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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR MANUEL FONSECA et
al.,

Defendants and Appellants.

B276478

(Los Angeles County
Super. Ct. No. VA134337)

APPEAL from judgments of the Superior Court of Los Angeles County, Raul A. Sahagun, Judge. Affirmed as modified and remanded.

Maxine Weksler and Ava R. Stralla, under appointments by the Court of Appeal, for Defendants and Appellants.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Margaret E. Maxwell,
Supervising Deputy Attorney General, Yun K. Lee and
Michael C. Keller, Deputy Attorneys General, for Plaintiff
and Respondent.

In a joint trial with separate juries, defendants and appellants Victor Manuel Fonseca and Rogelio Elias Castillo were convicted in count 1 of attempted premeditated murder (Pen. Code, §§ 664/187)¹ and in count 2 of assault with a firearm (§ 245, subd. (a)). The juries found that defendants committed both offenses for the benefit of, at the direction of, and in association with a criminal street gang. (§ 186.22, subd. (b).) Fonseca's jury found that he personally and intentionally discharged a firearm causing great bodily injury in count 1 (§ 12022.53, subds. (b)–(d)), and that he discharged a firearm proximately causing great bodily injury (§ 12022.7, subd. (a)) in count 2. Castillo's jury found that a principal personally and intentionally discharged a firearm causing great bodily injury in count 1 (§ 12022.53, subds. (b)–(d)), and that a principal was armed with a firearm in count 2 (§ 12022, subd. (a)). In a bifurcated proceeding, the trial court found Castillo had suffered a prior juvenile adjudication for a serious or violent felony within the meaning of the three strikes law. (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d).)

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Fonseca was sentenced to life in prison in count 1, plus 25 years to life for the firearm enhancement. In count 2, the court imposed a sentence of 22 years, which it stayed pursuant to section 654. Fonseca was awarded 844 days of custody credit, but no conduct or work credit.

Castillo was sentenced to life in prison in count 1, with a minimum parole date of 14 years, plus 25 years to life for the firearm enhancement. In count 2, the court imposed a sentence of nine years, which it stayed pursuant to section 654. Castillo was awarded 854 days of actual credit and 127 days of conduct credit for a total of 981 days of credit.

Fonseca contends there is insufficient evidence to support the jury's finding that he possessed the requisite intent to commit attempted murder and its finding that he inflicted great bodily injury on the victim. He also contends the trial court erred when it failed to award him presentence conduct credit. Castillo contends the trial court erred by admitting Fonseca's jail calls into evidence against him, the evidence is insufficient to support his conviction on an aiding and abetting theory, and the trial court miscalculated his custody credits. In supplemental briefs filed November 20, 2017, defendants additionally argue that the cause must be remanded to allow the trial court to consider exercising its discretion under section 1385 to strike the firearm use allegations under recently enacted Senate Bill No. 620 (2017–2018 Reg. Sess.). Both defendants join in all arguments made by the other that inure to their benefit. (Cal. Rules of Court, rule 8.200(a)(5).)

The Attorney General concedes that, as to both defendants, the matter must be remanded to allow the trial court an opportunity to exercise its discretion regarding whether to strike the section 12022.53 enhancements and that Fonseca is entitled to conduct credit, but otherwise contests defendants' claims. We remand the matter to permit the trial court the option, if it so chooses, to exercise its discretion to strike defendants' section 12022.53 enhancements within the confines of section 1385. As to Fonseca, we also modify the abstract of judgment to reflect that he is awarded 126 days of conduct credit. In all other respects, the judgments are affirmed.

FACTS

Prosecution

Earlier Shooting

At approximately 11:00 a.m. on March 16, 2014, a few hours before the incident leading to the charges in this case took place, Los Angeles County Sheriff's Department Detective Mark Christiansen responded to a report of shots fired near apartment buildings at the corner of Pioneer and Firestone Boulevards in Norwalk, where several Night Crawlers gang members were known to live. It was reported that a man was seen exiting a parked car and firing shots at an unidentified man who fled into one of three apartment

buildings in the complex.² Deputies discovered several spent bullets at the scene. The shooter appeared to have shot straight through a red Honda Civic, shattering the front and rear windows. Another bullet had ricocheted off the Civic, leaving a dent in the hood. Castillo walked through the doors of the apartment as Deputy Christiansen was talking with the building manager. Detective Christiansen considered Castillo to be a possible victim, but when he questioned Castillo about the shooting, Castillo denied that he was the target and claimed not to know anything about the shooting. Detective Christiansen noticed Castillo had the letters “NC” tattooed below his neck. He asked Castillo if he was a gang member. Castillo responded he was from “NC.”

Detective Steven Velasquez obtained surveillance video of the complex from the building manager, which showed the victim of the shooting wearing clothing consistent with the clothing Fonseca was wearing when he was arrested a few hours later, following the charged shooting.

The Charged Incident

Detective Christiansen responded to the scene of a shooting reported at Vista Verde Park in Norwalk at approximately 1:30 in the afternoon on the same day. He found the victim, Eduardo Perez, sitting against a restroom wall. Perez was in pain and “a little angry about being

² The victim never came forward.

shot.” Detective James Potts, who also responded to the scene, observed a gunshot wound to Perez’s right calf. He also noticed that Perez had three gang tattoos on his left arm. Perez told Detective Christiansen he saw two Hispanic men sitting on a bench as he was riding his bike through the park. Neither man spoke to him as he rode past. Out of nowhere, the skinnier man pulled out a gun and shot him in the leg. Perez fell off his bike and ran toward the restrooms. The men ran in the opposite direction.

Two witnesses observed the incident. Just before the shooting, Miguel Vargas was on his porch across the street from Vista Verde Park. He noticed two men sitting on a park bench, and then he saw a man with a backpack walking his bicycle through the park. The two men on the bench gesticulated to the man with the bike as he passed them. Vargas did not know if the gestures were gang signs. The man with the bike did not appear to be carrying a weapon or reacting aggressively.

Vargas started to go inside his house, but turned around when he heard two gunshots. The shorter of the two men was firing a gun at the man who had been walking his bike. The shooter continued to fire his gun and began backing away with his companion as the victim ran toward the park bathrooms. The two men then ran to a silver Ford Expedition and sped off. The taller man drove and the shooter sat in the front passenger seat. Vargas saw the first four numbers of the license plate, which were 6JAZ or 6JA2. He called 911. Vargas, who was frustrated with gang

activity in the neighborhood and wanted to help authorities, provided information to the deputies who responded to the shooting.

Rafael Magana was in his home when he heard two or three gunshots coming from nearby Vista Verde Park. He walked outside and saw a man limping toward the park restrooms. Magana saw a man with a gun walk quickly toward a light blue Ford Expedition, and then enter the passenger side. The SUV drove off. Magana took note of the last four numbers of the license plate—W532. Magana relayed what he had witnessed to responding deputies about five minutes later.

The partial license plate numbers Vargas and Magana provided were traced to an SUV registered to Rogelio Castillo. Detective Christiansen broadcast the information obtained from the witnesses.

About 20 minutes after receiving the radio broadcast, Deputy Paul Heang spotted the SUV and conducted a felony traffic stop. Castillo was driving and Fonseca was sitting in the back. Deputies recovered pieces of a revolver from Fonseca's front right pocket.

Detective Christiansen transported Vargas to the location of the stop, where Vargas identified Fonseca and Castillo. Vargas had not seen defendants' faces, but he recognized them from their clothing. Vargas also identified the Ford Expedition. Magana identified Fonseca as the man with the gun in the field showup shortly thereafter. He was unable to identify the driver.

Detective Christiansen questioned Fonseca about the shooting while Fonseca sat in the back of the patrol car. Fonseca laughed and said he “didn’t do nothing.” After Detective Christiansen said the shooting was not funny, Fonseca responded that Detective Christiansen was “a fucking pig.” Detective Christiansen asked Fonseca if he belonged to the Night Crawlers gang. Fonseca answered yes and “kind of puffed up his chest.”

Detective Christiansen also spoke with Castillo, who denied any involvement in the shooting. Castillo first claimed he was at the apartments on Pioneer Boulevard all day, and said he had just left to go home when they were pulled over. Detective Christiansen, who had learned of Castillo’s address through the vehicle’s registration, asked Castillo why he drove past his house if that was where he was going. Castillo explained that he was going to get something to eat first. Detective Christiansen responded that Castillo’s SUV was seen leaving the park and asked how his vehicle could have been at the park if he had not been there. Castillo was silent. Detective Christiansen told Castillo that a member of the rival Neighborhood street gang had been shot. Castillo smiled and asked, “He was from Neighborhood?” After Detective Christiansen confirmed this was true, Castillo nodded his head up and down. Detective Christiansen accused Castillo of being involved in the shooting. Castillo responded that he did not shoot anyone. Castillo did not deny driving Fonseca to the park or being present. He appeared confused when the deputy explained

that a non-shooter could be criminally liable for aiding and abetting the shooting.

Deputies searched the park but found no expended bullets or casings. There was an indentation in the sand where it appeared Perez had fallen, and a trail of blood drops leading to the restrooms.

Dr. Mahmoud Nemazee, an emergency room physician at Coast Plaza Hospital in Norwalk, treated Perez for a gunshot wound to his right calf. It was an “in-and-out wound,” meaning a bullet entered the leg on one side and exited the other side. There was no bruising around the wound, and Perez had good range of motion. Dr. Nemazee cleaned the wound and prescribed an antibiotic. He advised Perez to follow up with his doctor within about 10 days, by which time his leg should have healed. Perez spent a little more than an hour total at the hospital.

Detective Velasquez was the chief investigating officer in the case. He interviewed Fonseca at the police station on the afternoon of the shooting. Fonseca admitted he was a member of the Traviesos Clique of the Varrio Night Crawlers with the moniker Bandit. Fonseca said he had been “jumped in” to the Night Crawlers about two months earlier and had not “put in work” before joining the gang.

Detective Velasquez also interviewed Castillo at the station on the day of the shooting. He observed that Castillo had multiple gang tattoos, including the University of North Carolina logo at the back of his head, the letters NC on his face and upper torso, the words Night Crawlers on the left

side of his head, and other gang related tattoos on various parts of his body.

Armed Neighborhood Members Visit Castillo's Home

Three days after the shooting, three Neighborhood gang members were seen in front of Castillo's father's home. Castillo's mother and brother were pulling into the driveway when one of the men reached for something inside his waistband. Castillo's father scared the men away by banging on the window. He called 911. Deputies apprehended the men—whom they recognized as Neighborhood gang members—shortly afterwards. One of the men had a firearm in his possession. The parties stipulated that members of the Neighborhood gang had committed murders.

Jail Calls

Detective Velasquez retrieved recordings of telephone conversations between Fonseca and other gang members, including Fonseca's older brother, Luis, through the inmate telephone monitoring system at County Jail. Audiotapes of the conversations were played for the jury. In the phone conversations, Fonseca took responsibility for the shooting and implicated Castillo as an aider and abettor. He and Luis discussed how the gang was able to claim former Neighborhood gang territory as a result of the shooting. One

fellow gang member said he and his clique had been “posted at the apartment waiting for these motherfuckers to come and hit [Fonseca’s] fucking family” and was “stressing about the fool that you hit to come and get us.” There were discussions regarding pieces of the gun used in the shooting that authorities had been unable to find. Fonseca also told several gang members that he and Castillo agreed the younger “homies” needed to be spending more time out on the streets committing crimes in light of Neighborhood’s recent actions. The gangs were at “war” and it was important for the Night Crawlers to get the upper hand.

Gang Evidence

Detective Velasquez, who had interacted with gang members in various capacities since 2007 and had been assigned to Norwalk in 2014 as a gang detective, testified as an expert witness on gangs for the prosecution. He opined that respect and reputation are paramount to gangs. The more fear a gang generates, the more its reputation is enhanced. A gang member gains respect by “putting in work,” i.e., committing crimes, ranging from graffiti to murder. The more fear a gang generates, the less likely citizens are to report crimes. If a gang member is assaulted by a member of a rival gang, there must be retaliation or the gang will be viewed as weak and lose respect. To “catch someone slipping” means to catch someone who is vulnerable—i.e., someone out of his territory or unarmed.

“Thing thing” refers to a gun. To “go on a mission” means to commit a crime in a rival’s territory. Missions are usually done in groups to provide backup and confirmation that a member committed the crime. Older gang members direct younger members in committing crimes.

Detective Velasquez testified that Vista Verde Park is in the middle of the territory claimed by the Neighborhood gang. It is frequented by Neighborhood members. Neighborhood is the oldest gang in Norwalk. The Night Crawlers are Neighborhood’s rival and the newest gang in Norwalk. The Night Crawlers use the derogatory terms “Nadahood” and “Nalgahood” to refer to Neighborhood. The Night Crawlers claim the three apartment complexes on Pioneer south of Imperial. Fonseca lived in one of the complexes. The rivalry between Neighborhood and Night Crawlers began in 2009 or 2010 when a Neighborhood member tried to rob a Night Crawlers member. The rivalry was also based on overlapping territory. Disputes are common when two gangs claim the same territory. Night Crawlers had crossed out Neighborhood graffiti, reflecting the rivalry between the two gangs. In addition to various tattoos, the Night Crawlers used hand signals of the letters “N” and “C” to identify themselves.

Detective Velasquez testified that a Norwalk gang member must retaliate if assaulted. Failure to retaliate would result in loss of respect within the gang and loss of respect for the gang with rival gangs. Gang members who lose respect face punishment or loss of status in the gang. If

a gang member injures a rival gang member but fails to kill him, he is more likely to be identified. Identification can result in retaliation against the gang member and his family.

Detective Velasquez opined that Fonseca's brother Luis was a member of the Night Crawlers gang, as was Castillo's younger brother, Carlos. In his opinion, Fonseca was a member of the Night Crawlers criminal street gang at the time of the shooting. Fonseca had obtained a highly visible Night Crawler's tattoo on the top of his head after he was arrested. Given a hypothetical assuming the facts of the instant case, Detective Velasquez opined that the shooter acted "in association with" another member of the gang, the "association" being the other members providing back up and validating what occurred, and that the shooting benefitted both the shooter, by enhancing his reputation within the gang for committing a violent act upon a rival gang member in rival gang territory, and the gang itself, whose reputation was enhanced by spreading fear among its rivals and within the community. Velasquez had no doubt that Fonseca's reputation was enhanced despite the fact that Perez was only wounded and not killed, since the gang's purpose was served by retaliating for an assault on one of its own.

Defense

Castillo, 23 years old at the time of the trial, testified that he joined the Night Crawlers when he was 15 years old. Castillo made bad choices as a teenager. He smoked marijuana and was detained in Los Padrinos Juvenile Detention Center. After his release, he had a child with Fonseca's sister, Leslie Fonseca. Fonseca was not only a fellow gang member, he was like family to Castillo.

Castillo's moniker is "Dopey," but people also called him "Roger." He explained several terms in gang jargon to the jury, including that "to catch someone slippin" meant to catch them when they were alone or off guard. If a gang member caught a rival slipping, he was expected to kill, given the chance, especially if he was armed. It was important to know the boundaries of a rival's territory to avoid getting caught "slippin." Neighborhood was a rival of the Night Crawlers. Vista Verde Park was in the center of Neighborhood's territory. After the shooting, Castillo's and Fonseca's standing in Night Crawlers increased significantly, as did their gang's standing in relation to Neighborhood's.

Around 11:00 on the morning of March 16, 2014, Castillo drove from his father's house to the apartments on Pioneer Boulevard to visit Leslie and their baby. Law enforcement officers were already there when he arrived. Leslie told him she had heard shots, but at the time the police arrived, Castillo did not know who had been involved.

Later, Fonseca told Castillo that some Neighborhood gang members had shot at him. A few hours afterward, he and Fonseca went to Vista Verde Park, although there were parks within the territory claimed by Night Crawlers or Varrio Norwalk, which was not a rival gang. They picked the park because it was near Fonseca's house. Castillo had been there with his son several times before.

Castillo and Fonseca smoked marijuana while sitting on park benches next to the handball court. A man riding a bike approached them and made a hand gesture. Castillo and Fonseca gestured back. The man became agitated and told them to leave the park. The man began reaching into his waistband as if to pull out a weapon. Castillo immediately ran back to his car. He heard gunshots as he ran but did not know who was firing the gun. He and Fonseca jumped into his SUV and drove away. Castillo had not known Fonseca was carrying a handgun. He first saw the gun in the backseat of his car, where Fonseca was sitting, after the shooting. If he had he known Fonseca was armed, Castillo would not have driven him in his father's SUV because he would not want his father to get into trouble. Fonseca did not tell Castillo that he was the shooter. Castillo claimed to be driving home just before he was arrested. He passed by his house because he saw police vehicles there and he knew that Fonseca had just shot someone.

Castillo was surprised that he was arrested because he had not shot anyone. He told Deputy Christiansen that he

had not been in the park because he did not trust the deputy. Castillo did not smile when he learned the victim was a Neighborhood gang member. He asked if the man was from Neighborhood, and may have nodded only to acknowledge what the deputy said.

Castillo told Detective Velasquez and Detective Ivania Farias that he went to the park to smoke marijuana and was high at the time of the shooting. He was trying to calm Fonseca after the earlier shooting. He did not go to the park to claim rival territory, or to shoot, kill, or retaliate against anyone. At the time of the shooting, Castillo did not want to be involved with any violence—he was taking care of his son on a daily basis. Castillo did not really know what was going on between Night Crawlers and Neighborhood at the time of trial as he did not speak with anyone on the phone except his father and brothers.

Detective Farias confirmed that Castillo told the detectives he had gone to the park to smoke marijuana. Castillo did not tell Detective Farias he was high at the time of the shooting, and did not exhibit symptoms of being under the influence of marijuana.

DISCUSSION

Admission of Jail Calls

Prior to trial, a hearing was held regarding whether calls Fonseca made while in jail would be admissible against

defendants. With respect to Castillo, the court found the calls excepted from the hearsay rule under various exceptions that Castillo does not challenge on appeal.³ The court further found that the calls were more probative than prejudicial pursuant to Evidence Code section 352. Castillo contends the trial court abused its discretion under Evidence Code section 352, and violated his constitutional right to a fair trial. He challenges the calls in their entirety as highly prejudicial, arguing that the portions implicating him are speculative, and that the gang evidence is cumulative. We conclude that the trial court acted within its discretion.

We agree with the Attorney General that Castillo's failure to cite to specific sections of the calls in support of his arguments is problematic. The burden is on appellant to demonstrate error from the record; error will not be presumed. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) An appellate court is not required to search the record to ascertain whether it contains support for a defendant's claim. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.) The jail calls admitted against Castillo span 270 pages of transcript, and include a significant amount of material that is not relevant to the arguments Castillo sets forth in the briefing. Absent more specific guidance, we will address only those

³ The trial court found the calls excepted from the hearsay rule as declarations of a coconspirator, declarations against interest, and adoptive admissions. Castillo expressly disavows any challenge to these rulings.

portions of the calls included in the factual descriptions contained in Castillo's brief that reasonably relate to his arguments.

The Calls

The prosecutor played the jail calls for the jury during Detective Velasquez's testimony. In call #463_190, Fonseca and his brother Luis discussed how Fonseca identified himself:

"[Luis]: Hey, hey, hey, when they tell you, 'Where you from,' what do you say? Just Night Crawlers?

"[Fonseca]: Uh, yeah. Hello? Where else?

"[Luis]: Nah, but you be like Mischievous or what?

"[Fonseca]: Nah. I don't see the whole fucking nine yards. I just see [unintelligible].

"[Luis]: And what'd you tell them? South Central or Norwalk?

"[Fonseca]: Yeah. No, South Central. Not Norwalk because we don't have the Southeast card.

"[Luis]: We got it now.

"[Fonseca]: Oh yeah we got it?

"[Luis]: Yeah, we been having it. After, after that happened, yeah. We got it.

"[Fonseca]: After with me?

"[Luis]: Yeah.

"[Fonseca]: Ah, so, so I practically got it.

"[Luis]: Yeah, you and Roger helped, helped it out.

“[Fonseca]: (side conversation) Oh, um, yeah?

“[Luis]: Yeah.

“[Fonseca]: Oh, that’s bad. Hell yeah. Does Roger know?

“[Luis]: Nah.

“[Fonseca]: I’ll tell him when I see him on, on the bus.

“[Luis]: Yeah, just tell him when you see him at court.”

Detective Velasquez explained that this meant the Night Crawlers could claim Southeast as their territory after Fonseca shot Perez. He clarified that “Roger” referred to Castillo.

In call #880_383, Fonseca again spoke to Luis. He said that he and “Dopey” had been talking that day because they “had court” and felt that “we need more fucking soldiers on the street—” and “since we, since practically Dopey and, and us caught this case” it was time for the “little homies” to be “active and shit.” Luis put the call on speaker phone for Fonseca’s sister Vanessa and Castillo’s brother Carlos to hear as well. Fonseca said he understood that “Nalgahood be rolling, rolling around through the fucking apartments,” and they needed to “have that shit on lock.” He said he heard “you guys got more thing things, and that’s fucking plenty enough, to fucking start going on missions.” Fonseca said that he and Dopey felt the other gang members should take “thirty minutes of their day” and “try to catch them slipping, ‘cause pretty much they’re trying to catch us slipping, now we’ve gotta flip the tables.” He said that “in

my and Dopey's point of view," "we need to get our name on the map again."

Detective Velasquez explained that the reference to "little homies" being "active" meant Fonseca and Castillo wanted the young Night Crawlers out committing crimes. Getting more "soldiers on the street" meant getting more gang members "who are willing to do crimes and protect the gang." "Nalgahood" "rolling around the apartments" referred to members of rival Neighborhood walking through the apartments in Night Crawler territory. Getting their "name on the map again" meant increasing the gang's reputation by committing crimes."

In call #942_397, Fonseca spoke with "Raul." He referred to Castillo as "my crime partner." Fonseca again stressed that he and Castillo felt the gang needed to be more active in combating Neighborhood. At one point, Raul admonished Fonseca: "Sorry to say it, fool and hopefully you don't take this, to dis, to disrespect, fool, but they're stupid like you and Dopey, dog, where they just wanna go out there, do their thing, and get caught up. Fool, that's not the way to do that shit fool. And you already know it, my boy!" Fonseca responded, "Yup."

Analysis

In general, evidence is admissible if its probative value is not substantially outweighed by the probability that it will unduly consume time, "create substantial danger of undue

prejudice,” confuse the issues, or mislead the jury. (Evid. Code, § 352.) Evidence is probative if it “tends ‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive. [Citations.]” (*People v. Garceau* (1993) 6 Cal.4th 140, 177, overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117–118.) Although gang evidence may have a “highly inflammatory” impact (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 (*Samaniego*)), it “is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*)). Gang evidence may be admitted “if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative.” (*Samaniego, supra*, at p. 1167.) “[T]he decision on whether evidence, including gang evidence, is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court.” (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224–225.) We review the trial court’s ruling for abuse of discretion. (*Id.* at p. 225.)

We reject Castillo’s argument that the jury could only have drawn speculative inferences from Fonseca’s references

to him in the jail calls. Against his own penal interest, Fonseca indicated that he was primarily responsible for the shooting. He then implicitly acknowledged Castillo's participation when he accepted Luis's statement that "Roger" helped, and expressed a desire to let Castillo know the next time he saw him on the bus. Fonseca's statements evidenced his pride that the shooting had earned the gang the Southeast card, and his eagerness to convey the news to Castillo, whom the jury could reasonably infer would also be pleased to learn of their accomplishment. In a later call, Fonseca again accepted responsibility for himself and Castillo when Raul reproached him for getting caught after committing the crime. The jury could infer from Fonseca's acknowledgment and the surrounding conversation that he and Castillo intentionally shot Perez—he was apologetic not for the shooting, but for getting caught. The statements were relevant to both defendants' motives with respect to the crime and the enhancement. They supported the inference that the shooting had in fact benefitted the gang by conferring territory and status, and elevated defendants' importance in the eyes of fellow members. It could reasonably be inferred that defendants were motivated to commit the crime to increase the Night Crawlers' reputation and their reputations as individuals.

The statements conveying Fonseca and Castillo's thoughts on the gang's future activities tended to establish that the shooting was part of an ongoing feud between the Night Crawlers and Neighborhood, in which both defendants

were integrally involved, further solidifying their motive to commit the crime. Although Castillo denied he was involved in the shooting and denied discussing the future criminal activity of the Night Crawlers, he confirmed that he talked with Fonseca in the courtroom, holding tanks, and the buses to and from jail. The jury could reasonably find that defendants had been in contact—and therefore had ample opportunity for gang-related discussions—while rejecting Castillo’s testimony that he did not discuss the Night Crawlers or their criminal activities with Fonseca. The statements implicating Castillo were substantive and highly probative.

The evidence was not cumulative. Other gang evidence presented—including tattoos and Castillo’s admission of gang involvement to an officer—established only that he was a gang member, not that he was an “active” member who committed crimes, which he specifically denied to the officer and to the jury in his own testimony. The calls provide important evidence that Castillo was motivated to aid Fonseca in the shooting, and was not simply an innocent bystander.

The trial court did not abuse its discretion by admitting the calls pursuant to Evidence Code section 352. The calls were highly relevant to elements of the crime and enhancement and not cumulative of other evidence presented. The prejudice Castillo suffered was that which flows from relevant evidence, not the impermissible prejudice “““which uniquely tends to evoke an emotional bias

against the defendant as an individual and which has very little effect on the issues.”” (*People v. Karis* (1988) 46 Cal.3d 612, 638; see also *People v. Crew* (2003) 31 Cal.4th 822, 840.) Moreover, the application of the ordinary rules of evidence did not impermissibly infringe on Castillo’s rights to due process and to present a defense. (Cf. *People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103.) No error occurred.

Sufficiency of the Evidence Contentions

In determining whether sufficient evidence supports a conviction, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] . . . ‘We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient

substantial evidence to support” the jury’s verdict.
[Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Intent to Commit Attempted Murder

Fonseca contends the evidence is insufficient to support the finding that he intended to kill Perez. He asserts that given the close range, it is “highly likely” he intentionally shot Perez in the leg to wound rather than kill him. Fonseca’s argument overlooks and minimizes the evidence in a futile attempt to persuade us to reweigh the facts in his favor. This is not our role. Viewing the evidence in the light most favorable to the judgment, we conclude that substantial evidence supports the jury’s verdict.

“‘[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.’ [Citations.]” (*People v. Smith* (2005) 37 Cal.4th 733, 739.) “[E]vidence of motive is often probative of intent to kill.” (*Id.* at p. 741.) Intent to kill “may in many cases be inferred from the defendant’s acts and the circumstances of the crime. [Citation.] ‘There is rarely direct evidence of a defendant’s intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant’s actions. [Citation.] The act of firing toward a victim at a close, but not point blank, range “in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill” [Citation.]’ [Citations.] “‘The

fact that . . . the victim may have escaped death because of the shooter's poor marksmanship [does not] necessarily establish a less culpable state of mind." [Citation.]' [Citation.]" (*Ibid.*)

Substantial evidence supports the jury's finding that Fonseca intended to kill Perez. There was ample evidence of Fonseca's motive. He was a younger member of the Night Crawlers, and was expected to commit crimes to increase the reputations of both himself and his relatively new gang. Fonseca and Perez were in rival gangs who were actively battling over territory. His attack on Perez would aid the Night Crawlers in gaining disputed territory, and position them to exert greater control over the community. Castillo testified that Fonseca had been the target of the earlier shooting. It was uncontested that Neighborhood gang members had killed in the past, and therefore reasonable to conclude that the earlier shooting was an attempt on Fonseca's life. Following the shooting at the apartments where Fonseca lived, defendants went to Vista Verde Park in the heart of Neighborhood territory, although there were parks within Night Crawlers territory that would have been safe to visit. The jury could find that Fonseca's choice to go into a disputed area carrying a loaded firearm supports the conclusion that he believed Neighborhood was responsible for the attack on him and that he intended to kill a Neighborhood gang member in retaliation. Vargas testified that when Perez approached Fonseca and Castillo, they made hand gestures and appeared to be confronting him.

The jury could have reasonably inferred the gestures were gang signs, used to signal gang affiliation and thereby challenge members of a rival gang. Fonseca shot at Perez multiple times at close range without provocation, hitting him in the leg before escaping in Castillo's vehicle. A close-range shooting, even if unsuccessful in killing the victim, is sufficient to support a finding of intent to kill. The jury was not bound to conclude that Fonseca fired only into Perez's leg with an intent to wound his victim. Perez told officers that he was riding a bicycle. Given the difficulties of hitting a moving target and the fact that several shots were fired, it would be reasonable to conclude that Fonseca simply missed his mark. Substantial evidence supports Fonseca's conviction for attempted murder.

Aiding and Abetting

Castillo contends the evidence is insufficient to support his conviction on a theory of aiding and abetting. He argues that the prosecution's case rested entirely on his gang membership and the expert's testimony regarding how gang members act. His contention is without merit.

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." (§ 31.) "An aider and abettor is one who acts '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. Beeman* (1984) 35 Cal.3d 547, 560.)" (*People v. Chiu* (2014) 59 Cal.4th 155, 161.) When a charged offense is a specific intent crime, and the theory of accomplice liability is that he or she directly encouraged or facilitated the crime, the accomplice must share the actual perpetrator's specific intent in order to be found criminally liable to the same extent as the actual perpetrator. (*Samaniego, supra*, 172 Cal.App.4th at pp. 1164–1165.)

Castillo's conviction for aiding and abetting was supported by substantial circumstantial evidence, which included but was not limited to the gang expert's testimony. Fonseca implicated Castillo as an aider and abettor more than once in the jail calls. Castillo's own testimony evidenced an awareness of what Fonseca's intentions would have been under the circumstances. He corroborated Detective Velasquez's testimony regarding the actual practices and expectations of the Night Crawlers, including that if an armed member caught a rival off guard he would be expected to attempt to kill the rival. Moreover, as we have discussed, there was ample evidence to support the jury's finding that Fonseca intended to commit murder. The jury could reasonably infer that Castillo had similar motives. Castillo testified he was the father of Fonseca's sister's child and considered Fonseca to be a family member. They were also fellow members of the Night Crawlers who shared a duty to protect the gang's reputation. Castillo testified that

Fonseca had been the target of the earlier shooting. He accompanied Fonseca into contested territory—which would almost certainly place them in harm’s way—hours after the shooting. It was unnecessary for them to go to Vista Verde Park, as there were parks available to them that were under Night Crawler control. It is reasonable to infer that Castillo knew Fonseca would attempt to kill a member of Neighborhood if they were successful at finding a member at the park, which was likely given that Vista Verde was in Neighborhood territory. It is also reasonable to infer that an attack on Fonseca’s life would provoke Castillo to retaliate, or to aid in Fonseca’s retaliation, both to benefit the gang and to support his family. Substantial evidence supports Castillo’s conviction for attempted murder.

Personal Infliction of Great Bodily Injury

Fonseca contends the enhancement allegations for personal and intentional discharge of a firearm causing great bodily injury in count 1 (§ 12022.53, subds. (b)–(d)), and discharge of a firearm proximately causing great bodily injury in count 2 (§ 12022.7, subd. (a)) were not supported by the evidence because Perez’s bullet wound was neither “significant” nor “substantial.” This contention also lacks merit.

Section 12022.53, subdivision (d) requires a prison term of 25 years to life additional and consecutive to any other term for any person who “in the commission of a

[specified] felony . . . personally and intentionally discharges a firearm and proximately causes great bodily injury” Under section 12022.7, subdivision (a), “[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony” is subject to a three-year sentence enhancement.

For purposes of both sections, great bodily injury is defined as “a significant or substantial physical injury.” (§ 12022.7, subd. (f).) Great bodily injury need only be a substantial injury beyond that inherent in the offense itself. (*People v. Escobar* (1992) 3 Cal.4th 740, 746–747 (*Escobar*).) Indeed, the victim need not suffer permanent or even prolonged impairment of a bodily function, although “[m]inor, trivial or moderate injuries do not constitute great bodily injury.” (CALJIC No. 17.19.5.) In *People v. Martinez* (1985) 171 Cal.App.3d 727, the court found insufficient evidence of great bodily injury where a defendant wielded a knife and “picked or cut” the victim through two shirts and a heavy coat. Even the prosecutor conceded the victim’s injury was “almost like a pinprick on the knife wound” and requested to strike the great bodily injury allegation. (*Id.* at pp. 735–736.) In contrast, evidence that a bullet caused a “mere soft tissue injury” can be sufficient to support a finding of great bodily injury. (*People v. Le* (2006) 137 Cal.App.4th 54, 58 [bullet traveled through left thigh and lodged in right thigh, victim released from hospital within 24 hours after bullet was removed, but had ongoing pain and

difficulty walking].) “A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description. . . .’ [Citations.]” (*Escobar, supra*, at p. 752.)

Viewing the evidence in the light most favorable to the judgment, a reasonable trier of fact could conclude that Perez’s injury was substantial and significant. Deputies discovered a trail of blood leading into the bathroom where Perez had sought cover. He was sitting against the wall when the deputies arrived and appeared to be in pain. Paramedics transported him to the hospital for treatment. The doctor who examined him explained that the bullet entered on one side of his calf and exited the other. The doctor prescribed medication to prevent infection and advised him to follow up with his primary care physician in 10 days. A reasonable jury could find, based on this record, that a through and through gunshot wound to a limb, causing bleeding and pain, and requiring medical treatment and medication, constitutes a significant and substantial injury. Substantial evidence supports the jury’s great bodily injury findings.

Custody and Conduct Credits

Fonseca

Fonseca was awarded 844 days of actual credit, but no conduct or work credit. The failure to award conduct credit

resulted in an unauthorized sentence that may be corrected on appeal. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764 [computational errors concerning presentence credits “result in an unauthorized sentence” and are subject to correction by the appellate court]; see also *In re Ricky H.* (1981) 30 Cal.3d 176, 191 [appellate court has authority to correct an unauthorized sentence “whenever the error comes to the attention of the court”].) Fonseca was arrested on March 16, 2014, and sentenced on July 6, 2016. He accrued 844 days of custody credit, and 15 percent of his actual period of confinement—126 days—in conduct credit pursuant to section 2933.1. We order the abstract of judgment modified accordingly.

Castillo

Castillo was awarded 854 days of actual credit and 127 days of conduct credit. He argues that he was in custody for two additional days, resulting in 856 actual days in custody and 128 days of conduct credit—a total of three days more than he was awarded.⁴ It is undisputed that Castillo was sentenced on July 18, 2016. The parties disagree as to the date of Castillo’s arrest, however. Castillo argues that he was arrested with Fonseca on the afternoon of March 16,

⁴ The number of conduct credits is incorrect regardless of which arrest date is used for the calculation. In either case, 15 percent of the actual days served equals 128 conduct credits when rounded down to the nearest day.

2014—the date the shooting took place—at Studebaker and Florence, as Detective Christiansen testified. The People rely on the probation report, which states that Castillo was arrested on March 18, 2014, at 8:00 p.m., also at Studebaker and Florence.⁵ The People speculate that Castillo may have initially been held for a 2013 misdemeanor offense for which he received a 90-day jail sentence on April 2, 2014, but nothing in the record indicates that this was in fact the case.

In light of the conflicting evidence, we conclude the record before us is insufficient to make the determination. The parties are free to litigate any credit issue, if they so choose, in the trial court. (*People v. Kennedy* (2012) 209 Cal.App.4th 385, 394; *People v. Fares* (1993) 16 Cal.App.4th 954, 958; *People v. Hyde* (1975) 49 Cal.App.3d 97, 102; see § 1237.1.)

Firearm Enhancements

We agree with the parties that defendants are entitled to a remand of the cause to permit the trial court, if it so chooses and within the limits of section 1385, to strike the firearm use findings pursuant to the new authority set forth in Senate Bill No. 620.

When defendants were charged, convicted and sentenced, former section 12022.53 required the court to

⁵ Fonseca's probation report reflects that he was arrested on March 16, 2016, at 2:30 p.m., at Studebaker and Florence.

impose a sentencing enhancement upon any person who, in the commission of an enumerated felony personally uses a firearm, personally and intentionally discharges a firearm, or personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in section 12022.7, or death, to any person other than an accomplice. (Former § 12022.53, subds. (b)–(d).) The trial court imposed the mandatory firearm enhancements.

After defendants were convicted, but before the cause was final on appeal, the Governor signed Senate Bill No. 620, which amends former section 12022.53, subdivision (h), to permit the trial court to strike a firearm enhancement as follows: “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, § 1.)

We accept the parties agreement that Senate Bill No. 620 applies to this case, and remand the cause for consideration under the new statute.

DISPOSITION

We remand the matter to permit the trial court, if it so chooses and within the confines of section 1385, to exercise its discretion regarding whether to strike defendants' section 12022.53 firearm enhancements. As to Fonseca, we modify the abstract of judgment to reflect that he is awarded 126 days of conduct credit. In all other respects, the judgments are affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

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