, Delhi gang members. (*Id.* at pp. 671–673.) The expert had never met Sanchez and had not been present when the STEP notice was issued or during any of Sanchez's other police contacts. His knowledge derived solely from the police reports and FI card. Based on the information in the STEP notice, the police documents, and the FI cards, and the circumstances of the offense at issue, the expert opined that Sanchez was a member of the Delhi gang and the charged crimes benefitted the gang. (*Id.* at p. 673.)

In *Sanchez*, *supra*, 63 Cal.4th 665*,* our Supreme Court held that "the case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay under California law. They were recited by the expert, who presented them as true statements of fact, without the requisite independent proof. Some of those hearsay statements were also testimonial and therefore should have been excluded under *Crawford*[*v. Washington* (2004) 541 U.S. 36]. The error was not harmless beyond a reasonable doubt."[14] (*Sanchez*, at pp. 670–671.)

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identifying information. (*Sanchez*, *supra*, 63 Cal.4th at p. 672.)

[14] In *Crawford v. Washington*, *supra*, 541 U.S. 36 (*Crawford*), the United States Supreme Court held that the Sixth Amendment's confrontation clause generally bars admission at trial of a testimonial out-of-court statement offered for its truth against a criminal defendant, unless the

Accordingly, the court reversed the true findings on the street gang enhancements. (*Id.* at p. 671.)

Sanchez, *supra*, 63 Cal.4th 665 distinguished between an expert's general knowledge and "case-specific facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez,* at p. 676.) Over time, the distinction between background information and case-specific hearsay had become blurred, the court noted, leading to the rule that an expert could explain the "matter" upon which he or she relied, even if that matter was hearsay. (*Id.* at pp. 678–679.) California law allowed such hearsay "basis" testimony if a limiting instruction was given; in cases where an instruction was inadequate, the evidence could be excluded under Evidence Code section 352. (*Id.* at p. 679.)

However, *Sanchez*, *supra*, 63 Cal.4th 665 concluded "this paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion *must* be considered for its truth by the jury." (*Id.* at p. 679.) "Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth. If an expert testifies

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maker of the statement is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Id.* at p. 68.)

to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception." (*Id.* at p. 684.) Alternatively, the court held, "the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Ibid.*)

However, *Sanchez*, *supra*, 63 Cal.4th 665 made clear that its holding did not do away with all gang expert testimony. "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so," that is, he or she may "relate generally" the "kind and source of the 'matter' upon which his opinion rests." (*Id.* at pp. 685–686.) "Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception." (*Id.* at p. 685.) "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.)

C. MERITS

Combs, Harris and Allen contend that Officer Pineda's expert opinion violated the hearsay rule as well as the confrontation clause under *Sanchez*, *supra*, 63 Cal.4th 665. To determine whether admission of Officer Pineda's testimony constituted prejudicial error, we use the two-step analysis required by *Sanchez*. "The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford*, *supra*, 541 U.S. 36 limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Sanchez*, at p. 680.) An improperly admitted hearsay statement ordinarily constitutes statutory error under the Evidence Code. (*Id.* at p. 685.) Where the hearsay is testimonial and is admitted in violation of *Crawford*, the error is one of federal constitutional magnitude. (*Ibid.*)

With respect to the specific rivalry between McNeil and Keiun, Officer Pineda's opinion was independently proven by competent evidence through the testimony of Bowling and Pleasant. (See *Sanchez*, *supra*, 63 Cal.4th at p. 686.) When a case-specific fact has been independently proven by competent evidence, an expert is permitted to reiterate that fact in support of his opinions, even if the expert has no

personal knowledge of it. (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 403, 407; *People v. Dean* (2009) 174 Cal.App.4th 186, 193.) Here, Bowling testified that her son McNeil had been struck by a bullet in the hand while his best friend and fellow gang member Kirby was killed during a shooting. Believing Keiun was responsible for Kirby's death, McNeil, Combs, Harris and Allen drove together to Roscoe's to find Keiun and retaliate against him. Similarly, Pleasant described the rivalry between McNeil and Keiun, testifying that McNeil told her about the rivalry and how he felt Keiun was trying to kill him.

With respect to the general rivalry between the AGC and 87 Gangster Crips, we note that facts are only case specific when they relate "to the particular events and participants alleged to have been involved in the case being tried," which in *Sanchez*, *supra*, 63 Cal.4th 665 were the defendant's personal contacts with police reflected in the hearsay police reports, STEP notice, and FI card. (*Id.* at p. 676.) The California Supreme Court made clear that an expert may still rely on general "background testimony about general gang behavior or descriptions of the . . . gang's conduct and its territory," which is relevant to the "gang's history and general operations." (*Id.* at p. 698.) This standard plainly would include the general background testimony Officer Pineda gave about the general rivalry between the two gangs. By permitting this type of background testimony, the court recognized it may technically be based on hearsay, but an expert may

nonetheless rely on it and convey it to the jury in general terms. (*Id.* at p. 685.) Thus, after *Sanchez*, Officer Pineda properly testified to noncase-specific general background information about the AGC and its rivalry with the 87 Gangster Crips, even if it was based on hearsay sources like gang members and gang officers.

We also conclude that Officer Pineda's testimony did not violate the confrontation clause because the relied-upon hearsay was not testimonial under *Crawford*, *supra*, 541 U.S. 36. "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez*, *supra*, 63 Cal.4th at p. 689.) Unlike the STEP notice, police reports, and FI card in *Sanchez*, nothing in the record suggests Officer Pineda obtained any of this information primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. (See *ibid.*) Officer Pineda conveyed no specific statements by anyone with whom he spoke, and reached only general conclusions. "Day in and day out such information would be useful to the police as part of their general community policing responsibilities quite separate from any use in some unspecified criminal

prosecution." (*People v. Valadez* (2013) 220 Cal.App.4th 16, 36 (*Valdez*).)[15]

With respect to the specific rivalry between McNeil and Keiun, the statements made to Bowling and Pleasant were admissible as party admissions (Evid. Code, § 1220) and thus did not violate the confrontation clause. (See, e.g., *People v. Jennings* (2010) 50 Cal.4th 616, 661–662 [a defendant's own admissions do not implicate the confrontation clause].) Furthermore, the statements did not implicate the confrontation clause given that Bowling and Pleasant testified and were subject to cross-examination. Combs notes that during the pretrial hearing, Officer Pineda testified he learned of the McNeil-Keiun rivalry after speaking with officers investigating Kirk Kirby's homicide. The record does not reveal how the officers learned of this rivalry and thus we do not know if they spoke to other gang members, friends, neighbors, other law enforcement personnel, or the defendants themselves.

Furthermore, information obtained from interactions between a gang expert and gang members or other officers does not necessarily constitute testimonial hearsay because "such information would be useful to the police as part of their general community policing responsibilities quite separate from any use in some unspecified criminal prosecution." (*People v. Valadez*, *supra*, 220 Cal.App.4th at

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[15] *Valdez* has retained its validity after *Sanchez*. (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 585 (*Ochoa*).)

p. 36.) On appeal, we cannot, and will not, assume that the information relayed by Officer Pineda was testimonial hearsay. (See *Ochoa, supra,* 7 Cal.App.5th at p. 585.)

Combs also argues that the testimony by Bowling and Pleasant was unreliable and that Officer Pineda improperly vouched for their credibility by basing part of his opinion on their testimony. However, pursuant to CALCRIM No. 332, the court later instructed the jury, "You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." Thus, if the jury disbelieved the testimony that Officer Pineda relied upon, which required evaluating the credibility of Bowling and Pleasant, then the jury was free to disregard Officer Pineda's opinion about the McNeil-Keiun rivalry. Furthermore, no vouching occurred here. Officer Pineda's opinion of the rivalry was based the officer's review of Bowling's and Pleasant's testimony—both of whom were subject to cross-examination—as well as his discussions with other officers. Officer Pineda was allowed to rely on Bowling and Pleasant just as he was allowed to rely on information he gathered from *any* individual, gang member, or officer when forming a relevant opinion.[16]

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[16] Officer Pineda also never testified that Bowling or Pleasant were telling the truth or that the jury should find them credible. Thus, the federal and out-of-state authority Combs cites in support of his argument in this regard are inapposite.

III. Additional testimony from Bowling

Combs claims additional testimony from Bowling that what other people told her about her son's killing was "far worse" than what Combs told her about the circumstances of McNeil's death constituted inadmissible hearsay. Allen joins this contention. We disagree.

A. TRIAL COURT PROCEEDINGS

During a pretrial discussion about admitting statements made by Combs, Harris and Allen as declarations against interest, the parties discussed admonishing the witnesses that they should not testify about what they heard from other sources. The prosecutor noted he had warned Bowling not to testify about statements made to her by other people. Just before Bowling's cross-examination, the court told Bowling (outside the presence of the jury) that it had listened to her recorded police interview, including portions where she discussed " 'the word on the street' " or what " 'somebody told [her].' "

When the jury returned, the court instructed them: "All right. Ladies and gentlemen, I want you to listen closely to what I'm going to have to say to you. During cross-examination some questions by the defense attorneys to this witness about what others may have said to her are not to prove that those events actually happened but if any of those statements affected any of her testimony here in court. Okay. So you're going to hear questions about didn't someone say this, that, or the other or didn't somebody tell you this. And the whole issue is that not what those other

persons actually said actually happened but how it may have affected what she's testifying about what these defendants said. It's called the effect on the listener."

When cross-examined by Combs's attorney, Bowling testified that she had lived in Avalon Gardens for about thirty years; she knew that many AGC gang members hung out there; she had the conversation with Harris about two weeks after her son's death and the conversation with Combs sometime in January; she became frustrated because no one talked to her about her son's murder before Harris spoke to her; she had become depressed over her son's death; she did not go to police for a formal interview until February 2015; and she had some opinion about what might have happened to her son before going to the police about it. When cross-examined by Harris's attorney, Bowling acknowledged she had spoken with the police before speaking with Harris and had formed an opinion based on her conversations with the police.[17] When cross-examined by Allen's attorney, Bowling added that by the time she was formally interviewed by detectives in February 2015, she

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[17] Bowling also insisted that Harris had used the word "retaliate" when describing their plan to go to Roscoe's to find Keiun. Counsel tried to impeach Bowling with the transcript from the preliminary hearing wherein Bowling testified Harris did not tell her what precisely they were going to do to Keiun when they found him. Bowling said she did not remember this particular portion of her preliminary hearing testimony and confirmed that Harris said they were going to go to Roscoe's.

wanted "some closure about what happened" and wanted "someone paying for it."

On redirect, Bowling said had not talked to the police about the case before her formal interview with detectives. When she went to the crime scene after her son's death, she spoke to a police officer only about seeing her son's body. On re-cross, Bowling agreed that it was hard to keep track of where she got all her information about her son's death. Bowling also confirmed that at the end of her interview with detectives, she told them she wanted "closure."

On further redirect, Bowling and the prosecutor had the following colloquy:

"Q. You were also asked some questions about your thoughts and your opinions. I think it was your theories about the case; is that correct?

"A. Yes.

"Q. Do your theories and opinions of the case go beyond what [Combs] told you?

"A. Yes.

"Q. So your theories and your opinion and what you heard from other people is more than what just [Combs] told you; is that correct?

"A. Yes.

"Q. In fact, it's worse than what [Combs] told you; isn't that correct?

"A. Yes.

"[Counsel for Allen]: Objection.

"[Counsel for Combs]: Vague.

"The Court: I'll sustain that."

The prosecutor then asked Bowling, "So the theory that you heard and what you've been told by other people connect [Combs] more to the crime?" Although the defense objected, the court reminded counsel: "You opened this door. You went into this." The court then admonished the jury: "When he is talking right now about statements that she heard from other sources, people in the neighborhood, and then when he says theories—well, statements that you heard are actually worse than what [Combs] told you and she says yes, that's not being offered for the truth that whatever she heard actually did happen. It's being offered for the purpose of how it affected her mental state and her testimony here in court. Not that whatever she heard actually was worse." Bowling subsequently confirmed that what she heard on the street was "much worse" than what Harris or Combs told her because neither Harris nor Combs actually admitted they were responsible for her son's murder.

B. APPLICABLE LAW

As discussed above, hearsay evidence "is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Except as provided by law, it is inadmissible. (*Id.*, subd. (b).) To that end, "[a]n out-of-court statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is

relevant to an issue in dispute." (*People v. Turner* (1994) 8 Cal.4th 137, 189.) One such nonhearsay purpose is to show the statement "imparted certain information to the hearer, and . . . the hearer, believing such information to be true, acted in conformity with such belief." (*People v. Montes* (2014) 58 Cal.4th 809, 863.) Such evidence is not hearsay, since the hearer's reaction to the statement, not the truth of the matter asserted, is the relevant fact sought to be proved. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162; *People v. Thornton* (2007) 41 Cal.4th 391, 447.)

A trial court's ruling on the admissibility of evidence, including its determination of issues concerning the hearsay rule, is reviewed for abuse of discretion. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.) "Specifically, we will not disturb the trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*Ibid.*) Appellate courts are also bound by the rule that "[i]f a judgment rests on admissible evidence it will not be reversed because the trial court admitted that evidence upon a different theory, a mistaken theory, or one not raised below." (*People v. Brown* (2004) 33 Cal.4th 892, 901.)

C. MERITS

Bowling's testimony that what she heard from other people about Combs was "much worse" than what Combs told her was not offered for its truth but rather for the nonhearsay purpose of establishing its effect upon Bowling.

Thus, the trial court did not abuse its discretion when it admitted this portion of Bowling's testimony. Defense counsel had repeatedly questioned Bowling about the accuracy and reliability of her testimony, particularly whether she had confused rumors or gossip she heard from other sources with what Harris or Combs had actually told her. The statement about hearing "much worse" things from other people explained Bowling's ability to delineate between the two sources of information. The statement was not offered to prove the truth of the matter asserted—that Harris, Combs and Allen were responsible for McNeil's death or that the rumors they were responsible were in fact true—but rather to counter the argument that Bowling had a bias or personal agenda that impacted her ability to discern fact from fiction.

We do note, however, that the prosecutor could have asked the question in a manner which better ameliorated the concerns expressed by Combs and Allen on appeal. Specifically, the prosecutor could have elicited testimony demonstrating that Bowling was able to distinguish between her sources of information without detailing *how* she was able to do so or the relative horror of the details. Nevertheless, "[w]hen the question on appeal is whether the trial court has abused its discretion; the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge." (*People v. Stewart* (1985) 171 Cal.App.3d 59,

65.) A trial court abuses its discretion only when its challenged decision "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) We cannot say that the trial court's admission of this portion of Bowling's testimony meets that threshold here.[18]

IV. Photo of Combs

Combs contends the trial court abused its discretion when it admitted a photo showing him with the handle of a firearm in each front pocket. Allen joins this contention. We disagree.

A. TRIAL COURT PROCEEDINGS

At trial, the court admitted a photo that Combs posted to his Instagram account on February 6, 2015. The photo

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[18] We also note that the court immediately gave a limiting instruction following this portion of Bowling's testimony, telling the jury not to consider the testimony for its truth but only to show its effect on Bowling's ability to accurately recount the defendants' statements. The court subsequently instructed the jury pursuant to CALCRIM No. 226, which provides that, when judging the credibility of a witness, the jury may consider whether the witness's testimony was "influenced by bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case [was] decided." Lastly, the court instructed the jury that evidence admitted for a limited purpose may be considered only for that purpose and nothing else. We presume that the jury understood and followed these instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

showed Combs leaning against a wall with his arms crossed and with two handguns, one gun in each of his front pockets with the handles visible. In text that accompanied the Instagram post, Combs described the guns to a user: "Man it's a part of my out fit." The prosecution's firearm expert testified that the handguns appeared to be semiautomatic firearms that were consistent with the .40-caliber ammunition recovered at the crime scene.

B. APPLICABLE LAW

In order to be relevant and therefore admissible, evidence must tend to prove or disprove a "disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) " 'The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.' " (See *People v. Harris* (2005) 37 Cal.4th 310, 337.) When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers "substantially outweigh" probative value, the objection must be overruled. (*People v. Babbitt* (1988) 45 Cal.3d 660, 688.) On appeal, the ruling is reviewed for abuse of discretion. (*People v. Ashmus* (1991) 54 Cal.3d 932, 973, overruled on another ground by *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

Prejudice under Evidence Code section 352 "is not so sweeping as to include any evidence the opponent finds

inconvenient." (*People v. Doolin* (2009) 45 Cal.4th 390, 438 (*Doolin*).) "Evidence is not prejudicial . . . merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of undue prejudice. Unless the dangers of undue prejudice, confusion, or time consumption 'substantially outweigh' the probative value of relevant evidence, a section 352 objection should fail."" (*Id.* at pp. 438–439.)

Prejudice under the statute " ' " 'applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' " ' " " (*Doolin, supra,* 45 Cal.4th at p. 439.) " ' " 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors.' " ' " (*Ibid.*) " 'In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' " (*Ibid.*)

C. MERITS

In *People v. Riser* (1956) 47 Cal.2d 566, overruled on another ground in *People v. Chapman* (1959) 52 Cal.2d 95,

98, the California Supreme Court held: "When the prosecution relies . . . on a specific type of weapon, it is error to admit evidence that other weapons were found in [the defendant's] possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*Id.* at p. 577.) On the other hand, "[w]hen weapons are otherwise relevant to the crime's commission, but are not the actual murder weapons, they may still be admissible." (*People v. Cox* (2003) 30 Cal.4th 916, 956, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

For example, in *People v. Carpenter* (1999) 21 Cal.4th 1016, 1052, the Supreme Court determined there was no abuse of discretion where the trial court allowed a witness to testify the defendant had told her he kept a gun in his van. "Although the witnesses did not establish the gun necessarily was the murder weapon, it might have been. . . . The evidence was thus relevant and admissible as circumstantial evidence that [the defendant] committed the charged offenses." (*Ibid.*; see *People v. Neely* (1993) 6 Cal.4th 877, 896.) Thus, in order to admit evidence of a defendant's possession of a weapon, some degree of connection between the weapon and the crime must be shown before the evidence can be deemed admissible, although this determination will turn on the facts of the individual case. (See *People v. Homick* (2012) 55 Cal.4th 816, 877, fn. 36.)

Here, the photo of Combs was relevant and not unduly prejudicial. Evidence showing Combs in possession of

firearms of the same caliber ostensibly used during the shooting necessarily has more than minimal probative value—it has potential corroborative value of the forensic evidence gathered by police and the eyewitness testimony. There was also little risk that the photo would inflame the emotions of the jury, motivating them to use the evidence to reward or punish one side because of the jurors' emotional reactions rather than logically evaluate the point upon which it is relevant.[19] Although the photo showed that Combs had access to guns and glorified being armed, it was much less inflammatory than the evidence demonstrating he killed a fellow gang member during a mission to kill a rival. Combs admitted he was armed at the scene. Thus, the photo "did not disclose to the jury any information that was not presented in detail through the testimony of witnesses," and was "no more inflammatory than the graphic testimony provided by a number of the prosecution's witnesses." (*People v. Heard* (2003) 31 Cal.4th 946, 978.)[20]

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[19] The jury was also instructed that it must not be influenced by bias, sympathy, prejudice, or public opinion.

[20] Although Combs also contends the photo was unnecessary because it was duplicative of Bowling's testimony, photographs do not have to be excluded simply because the prosecution introduced testimony on the same subject matter. (*People v. Crittenden* (1994) 9 Cal.4th 83, 134–135.)

V. Improper vouching

Combs contends that the prosecutor improperly vouched for a police officer's credibility during closing argument. Harris and Allen join this contention. Although we agree that the prosecutor engaged in improper vouching, we do not believe it rose to the level of reversible error.

A. TRIAL COURT PROCEEDINGS

Detective Christopher Valento testified that other officers prepared FI cards after interviewing witnesses and turned the cards over to him. The detective then decided whether follow-up interviews were necessary. However, Detective Valento admitted that he had failed to conduct a follow-up interview with one of the witnesses. The detective confirmed that the murder book he prepared in this case had been turned over to the defense during discovery. Detective Valento also confirmed that an FI card had been prepared for witness P.S. The detective admitted he failed to interview witness Mario Guillen during the investigation.

When questioned further about FI cards, Detective Valento said he needed to check to see what he had in his possession during a court recess. Following a brief recess, the detective located FI cards in his possession, including P.S.'s. The prosecution acknowledged that although it had turned over police reports during discovery, it had not provided the FI cards to the defense. The court ordered that the FI cards be turned over to the defense immediately.

Officer Hector Beas subsequently testified he had interviewed P.S. as part of the investigation. According to

Officer Beas, P.S. was looking in an eastward direction when she spoke to him and never stated what direction the shooter was firing. However, Officer Beas acknowledged that in the FI card documenting P.S.'s interview, he wrote that "the person exited and shot eastbound." Officer Beas clarified that P.S. "was looking in an easterly direction and saying that's where the shooting happened. I made the assumption that she was saying that the shots came in an easterly direction." Officer Beas added that his task was to briefly summarize P.S.'s statement and leave it to the detectives to follow up with a more thorough interview.

Officer Beas said he had discussed the FI card with Detective Valento both the day before and the day of his testimony. Officer Beas also confirmed that the prosecutor had been present during both meetings with Detective Valento and that neither the detective nor the prosecutor told Officer Beas "to change anything in terms of [his] observations in this case."

The trial court subsequently instructed the jury pursuant to CALRIM No. 306 on the untimely disclosure of evidence.[21] During closing argument, Harris's attorney

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[21] The court instructed the jury as follows: "Both the People and the defense must disclose their evidence to the other side before trial within time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the People failed to disclose a field identification card of [P.S.] within the legal time period. In evaluating the weight and

criticized the prosecutor for belatedly turning over P.S.'s FI card to the defense, noting that the "only evidence they really knew somebody shooting eastbound they don't turn over to the defense."

In his rebuttal argument, the prosecutor responded as follows: "The F.I. card. F.I. cards generally have personal information. F.I. card was not given over. That's my fault at the end of the day. The—but what's interesting is about how you put stuff on the F.I. card. He said shooting eastward. Eastbound. Well, we know that [P.S.] was in a—doesn't know north, south, east, west. That much is clear. She actually told you that in her testimony. The officer assumed. He made a mistake. But this is the other thing that I want to address. They're saying we influenced his testimony. And here's the thing. The reason why it's 'we' is because I was present with the officer for both dates. So I would have had to be implicated in this as well. This is my bar card. Right there. That's my number . . . . The back of my bar card is an ethics hotline. You want to jot this number down because you think I somehow acted unethically by having an officer change his testimony, in other words, having an officer commit perjury, the phone number for the ethics hotline of the California Bar Association is 1 (800) 238-4427. Because if I did that, you should report me."

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significance of that evidence, you may consider the effect, if any, of that late disclosure."

Harris's attorney objected on the ground that the prosecutor was testifying. Allen's attorney added, "And misstates the argument, too." The prosecutor countered, "I was present. The officer said I was present. So that means I had something to do with this as well." The court stated, "[The prosecutor] personally can't vouch for the credibility of the officer. [¶] Let's just move on."

B. APPLICABLE LAW

"A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1202 (*Cole*).) The crucial issue "is not the good faith *vel non* of the prosecutor, but the potential injury to the defendant." (*People v. Clair* (1992) 2 Cal.4th 629, 661.) We review the prosecutor's remarks to determine whether there is a reasonable likelihood that the jury misconstrued or misapplied them. (*Id.* at p. 663.) Also, we do not view the prosecutor's remarks

in isolation but rather "in the context of the argument as a whole." (*Cole*, *supra*, 33 Cal.4th at p. 1203.)[22]

C. MERITS

With respect to vouching, "[a] 'prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of [his or] her office behind a witness by offering the impression that [he or] she has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," [his or] her comments cannot be characterized as improper vouching.' [Citations.] Misconduct arises only if, in arguing the veracity of a witness, the prosecutor implies [he or] she has evidence about which the jury is unaware." (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 561.)

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[22] We do not agree with the People that the defendants forfeited their claim by lodging an incorrect objection. The trial court clearly understood, and expressly stated, that the prosecutor's alleged vouching was the trial error at issue. Because we reach the merits of this claim, we need not address Combs' contention that counsel was ineffective for raising an incorrect objection.

Here, although the prosecutor vouched for both his own credibility as well as that of Officer Beas, he did not cite facts that were inaccurate, outside the record, or known to the prosecutor but not the jury. Responding to the implication that Detective Valento and the prosecutor had improperly influenced Officer Beas's testimony, the prosecutor discussed evidence already before the jury—namely, that the prosecutor was present during the meeting and no one told Officer Beas what to say—and said that if the jury believed the defense, he should be reported to the state bar. However, the prosecutor's suggestion that he should be reported for any wrongdoing addressed the defense's personal attack against the prosecutor as well as the general attack on Officer Beas's credibility. Thus, the prosecutor used his personal reputation and the prestige of his profession to vouch for the officer's credibility as well as his own. This was plainly unacceptable and improper conduct. Our finding that the conduct does not warrant reversal of any defendant's conviction should not be viewed as condoning the deputy district attorney's conduct.

Nevertheless, given that the prosecutor did not cite facts that were inaccurate, outside the record, or unknown to the jury, and was admonished through the court's late discovery instruction, we cannot say that the prosecutor's comments during closing argument " 'infecte[d] the trial with such unfairness as to make the conviction a denial of due process' " or "involve[d] 'the use of deceptive or reprehensible

methods to attempt to persuade either the court or the jury.' " (See *Cole*, *supra*, 33 Cal.4th at p. 1202.)

VI. Imperfect self-defense

Combs contends the trial court erred in failing to instruct sua sponte on the lesser included offenses of voluntary manslaughter and attempted voluntary manslaughter based on imperfect self-defense. Harris and Allen join this contention. We disagree.

A killing committed because of an unreasonable belief in the need for self-defense is voluntary manslaughter, not murder. Unreasonable self-defense, also called imperfect self-defense, "obviates malice because that most culpable of mental states 'cannot coexist' with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand." (*People v. Rios* (2000) 23 Cal.4th 450, 461.) However, imperfect self-defense is a " 'narrow' " doctrine that requires " 'without exception that the defendant . . . had an *actual* belief in the need for self-defense.' " (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

Although a trial court must instruct the jury sua sponte on all lesser included offenses if there is substantial evidence from which a jury can reasonably conclude the defendant committed the lesser, uncharged offense, but not the greater, (see *People v. Whalen* (2013) 56 Cal.4th 1, 68, disapproved on another ground by *People v. Romero and Self* (2015) 62 Cal.4th 1, 44), when the evidence is minimal and insubstantial, there is no duty to so instruct. (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5.)

Here, no evidence supported an imperfect self-defense instruction. Bowling testified that Harris had said that McNeil and Combs got out of the SUV and fired at the Monte Carlo. Harris sped away but came back after the shooting to pick up Combs. When Combs entered the SUV, Harris saw McNeil lying motionless on the ground. Combs then told Harris that Termite (Bernardez) was shooting at them. If the jury credited Combs's account, then it could *only* have found Combs acted in perfect self-defense and nothing less—it would not have been objectively unreasonable for Combs to fire when faced with an imminent threat from a shooter who had fired or was about to fire at him. Thus, the trial court instructed the jury accordingly. Combs's attorney admitted as much at sentencing, when she told the trial court that the defense theory had been perfect self-defense and she was unsure she "could have contemplated requesting imperfect self-defense" based on the evidence. In short, the evidence supported convictions for either murder and attempted murder or acquittal based on self-defense.[23] (See *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1232.) Where, as

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[23] According to Combs, the evidence suggested he might need to fire "preemptively in what he genuinely considered to be self-defense, even if this reaction was objectively unreasonable from the standpoint of the reasonable person" who would have waited to make sure Bernardez fired first. But Combs did not testify, nor does the record before this court show, that he perceived an immediate risk of death or great bodily injury when he fired at the Monte Carlo.

here, the defendant's version of events, if believed, establishes actual self-defense, while the prosecution's version, if believed, negates both actual and imperfect self-defense, the trial court is not required to give the imperfect self-defense instruction.[24] (See *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 834.)

VII. Sufficiency of the evidence

A. AS TO COUNT 1

Combs challenges the sufficiency of the evidence supporting his conspiracy conviction because no evidence corroborated Harris's statements to Bowling. Harris and Allen join this contention. Harris also contends that, apart from his own admissions, the rest of the evidence regarding the conspiracy was insufficient because it did not constitute adequate corroboration. We disagree with both claims.

Allen contends that although the jury could reasonably infer Combs and Harris agreed to kill Keiun, there was no evidence that he participated in any agreement or acted in a way to infer he shared their intent. Thus, he could not have been convicted as a coconspirator or as an aider and abettor to their crimes. Allen was convicted only on counts 1 and 2. We agree that there was not sufficient evidence supporting those convictions.

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[24] Nothing in the record demonstrates that Harris or Allen had a different mind state than Combs. Thus, neither was entitled to an imperfect self-defense instruction.

1. *Applicable law*

A challenge to the sufficiency of the evidence to support a judgment implicates the substantial evidence standard of review. We "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." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) We do not determine the facts ourselves, make credibility determinations or resolve evidentiary conflicts. (*People v. Nelson (*2011) 51 Cal.4th 198, 210 (*Nelson*); *People v. Young* (2005) 34 Cal.4th 1149, 1181 (*Young*).) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*Young,* at p. 1181.) Thus, " '[w]e presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*Nelson*, at p. 210.) Moreover, unless the testimony is "physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction." (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.) In short, reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755 (*Redmond*).)

A conspiracy requires two or more persons agreeing to commit a crime, along with the commission of an overt act by at least one of these persons in furtherance of the conspiracy.

(*People v. Swain* (1996) 12 Cal.4th 593, 600.) These elements may be established through circumstantial evidence or may " ' "be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy." ' " (*People v. Herrera* (2000) 83 Cal.App.4th 46, 64.)

Conspirators are "vicariously liable for the unintended acts of coconspirators if such acts are in furtherance of the conspiracy." Coconspirators are liable for any reasonably foreseeable offenses committed by the perpetrator. (*People v. Hardy* (1992) 2 Cal.4th 86, 188.) " '[P]roof of a conspiracy serves to impose criminal liability on all conspirators for the crimes committed in furtherance of the conspiracy. . . . "[W]here several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his [or her] . . . confederates committed in furtherance of the common design for which they combine." ' " (*People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843.) "Evidence is sufficient to prove a conspiracy . . . 'if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135 (*Rodrigues*).) Because conspiracy criminalizes the agreement to commit a crime, it " 'does not require the commission of the substantive offense that is the

object of the conspiracy.' " (*People v. Morante* (1999) 20 Cal.4th 403, 416-417.)

"Aider and abettor liability exists when a person who does not directly commit a crime assists the direct perpetrator by aid or encouragement, with knowledge of the perpetrator's criminal intent and with the intent to help him [or her] carry out the offense." (*People v. Miranda* (2011) 192 Cal.App.4th 398, 407.) Aiding and abetting may be inferred from the defendant's "presence at the scene of the crime, companionship [with the perpetrator] and conduct before and after the offense, including flight." (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294.) No one factor is dispositive; a combination of these circumstances, however, may satisfy the substantial evidence test. (*Miranda*, at p. 407; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094–1095.)

"A person who aids and abets the commission of a criminal offense is considered a principal in the crime. [Citation.] In order for criminal liability to be imposed under an aiding and abetting theory, the person must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' " (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 740.) However, "[m]ere presence at the scene of a crime which does not itself assist its commission or mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (*In re*

Michael T. (1978) 84 Cal.App.3d 907, 911.) Although mere presence at the scene of a crime is not sufficient, alone, knowledge of the criminal purpose need not be obtained long prior to commission of the crime. (*Swanson-Birabent*, at p. 742 ["[A]dvance knowledge is *not* a prerequisite for liability as an aider and abettor"].) " 'Aiding and abetting may be committed "on the spur of the moment," that is, as instantaneously as the criminal act itself.' " (*Ibid.*)

2. *Merits*

Combs challenges the sufficiency of the evidence supporting his conspiracy conviction because, he contends, no evidence corroborated Harris's statements to Bowling. Harris challenges the sufficiency of the evidence supporting his conspiracy conviction because, he contends, apart from his statements to Bowling, the rest of the evidence regarding the conspiracy did not constitute adequate corroboration.

Penal code section 1111 provides in relevant part that: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." However, "testimony" within the meaning of section 1111 means "all oral statements made by an accomplice or coconspirator under oath in a court proceeding *and* all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt

which are *made under suspect circumstances*." (*People v. Jeffery* (1995) 37 Cal.App.4th 209, 218, second italics added.) As our Supreme Court explained in *People v. Sully* (1991) 53 Cal.3d 1195: "The usual problem with accomplice testimony—that it is consciously self-interested and calculated—is not present in an out-of-court statement that is *itself sufficiently reliable* to be allowed into evidence." (*Id.* at p. 1230, italics added; see *People v. Williams* (1997) 16 Cal.4th 635, 682 [coconspirator hearsay statements were not testimony that required corroboration under section 1111].)

We have already determined that Harris's statements were specifically disserving toward his penal interest and fell within the declaration against interest hearsay exception. Furthermore, his statements were not made under suspect circumstances. Therefore, they were sufficiently reliable to require no corroboration. (See *People v. Jeffery*, *supra*, 37 Cal.App.4th at p. 218.) For this reason too, we reject the defendants' related claim that the trial court erred in failing to instruct the jury, pursuant to CALCRIM No. 334, that corroboration of accomplice testimony was required. Thus, Combs's insufficiency claim must fail.

Harris contends that, apart from his statements to Bowling, the rest of the evidence regarding the conspiracy did not constitute adequate corroboration. We have, however, already determined that Harris's out of court statements were not "testimony" within the meaning of section 1111. Accordingly, the statements can also be used

to corroborate all the other evidence presented at trial. Examined together, Harris's statements, along with the other admissions, eyewitness testimony and gang evidence all provided sufficient corroboration.

While sufficient evidence supported Combs's and Harris's conspiracy convictions, the same cannot be said for Allen. According to the People, Allen himself provided incriminating evidence supporting a reasonable inference that his role went beyond just being present with the others. As discussed above, McNeil's cousin, O'Quana Pleasant, spoke to Allen and Harris after the shooting. When she asked them where McNeil was, Allen said, "That's on Avalon. That's T.F. (McNeil) laid out over there. It was me, him, Box (Harris), and Buddha (Combs)." Pleasant knew that McNeil, Combs, Harris and Allen were all members of the AGC and believed Allen since he swore "on Avalon" that he was telling the truth. In other words, Allen simply confirmed he had been present at the scene along with the other men and that it was McNeil who had been killed. As correctly noted by Allen, there were the only two pieces of evidence regarding Allen's actions or words on the day in question—he was in the SUV and he was at the scene. However, no evidence revealed that Allen was present when the conspiracy was formed or when the weapons were obtained. Moreover, there was no direct or circumstantial evidence that Allen performed any kind of functional role that day—as a planner, a lookout or even a cheerleader.

Thus, his attendance and utility were, and remain, unexplained.

The People points to Officer Pineda's testimony, in which explained that each gang member on a mission relies on the others to facilitate the commission of the crimes by serving as lookout, getaway driver, or shooter, and that all gang members going on such a mission would be armed and/or know the others were armed. As noted by Allen, however, to the extent Officer Pineda's opinion meant that *every* gang member in *every* car in *every* gang rivalry crime is actively involved in a division of labor, without a shred of case-specific evidence proving shared intent, it proves far too much.

We agree. Sufficient evidence simply does not support an inference that Allen positively or tacitly came to a mutual understanding to commit a crime. (*Rodrigues*, *supra*, 8 Cal.4th at p. 1135.) Furthermore, neither Allen's mere presence at the scene of the crime nor his failure to prevent a crime establishes, without more, that he aided and abetted the charged offenses. (See *People v. Durham* (1969) 70 Cal.2d 171, 181.) While reversal is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]," (*Redmond*, *supra*, 71 Cal.2d at p. 755), Allen's convictions meet this standard.[25] Because we reverse his convictions

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[25] Allen was convicted of counts 1 and 2 only—conspiracy to commit murder and the murder of McNeil.

based solely on insufficient evidence rather than trial error, the double jeopardy clause bars the prosecution from trying Allen again. (See *People v. Steel* (2004) 34 Cal.4th 535, 544.)

B. AS TO THE GANG ENHANCEMENT

Combs contends the evidence was insufficient to support the jury's finding that the gang enhancements were true.[26] He claims that sufficient evidence did not establish that one of the AGC's primary activities was the commission of one or more of the crimes listed in section 186.22, specifically because Officer Pineda testified that the gang was merely "involved in" certain crimes and did not state the crimes were the gang's chief or principal activities. Allen joins this contention. We disagree.

"The gang enhancement applies to one who commits a felony '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.' (Pen. Code, § 186.22, subd. (b)(1).) 'In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have

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[26] The substantial evidence standard for claims of insufficiency of the evidence applies to special allegations, such as section 186.22 gang enhancements. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period.' " (*Sanchez*, *supra*, 63 Cal.4th at p. 698.) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) Expert testimony may establish the primary activities. (*Ibid.*)

Officer Pineda testified that he had monitored the AGC since 2008. He had extensive experience dealing with AGC gang members and had testified as an expert on AGC at least six times. Officer Pineda was also the main investigator in approximately 20 arrests involving AGC gang members for crimes ranging from narcotics sales, possession of weapons, robbery, burglary, and shootings. The officer specifically identified two AGC gang members who were separately convicted of possession of a firearm by a felon and another gang member who was convicted of murder. When asked, to list some of the "primary activities" of the AGC, Officer Pineda replied: "The Avalons are involved in the sales of narcotics. They are involved in street robberies. They are involved in burglaries. They are involved in shootings, murders, and attempt murders." Officer Pineda stated that this determination was based on his "experience in either personally being the investigator of such crimes or also reading other reports, other crime reports in which

crimes involving Avalon Garden Crip gang members have occurred."

Officer Pineda's testimony was a direct response to the prosecutor's question regarding the "primary activities" of AGC members. Despite Combs's argument to the contrary, the officer's use of the phrase "involved in" does not undermine his determination that the gang's primary activities included drug sales, robberies, burglaries, shootings, and murders. Given Officer Pineda's personal experience investigating the AGC's commission of these crimes—leading to 20 arrests—as well his review of other reports, the officer's testimony sufficiently demonstrated that AGC members "consistently and repeatedly" committed the offenses which the officer opined were the gang's primary activities.

Although Combs cites *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander*) to support his claim, the case is inapposite. In *Alexander,* the prosecution's gang expert testified he knew of past crimes committed by members of the gang, but did not provide any further information as to the specifics of the crimes and did not explain where, when, or how he learned of information concerning those crimes. On cross-examination, he admitted that the majority of cases connected with the gang involved graffiti, which is not one of the enumerated crimes in section 186.22, subdivision (e). (*Id.* at p. 612 & fn. 2.)

The Fourth District of the Court of Appeal held that the testimony lacked foundation and was conclusory, and

could not be considered substantial evidence of the gang's primary activities because it was not " 'reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*Alexander, supra,* 149 Cal.App.4th at p. 614.) The prosecution also offered evidence regarding two past criminal convictions of gang members from two years earlier. (*Id.* at pp. 612–613.) The Fourth District concluded this evidence was also insufficient to establish the gang's primary activities, stating, "[w]ithout more, these two convictions do not provide substantial evidence that gang members had '*consistently and repeatedly* . . . committed criminal activity listed in the gang statute.' " (*Id.* at p. 614.)

Here, Officer Pineda testified that the AGC had committed several of the enumerated crimes listed in section 186.22, subdivision (e) and clearly explained where, when, and how he had learned of the information concerning these crimes. Thus, sufficient evidence supported the gang enhancement here. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.)

C. AS TO THE FIREARM ENHANCEMENT

Combs contends that insufficient evidence supports the section 12022.53 enhancement attached to the conspiracy conviction. Specifically, Combs maintains that the conspiracy had concluded by the time a firearm was discharged. We disagree.

Under section 12022.53, subdivision (b), any person who, in the commission of an enumerated felony personally

uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. Under section 12022.53, subdivision (c), any person who, in the commission of an enumerated felony, personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years. Under section 12022.53, subdivision (d), any person who, in the commission of am enumerated felony, personally and intentionally discharges a firearm and proximately causes great bodily injury or death to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.

Whether a defendant used or discharged a firearm in the commission of a qualifying offense is a question of fact. (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1007.) We review the sufficiency of the evidence to support the enhancement according to accepted rules of appellate review—we view the record in the light most favorable to the prosecution and may not reverse the judgment "if ' "any rational trier of fact could have found the essential elements of the [enhancement] beyond a reasonable doubt." ' " (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057.)

In making his claim, Combs characterizes the shooting as a separate and distinct objective from the conspiracy. Not so. Although the overt acts alleged as part of the conspiracy involved Keiun, the conspiracy was not limited to

Keiun as its only target. The defendants initially focused on Keiun but were clearly willing to retaliate against another member of Keiun's gang to see their plan to fruition and achieve their overall goal. The decision to target Bernardez and O'Quinn was just another step toward accomplishing the defendants' larger objective—instilling fear in their rivals, as well as the community at large, and expanding AGC's territory. Indeed, the shooting sent a powerful message to Keiun and his gang that AGC was a violent force ready to retaliate against rival gang members in their territory. Thus, the initial plan and ultimate shooting served the same purpose.[27]

"[O]ne who employs a firearm at any time on the continuum between the initial step of the offense and arrival at a place of temporary safety is subject to the enhancement." (See *People v. Taylor* (1995) 32 Cal.App.4th

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[27] Contrary to Combs' claim, *In re Brigham* (2016) 3 Cal.App.5th 318 (*Brigham*) does not change this result. *Brigham* held that the doctrine of transferred intent should not apply if the jury believed the statement of the defendant (a hit man) that he agreed only to kill a man named Chuckie; he saw that the intended victim was not Chuckie; he urged his accomplice not to shoot; and he tried unsuccessfully to wrestle the gun from his accomplice's hands. (*Id*. at pp. 329–328.) Here, the evidence demonstrated that Combs intended to kill Keiun and, barring that, the first person he could find from Keiun's gang because doing so sent the same message and effectuated the larger goal.

578, 582 [reviewing meaning of personal use of a firearm "in the commission of a felony" as used in section 12022.5].) "Thus, a firearm is discharged 'in the commission of' a felony within the meaning of section 12022.53[, subdivision] (d), if the underlying felony and the discharge of the firearm are part of one continuous transaction, including flight after the felony to a place of temporary safety." (*People v. Frausto* (2009) 180 Cal.App.4th 890, 902.) "Temporal niceties are not determinative and the discharge of a gun before, during, or after the felonious act may be sufficient if it can fairly be said that is was a part of a continuous transaction." (*Ibid.*)

Here, a reasonable trier of fact could find that the shooting was part of one continuous transaction. The shooting took place shortly after they departed Roscoe's, where the defendants initially believed they would find Keiun. The jury could reasonably infer that since Keiun was not there, the defendants decided to continue their mission and locate Keiun nearby or another member of 87 Gangster Crips. Once the defendants confronted the occupants of the Monte Carlo, the overarching goal of their mission was satisfied because the shooting would undeniably send a strong message to Keiun and his gang. Thus, substantial evidence supports the firearm enhancement.

VIII. Combs's sentencing error

Combs contends that the sentencing enhancements imposed pursuant to section 12022.53, subdivisions (b) and (c), must be stricken because the charging document did not specifically allege that *he* personally used and personally

discharged a firearm and, due to faulty jury instructions, the jury only found that a principal used and discharged a firearm instead of finding that Combs personally used and discharged a firearm. We agree.

Count 1 of the amended information listed several overt acts, including the allegation that McNeil and Combs "armed themselves with firearms" in order to murder Keiun. However, with respect to the firearm allegations, the information alleged only that "a principal" used a firearm and that "a principal" personally and intentionally discharged a firearm.[28] The allegations did not charge personal use and discharge by Combs himself.[29] The jury instructions suffered from the same infirmity. Nevertheless, during closing argument, the prosecutor informed the jury that the section 12022.53, subdivision (b),

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[28] As noted by Combs, the information used the term principal in all of its 12022.53 allegations—a word that is contained *exclusively* in subdivision (e) of section 12022.53. Combs argues that by using the term principal, the information "was plainly alleging gang-principal use and discharge, not personal use and discharge by [Combs] himself."

[29] Inexplicably, the information did allege personal use of a firearm by Allen, under section 12022.5, subdivision (a). Thus, when the drafters of the amended information intended to allege personal use or discharge by a particular defendant they knew how to do so. However, no evidence supported this particular allegation and Allen's verdict forms never asked the jury to make such a finding.

and section 12022.53, subdivision (c), allegations applied only to Combs. As the prosecutor stated: "12022.53(b) and (c). Those are gun allegations. So (b) and (c). That would apply to Mr. Combs. And (b) is basically he used the weapon. Because he didn't have to fire it. We know that's—he did more than that because there were fifteen rounds shot. And (c) is that you fire it." Indeed, there was no doubt or dispute that Combs was the only principal who could have personally used or discharged a firearm during the course of the crimes. The prosecution theory was that McNeil and Combs shot at the Monte Carlo while Harris and Allen waited inside the SUV. Although Combs argued that the evidence was insufficient in this respect, no one argued—or even raised the possibility—that it was Harris or Allen who had actually fired at the Monte Carlo. Thus, Combs's claim that he was not reasonably on notice that he was exposed to greater punishment for the personal use and personal discharge of a gun is disingenuous at best.

With respect to Harris and Allen, the prosecutor informed the jury: "There is also a separate allegation as to 12022.53(b) and (c) and it's subsection (e). And that basically says that [Harris] and [Allen] are just equally as guilty even though they didn't personally use it, use the gun. If you find the gun allegation true, they are also convicted of these two counts." "Just going to repeat it one more time because it's a little nuance of the law. 12022.53(b) and (c) obvious in terms of Mr. Combs, but how they affect Mr. Harris and Mr. Allen is that if you find the gang allegation

true and you also find that Mr. Combs fired the gun, then the gun allegation applies to [Harris and Allen] as well."

The verdict forms muddied the issue once again, though. With respect to count 1, none of the verdict forms cited any of the overt acts previously listed in the amended information, including the allegation that McNeil and Combs had armed themselves to murder Keiun. Furthermore, on Combs's verdict forms, the jury was tasked with determining whether a principal used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), and whether a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1). The jury also had to determine whether a principal personally used a firearm within the meaning of section 12022.53, subdivision (b), and whether a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c).[30]

On Harris's and Allen's verdict forms, however, the jury was tasked only with determining whether a principal used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), and whether a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1). In other words, while the jury was asked to find that a

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[30] Subdivisions (b) and (c) of section 12022.53 refer to a person rather than a principal. Thus, use of the word principal in this instance is either duplicative or a drafting mistake.

principal personally used and personally discharged a gun with respect to Combs, the jury was not asked to make such a finding as to Harris and Allen.

Nevertheless, the jury was not asked to make an express finding and did not make an express finding that Combs personally used or discharged a firearm—only that a principal did so.[31] This is a distinction with a difference. As the jury was rightly instructed, a principal means a participant, not necessarily a named defendant himself. As set out in CALCRIM No. 1402, "[a] person is a principal in a crime if he or she directly commits or attempts to commit the crime or if he or she aids and abets someone else who commits or attempts to commit the crime." Thus, the jury's finding as to Combs that a principal personally and intentionally discharged a firearm is not equivalent to finding that Combs personally used or discharged a firearm.

Although Combs's verdict form also cited subdivisions (b) and (c) of section 12022.53 without reference to subdivision (e), we agree with Combs that is a matter of speculation whether jurors knew what subdivisions (b) or (c) meant or grasped the significance of these subdivisions standing alone, without reference to subdivision (e). There was nothing to alert jurors that subdivisions (b) or (c),

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[31] Although the trial court did instruct the jury on personal use and discharge, it did not specify that this instruction applied to Combs alone. Indeed, jurors were told that unless the court said otherwise, every instruction applied to each defendant.

without reference to subdivision (e), meant personal use or discharge by Combs. Moreover, as discussed above, the verdict form's citations to subdivisions (b) and (c) incorrectly used the term principal—a term of art on which the jury *was* specifically instructed.

"For the penalties in . . . section [12022.53] to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading *and* either admitted by the defendant in open court or found to be true by the trier of fact." (§ 12022.53, subd. (j), italics added.) Indeed, it is the prosecution's obligation "not only to plead and prove an enhancement, but also to tender adequate instructions and verdict forms so that a lawful determination can be made and sustained on appeal." (*People v. Winslow* (1995) 40 Cal.App.4th 680, 683.) "All too frequently, this responsibility is lost upon the prosecutor who concentrates on the substantive charge or charges." (*Ibid.*) "Here, defective verdict form[s] have come back to haunt the People. This opinion should serve as a reminder that extreme care should be exercised in drafting verdict forms." (*In re Birdwell* (1996) 50 Cal.App.4th 926, 928.) Because such an error is not subject to harmless error analysis, (see, e.g., *People v. Botello* (2010) 183 Cal.App.4th 1014, 1028–1029), the sentencing enhancements imposed pursuant to section 12022.53, subdivisions (b) and (c), must be stricken.

IX. Harris's sentencing error

Harris contends his sentence should be modified to reflect the oral pronouncement, which imposed a 10-year sentence under section 12022.53, subdivision (b), rather than the 20-year sentence (imposed under section 12022.53, subdivision (c)) as indicated on the abstract of judgment. The People agrees.

At sentencing, the trial court imposed "an additional ten years" when sentencing Harris on one count 1 pursuant to "the true finding of the 12022.53(b) and (e)(1)." However, the minute order and abstract of judgment reflect the 20-year term under subdivision (c) of section 12022.53. When a court's oral pronouncement of a sentence conflicts with the minute order or abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Thus, the abstract of judgment and minute order should be modified to reflect the trial court's oral pronouncement.

Harris also contends that his judgment should be modified to reflect an increased number of custody credits. The People states that the issue is now moot because the trial court granted counsel's request for additional custody credit on April 14, 2017, which now reflects that Harris was awarded 349 days of custody credits. However, the clerk's transcript was certified on March 29, 2016 and thus does not contain any minute orders from 2017. On remand, the parties are directed to confirm that Harris has now received the correct amount of custody credits.

X. Supplemental briefing

On October 11, 2017, the Governor signed Senate Bill 620, which amends section 12022.53 to give the trial court the authority to strike in the interests of justice a firearm enhancement allegation found true under that statute. Effective January 1, 2018, section 12022.53, subdivision (h), is amended to state: "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." (Stats. 2017, ch. 682, § 2(h).)

In a supplemental brief, Harris argues the amendment to section 12022.53 applies to him because his case is not yet final on appeal, citing the rule of *In re Estrada* (1965) 63 Cal.2d 740. Under *Estrada*, courts presume that absent evidence to the contrary, the Legislature intends an amendment reducing punishment under a criminal statute to apply retroactively to cases not yet final on appeal. (*Id.* at pp. 747–748; *People v. Brown* (2012) 54 Cal.4th 314, 324.) The *Estrada* rule has been applied not only to amendments reducing the penalty for a particular offense, but also to amendments giving the court the discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 70, 75.) Harris argues that because his case is not yet final, it must be remanded to the trial court for resentencing under the amended version of section 12022.53, subdivision (h), so the

trial court can consider whether to strike one or both firearm enhancements.

The People agrees that the amendment to section 12022.53 is subject to the *Estrada* rule and should be applied retroactively to cases not final on appeal. But it argues that because the amendment does not become effective until January 1, 2018, the issue is not yet ripe. Because this opinion will be handed down after January 1, 2018, the issue is now ripe.

The People also argues that we need not remand the case because the trial court would not have exercised its discretion to lessen Harris's sentence. The People cites *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, in which a different division of this court concluded that remand was unnecessary when the trial court erroneously believed it lacked the discretion to strike a prior conviction under the three strikes law. In that case, however, the trial court stated on the record that it would not have exercised such discretion in any event. (*Id.* at p. 1896.) Here, the trial court made no comparable statements as to whether the firearm enhancements should be stricken. Thus, although we express no opinion as to how the trial court should exercise its newly granted discretion under section 12022.53, subdivision (h), on remand, we do conclude that the trial court must exercise this discretion in the first instance.

DISPOSITION

With respect to Paul Demetrius Allen, Jr., we reverse the judgment on counts 1 and 2 as well as the accompanying

gang enhancement allegations. We also hold that the sentencing enhancements imposed in Dayvion Deandre Combs's case pursuant to Penal Code section 12022.53, subdivisions (b) and (c), must be stricken, and that section 12022.53, subdivision (e)(2), prohibits imposition of the firearm enhancements in addition to the gang enhancement. We therefore vacate Combs's sentence and remand the matter for resentencing. On remand, Octavia Harris's sentence must be modified to reflect the trial court's oral pronouncement at sentencing, which imposed a 10-year sentence enhancement under section 12022.53, subdivision (b), rather than the 20-year sentence enhancement indicated on the abstract of judgment. The parties must also confirm that Harris has now received the correct amount of custody credits. We also remand so that the trial court can exercise its newly ripe discretion under section 12022.53, subdivision (h), and decide whether any of Harris's remaining firearm enhancements should be stricken. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J. LUI, J.