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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONEL AYALA,

Defendant and Appellant.

B291438

(Los Angeles County
Super. Ct. No. PA084498)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Terrell, Judge. Modified and, as so modified, affirmed.

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Leonel Ayala appeals his convictions for first degree murder with a firearm and assault with a semiautomatic firearm, as well as gang enhancements, which applied to both offenses. Ayala raises claims of: (1) insufficiency of evidence to support deliberate and premeditated murder and the gang enhancement, (2) error in admitting gang expert testimony, (3) prosecutorial misconduct based on misstatements of law, (4) error for refusing to strike the firearm enhancement, and (5) sentencing error on the assault with a semiautomatic firearm conviction.

We reject each of Ayala's challenges to his convictions. As to count 1, we order the gang enhancement stricken and the firearm enhancements under section 12022.53, subdivisions (b) and (c), imposed and stayed. As to count 4, we order the abstract of judgment amended to reflect the punishment stricken for the gang enhancement. In all other respects, we affirm the judgment of conviction.

FACTUAL AND PROCEDURAL BACKGROUND

I. Facts

A. Assault of Fresly C. and Murder of Jonathan V.¹

On September 13, 2015, Fresly C. was walking near the intersection of Van Nuys Boulevard and Haddon Avenue in Pacoima. A white Dodge Charger with a black stripe pulled up to him. The rear passenger pointed a gun out of the window, and asked, "Where are you from?" Fresly C. did not respond. He kept his head down and continued to walk. The Charger traveled at

¹ To protect the personal privacy interests of the victims, we will refer to them by first names and last initials. (Cal. Rules of Court, rule 8.90(b)(4).)

10 to 15 miles per hour, and never slowed down during the contact. It drove out of Fresly C.'s view.

At about noon, Urvano S.C. and his five-year-old grandson were visiting Jose S. on Pinney Street, near Amboy Avenue. Urvano S.C. and Jose S. heard gunshots. At the driveway next to Jose S.'s house, Jacob Ochoa shot Jonathan V. Ochoa shot Jonathan V. from three feet away.

As the shots were fired, Urvano S.C.'s grandson started crying and yelled, "Papa." Urvano S.C. climbed on top of his grandson and covered him. A bullet struck Urvano S.C. on his buttocks. After the shooting, Ochoa escaped in a white Dodge Charger.

After his contact with the white Dodge Charger, Fresly C. went to Pinney Street and saw Jonathan V. lying on the ground. Fresly C. knew Jonathan V. as Spider from the Latin Times Pacoima gang. Jonathan V. had tattoos on his arms that depicted "LTP." Jonathan V. died as a result of multiple gunshot wounds.

Later in the evening, the police stopped Ayala in a white Dodge Charger. Fresly C. identified the Charger as the car that approached him.

B. Interview of Ayala

Los Angeles Police Department Detective Gabriel Bucknell and Officer Thomas Kimrey interviewed Ayala about the murder on Haddon Avenue and Pinney Street. For nearly an hour, Ayala denied involvement. Bucknell confronted Ayala with tracking evidence from a GPS monitor which he wore on his ankle. Ayala initially said that he was visiting his grandmother. But the GPS monitor did not place Ayala at the location he provided for his grandmother's home.

Ayala ultimately admitted his involvement in the murder. He first claimed membership in the Project Boys gang. His nickname was Flaco. Ayala admitted that he drove the white Dodge Charger to Haddon Avenue and Pinney Street. He knew that the area was the territory of the Pacoima South Side Locos, which was a rival gang. He went there with Ochoa, who was a fellow Project Boys gang member. On their way to the location, Ayala discovered that Ochoa was armed with a nine-millimeter handgun.

Ayala had known Ochoa for about one month. He knew that Ochoa was a new gang member, who was willing to “put in work” for the gang.² On the day of the murder, Ayala and Ochoa went to the rival gang territory to “hit up” people.³

Ayala described how the incident unfolded when he arrived with Ochoa. When they reached Amboy Avenue, Ochoa told Ayala to stop driving. Ochoa exited the car. Ayala drove slowly behind him. Ochoa walked up to the victim, and shot him. Ayala began backing up the car. Ochoa returned to the car and entered the back seat. They drove away on Amboy Avenue.

² According to Bucknell, “putting in work” typically involved committing an act of violence against another person. Gang members put in work to establish a reputation of willingness to commit crimes for the gang.

³ Bucknell explained that to “hit somebody up” entailed challenging a person to identify his or her gang. A violent confrontation typically occurred if the two parties belonged to rival gangs. The confrontation could result in a fight or a shooting.

Ayala repeatedly claimed that he did not know Ochoa would shoot anyone. However, Ayala also conceded that he could have stopped Ochoa from shooting but failed to do so.

Bucknell informed Ayala that he was going to jail for his involvement in the murder. Ayala offered to call Ochoa to have him admit to the shooting. He called Ochoa. Ayala told Ochoa that he was at the police station and had been interviewed. Ayala complained that Ochoa hit a sixty-year-old man and a six-year-old child. He told Ochoa that he should have aimed better. Ochoa admitted that he did not see the “old man” or the child.

C. Gang Evidence

Los Angeles Police Department Officer Tomas Salazar testified as a gang expert. He was assigned to the gang enforcement detail of the Foothill Division, where he primarily monitored the Project Boys gang.

Established in the mid-1980's, the Project Boys gang consisted of 190 documented members. Its territory centered around the San Fernando Gardens public housing community, also known as “the Projects.” The primary activities of the Project Boys included challenging persons to fights, vandalisms, possession of narcotics, possession of firearms, assaults with deadly weapons, attempted murders, and murders.

Salazar was familiar with Ayala and Ochoa. He believed both to be Project Boys gang members. Ayala had multiple tattoos which showed membership in the Project Boys.

The rival gangs of the Project Boys included the Van Nuys Boys, Pacoima South Side Locos, Latin Times Pacoima, Cayuga Street, Knock Knock Boys, and San Fer. Of these rival gangs, the Pacoima South Side Locos and the Latin Times Pacoima gangs claimed the area of Haddon Avenue and Pinney Street.

Salazar also discussed the on-going feud between the Project Boys and the Pacoima South Side Locos. He described a previous shooting incident by gang members from the Pacoima South Side Locos at the San Fernando Gardens.

Salazar explained features of gang culture, including the importance of instilling fear in the community, and obtaining respect from other gang members and persons in the community. He also discussed how members “put in work” for the gang by committing crimes which generate income or respect for the gang.

The prosecutor asked Salazar to answer a hypothetical question derived from the evidence for the assault with a semiautomatic firearm against Fresly C. and the murder of Jonathan V. Salazar opined that both crimes were committed for the benefit of, and in association with, a gang. He reasoned that committing the crimes benefitted the gang by challenging persons in a rival gang’s territory. The crimes would also elevate the status of both the shooter and the driver. He further explained that the two gang members acted in concert to commit the crimes. Salazar noted that in walk-up shootings—as opposed to drive-by shootings—the shooter attacks his or her intended target at a closer range, providing greater accuracy.

II. Procedure

The jury convicted Ayala of first degree murder of Jonathan V. (Pen. Code, § 187, subd. (a)⁴; count 1) and assault with a semiautomatic firearm of Fresly C. (§ 245, subd. (b); count 4).⁵ The jury found true the allegations that Ayala was vicariously

⁴ All further undesignated statutory references are to the Penal Code.

⁵ Ayala was tried separately from Ochoa.

liable for the intentional discharge of a firearm, causing Jonathan V.'s death (§ 12022.53, subds. (d), (e)(1)), as well as the intentional discharge and use of a firearm in the commission of the murder (§ 12022.53, subds. (b), (c), (e)(1)). It also found that Ayala committed the murder and the assault with a semiautomatic firearm for the benefit of, at the direction of, or in association with, a criminal street gang (§ 186.22, subd. (b)(1)(C)). The jury acquitted Ayala of the three counts of attempted murder (§ 664, 187, subd. (a); counts 2, 3, 5), involving Jose S. and Urvano S.C. and his grandson.

The trial court sentenced Ayala to 25 years to life for the murder conviction and a consecutive term of 25 years to life for the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1).⁶ It imposed a consecutive three-year term for the assault with a semiautomatic firearm conviction.⁷ The total aggregate term was 50 years to life, plus three years in state prison.

⁶ As we will discuss, as to count 1, the trial court did not address the gang enhancement and the firearm enhancements under section 12022.53, subdivisions (b) and (c).

⁷ The trial court “stayed” the term for the gang enhancement. As we will discuss, the functional effect of the trial court’s order was striking the punishment because it was unconditional. (*People v. Santana* (1986) 182 Cal.App.3d 185, 191; *People v. Lopez* (1983) 147 Cal.App.3d 162, 165.)

DISCUSSION

I. Sufficiency of the Evidence for Deliberate and Premeditated Murder

Ayala argues that the evidence was insufficient to prove that he was a direct aider and abettor of murder and that he acted with premeditation and deliberation. As we will discuss, we conclude substantial evidence supported first degree murder under these theories, as well as the theory of uncharged conspiracy, based on Ayala driving Ochoa to and from rival gang territory to kill a rival gang member.

Our standard of review is well settled. For a challenge of the sufficiency of the evidence, the record must contain “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.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.) We review the evidence in the light most favorable to the judgment. (*Zamudio*, at p. 357.) We must “presume in support of the judgment the existence of every fact [the trier of fact] could reasonably have deduced from the evidence.” (*Ibid.*) We do not resolve credibility issues or conflicts in the evidence. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.)

“The same standard applies when the conviction rests primarily on circumstantial evidence.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053 (*Kraft*).) “If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*People v. Jennings* (2010) 50 Cal.4th 616, 638–639.)

A. Aiding and Abetting Murder

Principals to a crime are “[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission.”

(§ 31.) Proof of liability for a crime under a theory of aiding and abetting falls into four distinct elements: (1) a crime committed by the direct perpetrator, (2) knowledge of the direct perpetrator’s intent to commit the crime, (3) an intent to assist in committing the crime, and (4) conduct by the aider and abettor that in fact assists the commission of the crime. (*People v. Perez* (2005) 35 Cal.4th 1219, 1225; *People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) The defendant must not only know the direct perpetrator’s intent, he or she must share that intent. (*People v. Beeman* (1984) 35 Cal.3d 547, 560 (*Beeman*); *McCoy*, at p. 1118.)

1. Ayala’s knowledge of Ochoa’s intent

Ayala urges us to credit his claim to Bucknell that he did not know Ochoa intended to kill anyone. We reject his argument for two reasons.

First, we cannot reweigh the evidence. The jury was not obligated to credit Ayala’s account that he did not know Ochoa intended to kill anyone. Ayala lied to Bucknell. For nearly the first hour of his interview, Ayala denied his involvement in the shooting. When Bucknell confronted Ayala with GPS evidence that tracked his location, he claimed to have visited his grandmother. But the GPS evidence also placed him away from his grandmother’s house. When informed of this, Ayala admitted to driving to the area of the shooting.

The jury could have reasonably concluded that Ayala’s subsequent denial of knowing Ochoa’s intent to kill was merely a continuation of his earlier false denial of involvement. “[A]

rational trier of fact may disbelieve those portions of a defendant's statements that are obviously self-serving." (*People v. Ewing* (2016) 244 Cal.App.4th 359, 378 (*Ewing*); *People v. Silva* (2001) 25 Cal.4th 345, 369.) Ayala's denial of guilt provided ample reason for the jury to do so here.

Second, the facts supported the contrary inference that Ayala did know of Ochoa's intent to kill. Ayala's version—that Ochoa abruptly ordered him to stop, exited the car, and fired shots—paints him as a passive bystander to the crimes. It is true that mere presence at a crime scene is insufficient to establish aiding and abetting. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409; *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1460; *People v. Durham* (1969) 70 Cal.2d 171, 181.) However, presence at the crime scene can be considered, along with companionship and conduct before, during, and after the offense. (*Campbell*, at p. 409; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094; *People v. Lara* (2017) 9 Cal.App.5th 296, 322.)

Ayala was hardly a mere bystander. He knew that Ochoa had a gun with him in the car. Ayala claimed to have discovered Ochoa's gun when they were halfway to the location of the shooting. Ayala had ample time to terminate the trip. Or, he could have asked Ochoa why he had the gun. Such expectations are reasonable. Ignoring the gun would have been unreasonable. Ayala even conceded that he could have prevented the shooting but failed to do so. A jury could have inferred from these facts that he knew of Ochoa's intent to kill.

Ayala asserts that his knowledge of Ochoa's intent to kill was not conclusively established by the possession of a gun. Ayala demands an explicit declaration of an intent to kill by Ochoa.

We reject Ayala's assertion. The primary actor need not expressly communicate his criminal purpose to the defendant, as that purpose may be apparent from the circumstances. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531–532.)

Perhaps as an isolated fact, possession of a gun appears innocuous. But we cannot view Ochoa's possession in isolation. Ayala and Ochoa were Project Boys gang members. Their culpability was not based on mere gang affiliation. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055 (*Nguyen*).) Rather, their plan was to "hit up," or confront people in the rival gang territory. Ayala knew Ochoa wanted to enhance his reputation in the gang. Ochoa was willing to "put in work" for the gang. As Officer Salazar described, putting in work entailed committing crimes to generate respect for the gang, or fear of the gang. The jurors could have reasonably inferred Ayala knew his ambitious fellow gang member intended to kill when he carried a firearm into rival territory.

2. Ayala's intent and assistance in committing the crimes

Substantial evidence established Ayala knowingly drove an armed fellow gang member to rival territory to violently confront others. He waited while his fellow gang member fired multiple shots. He drove his fellow gang member away from the scene. These facts demonstrate his intent and assistance to Ochoa.

Conceding that he told Detective Bucknell of their plan to hit up people, Ayala denies that the plan included killing anyone. Ayala tries to minimize an intent to kill to a mere intent to intimidate or hit up people.

We are not persuaded. Ayala and Ochoa traveled to rival gang territory armed with a loaded gun. Why else would the gun

need to be loaded other than to fire it? Moreover, Ayala acknowledged to Detective Bucknell that such confrontations can lead to violence. From these facts, the jury could have reasonably inferred that the plan entailed killing, rather than verbal contact or a mere display of the gun. “Although it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt.” (*Kraft, supra*, 23 Cal.4th at pp. 1053–1054; *Nguyen, supra*, 61 Cal.4th at pp. 1055–1056; *People v. Bean* (1988) 46 Cal.3d 919, 932–933.)

Ayala further claims that he was under Ochoa’s control, and did not affirmatively intend to assist in the murder. Ayala told the detectives that he followed Ochoa’s orders about where to drive and when to stop. But the jury was free to find that Ayala’s description of Ochoa’s instructions was a contrived attempt to minimize his culpability to the detectives. The jurors could have reasonably disbelieved Ayala’s claim that Ochoa ordered him to do anything. Ochoa was the junior gang member. The jurors could also have reasonably disbelieved that Ayala would allow Ochoa to exit his car on foot, only to be stranded in rival gang territory. It is more reasonable to believe that Ayala dropped Ochoa off only to facilitate the killing.

Ayala also asserts that he did not affirmatively act to facilitate the murder. He notes that he was unarmed and did not personally yell any verbal challenges to the victim. Intent to assist murder is not exclusively revealed by such inaction. Serving as a driver or a look out reasonably supported Ayala’s intent to facilitate the murder. As the driver, Ayala played a

vital role in transporting the killer to the location and extracting him to avoid apprehension by the police and identification by witnesses. Ayala's presence facilitated and encouraged Ochoa by showing that he was available to back him up and to help him escape after the shooting.

Based on the entirety of the facts, we conclude that the jurors could reasonably infer that Ayala not only knew of Ochoa's murderous intent, but also shared it and facilitated it.

B. Conspiracy to Commit Murder

In addition to aiding and abetting, the prosecutor proceeded on the alternate theory of uncharged conspiracy to demonstrate Ayala's culpability for murder.⁸ For many of the same reasons the evidence supported the theory of aiding and abetting, we conclude that it supported Ayala's murder conviction under the theory of uncharged conspiracy.

Conspiracy requires an agreement between two or more persons to commit a crime, and an overt act in furtherance of the conspiracy. (*People v. Homick* (2012) 55 Cal.4th 816, 870.) The conspirators must have intended to agree and intended to commit the target offense. (*People v. Swain* (1996) 12 Cal.4th 593, 599–600.) “Evidence is sufficient to prove a conspiracy to commit a crime ‘if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.]’” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135; *People v. Maciel* (2013) 57 Cal.4th 482, 515 (*Maciel*).) “The

⁸ Ayala does not discuss the evidence to support conspiracy as a theory of liability in his insufficiency of evidence claim. The Attorney General asserts that the evidence sufficiently supports the murder conviction under a conspiracy theory. As we will discuss, we agree with the Attorney General.

existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]” (*Rodrigues*, at p. 1135; *Maciel*, at pp. 515–516.)

The agreement between Ayala and Ochoa to commit the murder was established by their explicit plan to drive into rival gang territory to hit up people. This plan was motivated by Ochoa’s desire to enhance his reputation within the gang.

Ayala assisted Ochoa in his endeavor by driving him to rival gang territory. On their way, Ayala learned that Ochoa was armed with a gun. Undeterred by this discovery, Ayala continued with their plan to confront rival gang members. Based on Ayala’s proceeding with this plan, we can reasonably infer his intent to agree to commit the murder.

We can further reasonably infer Ayala’s intent to commit the murder from his acts leading up to the shooting. When Ayala and Ochoa arrived in rival territory, they first assaulted Fresly C. with the gun. Next, Ayala dropped off Ochoa, who walked up to Jonathan V. with the gun. Ayala waited for Ochoa to complete the shooting. After Ochoa shot Jonathan V., he escaped with Ayala.

Each step supported the inference that Ayala and Ochoa positively came to a mutual understanding to commit the murder. (*Maciel, supra*, 57 Cal.4th at pp. 515–516.) Additionally, Ochoa’s murder of Jonathan V., among other acts, satisfied the overt act requirement. (*People v. Jurado* (2006) 38 Cal.4th 72, 121.) Accordingly, we conclude the evidence sufficiently proved a conspiracy to commit the murder.

C. Deliberation and Premeditation

Ayala contends that the evidence was insufficient to support the theory that the murder was deliberate and premeditated. We can reject his contention based on our earlier conclusions that the evidence was sufficient for murder under the theories of direct aiding and abetting and uncharged conspiracy. “It would be virtually impossible for a person to know of another’s intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required.” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166 (*Samaniego*).) Moreover, “all conspiracy to commit murder is necessarily conspiracy to commit premeditated and [deliberate] first degree murder.” (*People v. Cortez* (1998) 18 Cal.4th 1223, 1237; *Maciel, supra*, 57 Cal.4th at p. 515.)

Even when considering the evidence under the more precise definitions of premeditation and deliberation, Ayala’s contention still fails. Premeditated means “considered beforehand.” (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) Deliberate means “‘formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.’ [Citation.]” (*Ibid.*) An intentional killing is deliberate and premeditated if it resulted from “preexisting thought,” rather than “rash impulse.” (*People v. Stitely* (2005) 35 Cal.4th 514, 543.)

To assess the sufficiency of evidence to support premeditation and deliberation, the Supreme Court has established three factors or categories of evidence: planning activity, motive to kill, and the manner of killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*); *People v.*

Wharton (1991) 53 Cal.3d 522, 546.) First degree murder typically entails any one of the following: (1) extremely strong evidence of planning, (2) a combination of evidence of motive and either evidence of planning or evidence of a calculated manner of killing, or (3) evidence of all three factors. (*Anderson*, at p. 27; *Wharton*, at pp. 546–547; *People v. Memro* (1995) 11 Cal.4th 786, 863.) The *Anderson* factors assist with reviewing the evidence. They are not a requirement to finding first degree premeditated and deliberate murder. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081; *People v. Cole* (2004) 33 Cal.4th 1158, 1224.)

First, we can reasonably infer planning from Ayala's agreement to drive Ochoa to rival gang territory to hit up people. Ayala knew that Ochoa took a gun with him. From Ayala's knowledge, we can further infer that the plan included use of the gun. (See *Koontz*, *supra*, 27 Cal.4th at p. 1082 [sufficient evidence of planning based on defendant's arming self with gun prior to shooting victim].)

Second, Ayala's gang affiliation motivated the crimes. Officer Salazar explained that to earn respect within a gang, a gang member must instill fear in the community. He or she instills fear by committing crimes, especially violent crimes. The more violent the crime committed, the greater the enhancement of his or her reputation. Ayala suggested that Ochoa was motivated by this principle. But there is no reason why it would not have motivated both of them. Salazar confirmed that shooting at a rival gang member in rival gang territory would enhance the shooter's status, as well as the status of the driver who assisted the shooter.⁹

⁹ We reject Ayala's argument that Officer Salazar's testimony about gang culture was insufficient to prove his intent

Ayala's motive to commit the murder further arose from the rivalry between his gang and the Pacoima South Side Locos and the Latin Times gangs which occupied the area of the murder. We can reasonably infer the motive for gang shootings from the gang's hatred of its rivals.¹⁰ (See *People v. Sanchez* (2001) 26 Cal.4th 834, 849; *People v. Rand* (1995) 37 Cal.App.4th 999, 1001.)

Finally, the manner of killing involved Ayala driving Ochoa to the rival gang territory, dropping him off within a block of his target. Ayala slowly followed Ochoa until he completed the

for the substantive crimes, and as we will discuss, for the gang enhancement. Gang evidence is admissible to prove intent. (*People v. McKinnon* (2011) 52 Cal.4th 610, 655; *People v. Lee* (2011) 51 Cal.4th 620, 643–644.) Expert testimony about gang culture and habits is the type of evidence on which a jury may rely to convict on a gang-related offense. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930 (*Ferraez*).) Moreover, the substantial evidence that supported the crimes was not limited to Salazar's testimony. As discussed, it was also comprised of other evidence, including Ayala's admissions to Detective Bucknell about his participation in the incident.

¹⁰ We reject Ayala's argument that members of his gang would have no motive to kill anyone from the rival Pacoima South Side Locos gang, which was responsible for a previous drive-by shooting. He reasons that because no one was killed during the prior shooting, Ayala would not want to kill anyone in retaliation. It is unreasonable to presume that the failure to kill in a shooting by one gang would have diminished a motive to kill in retaliation by its rival. It is also inconsequential that Officer Salazar may have been uncertain of the exact date of the prior drive-by shooting. The rivalry existed at the time of the incident in this case.

killing. These acts facilitated a “walk-up” shooting, designed to attack Jonathan V. in close quarters. As described by Officer Salazar, a walk-up shooting allows the shooter to reduce the chance of missing his target. This tactic also allowed Ayala to avoid attention to his distinctive car. This manner of killing suggests a “‘preconceived design’ ” to kill. (*Anderson, supra*, 70 Cal.2d at p. 27.)

Based on all three of the *Anderson* factors, substantial evidence supported a guilty verdict of deliberate and premeditated murder. Accordingly, we conclude there was sufficient evidence to sustain the first-degree murder conviction against Ayala.

II. Sufficiency of Evidence for the Gang Enhancement

Ayala also argues that the evidence was insufficient to prove the gang enhancement. We disagree.

We apply the same standard of review on a challenge to the sufficiency of the evidence of an enhancement as to the sufficiency of the evidence of a conviction. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057–1058; *People v. Wilson* (2008) 44 Cal.4th 758, 806.) Accordingly, the record must disclose substantial evidence to support the enhancement. (*People v. Franklin* (2016) 248 Cal.App.4th 938, 947 (*Franklin*).)

The gang enhancement under section 186.22, subdivision (b), first requires proof that the defendant committed the offense “for the benefit of, at the direction of, or in association with any criminal street gang.” (§ 186.22, subd. (b)(1); *People v. Abillar* (2010) 51 Cal.4th 47, 59 (*Abillar*); *Franklin, supra*, 248 Cal.App.4th at p. 948.) Second, it requires that the defendant commit the offense “with the specific intent to promote, further,

or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1); *Abillar*, at p. 64; *Franklin*, at p. 948.)

To prove these elements, Officer Salazar testified as the prosecution expert witness on gangs, as permitted by *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047–1048. Salazar expressed his opinions based on hypothetical facts which tracked the facts of the case. The Supreme Court has recognized that an expert opinion, such as Salazar’s, may sufficiently support the gang enhancement. (*Abillar*, *supra*, 51 Cal.4th at p. 63; see *People v. Vang* (2011) 52 Cal.4th 1038, 1048 (*Vang*).)

Salazar first opined the hypothetical crimes were committed for the benefit of a criminal street gang. He stated that a gang member’s act of challenging persons in a rival gang territory benefitted his gang. Instilling fear into the community and among rival gang members allowed the gang member to gain respect. The gang member could take credit for creating fear in the community and earn the reputation of being violent. Salazar stated that shooting at a rival gang member in rival gang territory enhanced the shooter’s status within the gang, as well as the status of the driver who assisted him. The commission of violent crimes, such as murder, also benefitted the entire gang by elevating its status among other gangs.

Salazar next opined that the hypothetical gang members committed the shooting of the rival gang member in association with their gang. Specifically, he explained that the manner of driving by one gang member assisted the commission of the shooting by the other. He noted that the driver facilitated the shooting and escape by slowly following behind the other gang member before the shooting. The jury could reasonably infer the association element from the very fact that the gang member

committed the offenses in association with his fellow gang member. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) Accordingly, substantial evidence supported the first element of the gang enhancement on the association theory, as well as the benefit theory.

The mental state for the gang enhancement consists of a specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b).) The criminal conduct to be promoted, furthered, or assisted includes the criminal conduct underlying the offense sought to be enhanced. (*Abillar, supra*, 51 Cal.4th 47, 66.) *Abillar* allows for the jury to infer the requisite specific intent for the gang enhancement based on substantial evidence that the defendant intended to, and did, commit the crime with another gang member. (*Id.* at p. 68; *Ewing, supra*, 244 Cal.App.4th at p. 379; *People v. Miranda* (2011) 192 Cal.App.4th 398, 412.)

We have already discussed the facts which established Ayala's intent to commit the crimes and assist in their commission by his fellow gang member. Ayala drove his armed fellow gang member to rival territory, where he hit up one person, and shot another. Once the shooting was complete, they fled together. From this substantial evidence, the jurors could have reasonably inferred that Ayala had the specific intent necessary for the gang enhancement.

Ayala denigrates the gang expert testimony as generalizations about gang culture, and asserts that it was insufficient to prove the requisite mental state for the gang enhancement. Specifically, Ayala contends that the prosecutor exclusively relied on his gang membership to prove his intent. He seems to reason that although identifiable patterns of

behavior can characterize a culture, they do not necessarily predict behavior in a specific instance.

Courts have rejected Ayala's challenge as applied to gang expert testimony. Jurors may rely on expert testimony about gang culture and habits to find the gang enhancement true. (*Ferraez, supra*, 112 Cal.App.4th at p. 930.) Further, we reject Ayala's argument because the jurors could have rationally inferred his intent from other evidence, including his admissions to Detective Bucknell.

Accordingly, we conclude that the evidence sufficiently supports the gang enhancement as applied to the crimes.

III. Admission of the Gang Expert's Testimony Addressing the Hypothetical Question

Ayala contends that the trial court erred by admitting a portion of the gang expert's testimony. Specifically, he argues that the prosecutor improperly asked a hypothetical question which included the facts of the case. He also asserts that the expert improperly stated a legal conclusion that the crimes in the hypothetical question were committed for the benefit of, and in association with, a criminal street gang.

We review a challenge to the trial court's admission of expert testimony for an abuse of discretion. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944 (*Gonzalez*)). No abuse of discretion occurred here.

Ayala first complains that the hypothetical question contained facts that exactly matched the evidence presented at trial. The Supreme Court expressly rejected this complaint in *Vang*. (*Vang, supra*, 52 Cal.4th at p. 1045.) The court held that "[h]ypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did

not disguise the fact the questions were based on the evidence.” (*Id.* at p. 1051.)

Generally, an expert witness may form an opinion based on facts presented in a hypothetical question. (*Vang, supra*, 52 Cal.4th at p. 1045.) The question may ask the expert to assume facts which are presented within the limits of the evidence and not unfairly assembled. (*Ibid.*) Trial courts must allow considerable latitude in the choice of facts upon which to frame a hypothetical question. (*Ibid.*) The key limitation is the hypothetical question must be “‘rooted in facts shown by the evidence.’” (*Ibid.*; *People v. Gardeley* (1996) 14 Cal.4th 605, 618, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 (*Sanchez*).) “A hypothetical question not based on the evidence is irrelevant and of no help to the jury.” (*Vang*, at p. 1046.) Here, the prosecutor properly included the names of the gangs, the actual location of the incident, and other pertinent details. The hypothetical facts contained nothing improper.

Next, Ayala argues that Salazar impermissibly stated his opinion about whether the crimes were committed for the benefit of, at the direction of, or in association with, the Project Boys gang. He reasons that this testimony improperly expressed an opinion on his guilt. He correctly points out that opinions on guilt or innocence are inadmissible. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77; *Vang, supra*, 52 Cal.4th at p. 1048.) A trier of fact is as competent as an expert witness to draw a conclusion of guilt. (*Coffman and Marlow*, at p. 77; *Vang*, at p. 1048.)

Salazar’s testimony did not express an opinion on guilt. An expert may express an opinion that a crime was gang-related.

(*Vang, supra*, 52 Cal.4th at p. 1052.) More specifically, “[e]xpert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the . . . gang enhancement.” (*Id.* at p. 1048.) Salazar provided the theoretical bases on which to conclude that the hypothetical crimes were committed for the benefit of, and in association with, a criminal street gang. His opinion was probative for this very reason. But probative value does not make evidence inadmissible. (*Id.* at p. 1049; see *Gonzalez, supra*, 38 Cal.4th at p. 947.) Even if the expert opinion embraced the ultimate issue of whether the crimes were gang-related, it would not be inadmissible. (Evid. Code, § 805; *Vang*, at p. 1048.)

Ayala also appears to claim that Salazar improperly testified to facts not in evidence to establish the gang allegation. However, he does not specify which facts were objectionable. Salazar did not improperly testify to any case-specific facts about which he had no knowledge.¹¹ (*Sanchez, supra*, 63 Cal.4th at p. 686.) The facts were independently presented by the other witnesses and other evidence.¹²

Contrary to Ayala’s argument, the jury was not bound by Salazar’s opinion or the facts in the hypothetical question.

¹¹ The trial court specifically reminded the prosecutor about the requirements of *Sanchez*, cautioning him to avoid eliciting case-specific hearsay which was not independently admitted. (*Sanchez, supra*, 63 Cal.4th at p. 686.)

¹² Ayala cites *People v. Baker* (2012) 204 Cal.App.4th 1234, 1245–1246, and *People v. Stevens* (2015) 62 Cal.4th 325, 336. In these cases, the expert testified to facts of the offense on which to base eligibility for mental disordered offender status. Neither expert had independent knowledge of these facts.

Neither relieved the jurors of their duty to find the facts and apply the law to them, to deliberate with one another, and to make the appropriate findings as to the gang enhancements. The jury was still required to decide whether to credit the expert's opinion, as instructed by the trial court in CALCRIM No. 332. (*Vang, supra*, 52 Cal.4th at p. 1050; *People v. Prince* (2007) 40 Cal.4th 1179, 1227.) Accordingly, we conclude there was no error by the admission of the gang expert testimony.¹³

IV. Prosecutor's Misstatements of the Law

Ayala contends that the prosecutor misstated the law on three different occasions during his closing argument. First, the prosecutor argued that Ayala was a direct perpetrator because he drove Ochoa to the crime scene. Second, he claimed that the natural and probable consequences doctrine was the only theory of liability for second degree murder. Third, he argued that under the natural and probable consequences theory, the target crime was assault with a semiautomatic firearm, consisting of Ochoa pointing the gun at Jonathan V. before firing it.

The first and second statements misstated the law, but the third statement did not. It is improper for the prosecutor to misstate the law, particularly to absolve the prosecution from its obligation to overcome reasonable doubt on each element of a charged crime. (*People v. Centeno* (2014) 60 Cal.4th 659, 666 (*Centeno*); *People v. Marshall* (1996) 13 Cal.4th 799, 831; *People v. Hill* (1998) 17 Cal.4th 800, 829 (*Hill*).) But as we will discuss,

¹³ Because there was no error by the admission of the gang expert testimony, we also reject Ayala's claims that he was deprived of his right to due process and a jury determination of his guilt, in violation of the federal constitution. We also do not reach his claim of prejudice.

the misstatements of law did not amount to prosecutorial misconduct under federal or state law.

A. Ayala Was Not a Direct Perpetrator

The prosecutor incorrectly characterized Ayala as a direct perpetrator. Under section 31, a perpetrator is a person who directly commits the crime. (§ 31.) An aider and abettor assists in the commission of a crime by the perpetrator. (*Beeman, supra*, 35 Cal.3d at p. 556.) Ochoa was the perpetrator of the murder. He shot and killed Jonathan V. Ayala was the aider and abettor.¹⁴ He drove Ochoa to the rival gang territory, waited for him to complete the murder, and fled with him.

B. More Than “One Road” to Second Degree Murder

The prosecutor erroneously asserted that the natural and probable consequences theory was the “one road to second degree murder” in this case. There was more than one road. It is true that a conviction for murder under the natural and probable consequences doctrine is second degree murder. (*People v. Chiu* (2014) 59 Cal.4th 155, 166 (*Chiu*)). Conceivably, the jury could have also found that Ayala directly aided and abetted Ochoa’s murder, but did not act with deliberation and premeditation.¹⁵

¹⁴ Aiders and abettors and perpetrators are both principals in the crime. Principals are distinguished from accessories, who aid the principals after the crime is committed. (§ 32.)

¹⁵ However, as discussed earlier, under *Samaniego*, aiding and abetting murder would likely entail a brief period of deliberation and premeditation. (*Samaniego, supra*, 172 Cal.App.4th at p. 1166.)

This determination would have also made Ayala liable for second degree murder.¹⁶

The Attorney General contends that Ayala forfeited his challenge to the prosecutor's argument that the natural and probable consequences doctrine was the only road to second degree murder. Generally, a defendant may not complain of prosecutorial misconduct on appeal, unless he or she objected on the same ground in a timely manner and requested a curative instruction. (*People v. Lopez* (2008) 42 Cal.4th 960, 966; *Centeno*, *supra*, 60 Cal.4th at p. 674.) If an objection would have been futile, or if an admonition would not have cured the harm caused by the misconduct, the failure to object will be excused. (*Hill*, *supra*, 17 Cal.4th at p. 800; *Centeno*, at p. 674.)

Ayala did not object to the prosecutor's specific comment during closing argument. However, prior to closing argument, Ayala did object to the prosecutor's reliance on the natural and probable consequences theory of liability, and the trial court's instruction of it. Both objections were overruled. Even if we assume there was no forfeiture, the statements did not amount to prosecutorial misconduct, as we will discuss.

C. Target Offense Under the Natural and Probable Consequences Doctrine

The prosecutor argued that under the natural and probable consequences theory of aiding and abetting, murder was a reasonably foreseeable consequence of assault with a semiautomatic firearm as the target offense. The prosecutor

¹⁶ Ayala also suggests that the jury could have reasonably found that his driving Ochoa, while armed, into rival gang territory was an act sufficient for implied malice murder.

relied on Ochoa's act of pointing his firearm at Jonathan V. when he shot him. This was a valid theory of liability.

Under the natural and probable consequences doctrine, a defendant is guilty not only of the intended offense he or she committed, but also of any reasonably foreseeable offense committed by another person. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262 (*Prettyman*).) Accordingly, a defendant may be liable for a target offense, as well as for any other crime that is the natural and probable consequence of that target offense. (*Ibid.*)

In a typical scenario, the natural and probable consequences theory applies when a defendant participates in a target offense, and the event escalates with the commission of a separate nontarget offense committed by another person. (See e.g. *People v. Medina* (2009) 46 Cal.4th 913, 922–923.) The target offense and the nontarget offense would consist of distinct acts.

Ayala argues that the prosecutor improperly relied on the same act for the target and the nontarget offenses.¹⁷ He reasons that because they were based on the same act, foreseeability was a foregone conclusion.

Although the initial act was the same for the target and nontarget offenses, the crimes were still distinct from one another. Guilt was established for the target offense before guilt

¹⁷ The Supreme Court has not determined whether the natural and probable consequences doctrine applies when the target offense and the nontarget offense consist of the same act. *Prettyman* does not directly address what crimes can or cannot provide liability for murder under the natural and probable consequences doctrine. (*People v. Gonzalez and Soliz* (2011) 52 Cal.4th 254, 299.)

was established for the nontarget offense.¹⁸ As described earlier, Ayala drove Ochoa to rival gang territory, knowing that he was armed and planned to confront rival gang members. When Ochoa pointed the gun at Jonathan V., Ayala was guilty of assault with a semiautomatic firearm as an aider and abettor.

Guilt for murder required additional proof. Specifically, murder required proof of Ochoa's malice, proof that his shot caused Jonathan V.'s death, and proof that it was reasonably foreseeable from the assault with a semiautomatic firearm. Because of the need for this additional proof, the murder was not a foregone conclusion, as Ayala asserts.¹⁹ The distinct commission of crimes allowed for the murder to be a natural and probable consequence of the assault with a semiautomatic firearm.

¹⁸ The jury instruction for the natural and probable consequences doctrine requires a defendant's guilt for the target offense as a prerequisite for liability of the nontarget offense. (CALCRIM No. 403; CALJIC No. 3.02.) The Supreme Court left open the question of whether a defendant may be convicted under the natural and probable consequences doctrine when the target criminal act was not committed. (*Prettyman, supra*, 14 Cal.4th at p. 262, fn. 4.)

¹⁹ Because the nontarget offense required proof of additional elements, the target offense did not actually consist of the same act as the nontarget offense, as Ayala asserts. The Fourth District held that instruction on the natural and probable consequences doctrine was appropriate when the target offense—discharge of a firearm from a vehicle—and the nontarget offense—attempted murder—were based on the same act. (*People v. Laster* (1997) 52 Cal.App.4th 1450, 1463.) *Laster* distinguished its situation from the situation we have in this case. (*Id.* at p. 1464.)

Thus, we reject Ayala’s argument that assault with a semiautomatic firearm could not be used as a target offense. The natural and probable consequences was a valid theory of liability in this case.²⁰ Accordingly, the prosecutor’s argument about its application was not improper.

D. No Prosecutorial Misconduct Under the Federal Constitution

Although the prosecutor’s two arguments misstated the law, they did not amount to a violation of federal due process. A prosecutor’s misconduct constitutes a federal violation under the Fourteenth Amendment of the U.S. Constitution when “it infects the trial with such unfairness as to make the conviction a denial of due process.” (*People v. Morales* (2001) 25 Cal.4th 34, 44 (*Morales*); *People v. Thomas* (2012) 54 Cal.4th 908, 937; *Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

The trial court’s instructions to the jury clarified any confusion created by the prosecutor’s arguments. First, the prosecutor’s incorrect application of the term “perpetrator” was clarified by the definition in CALCRIM No. 400.²¹ Moreover,

²⁰ Based on our conclusion that the natural and probable consequences doctrine was a valid theory of liability in this case, we reject Ayala’s claim that instruction on it was error.

²¹ We reject Ayala’s argument that the trial court improperly instructed the jury that he could be convicted of first degree murder as a direct perpetrator. The trial court instructed with CALCRIM No. 521, which discusses the premeditation and deliberation theory of first degree murder. This instruction correctly states that to establish first degree murder, the prosecutor must prove the defendant acted willfully, deliberately, and with premeditation. (CALCRIM No. 521.) Under a theory of premeditation and deliberation, culpability for first degree

there was no evidence that Ayala fired the handgun which killed Jonathan V.

Second, the instructions on first and second degree murder cured the prosecutor's incorrect assertion that the natural and probable consequences doctrine was the only road to second degree murder.²² (CALCRIM Nos. 520, 521.) Specifically, the trial court instructed that all murders are second degree, unless the prosecutor proved beyond a reasonable doubt that it was first degree murder as defined in CALCRIM No. 521.²³ Accordingly, the only theory of first degree murder was deliberation and premeditation. The instructions allowed for second degree murder under theory of direct aiding and abetting, as well as aiding and abetting under the natural and probable consequences theory.

murder as an aider and abettor still requires proof that the defendant personally acted with premeditation and deliberation. (*Chiu, supra*, 59 Cal.4th at pp. 166–167.) Accordingly, the trial court did not instruct on an invalid theory of guilt.

²² The trial court never instructed the jurors that the natural and probable consequences theory was “the only road” to second degree murder. We reject Ayala’s argument to the contrary.

²³ Ayala argues that because the jurors were never specifically told that implied malice murder was second degree murder, they did not know that a conviction for second degree murder could be sustained by implied malice. However, such an instruction is unnecessary, given CALCRIM No. 520, which discusses implied malice, and states that all murders are second degree, with the exception of first degree murder as defined in CALCRIM No. 521.

Third, the trial court told the jurors that they should apply the law stated in the instructions, and that if anything said by the attorneys conflicted with those instructions, the latter must control. (CALCRIM No. 200.)

These instructions safeguarded Ayala's due process rights against any hint of unfairness which the prosecutor's remarks might have created. Accordingly, there was no prosecutorial misconduct under the federal standard.

E. No Prosecutorial Misconduct Under the State Constitution

Prosecutorial misconduct under state law involves the use of "deceptive or reprehensible methods to attempt to persuade . . . the jury." (*Morales, supra*, 25 Cal.4th at p. 44; *People v. Otero* (2012) 210 Cal.App.4th 865, 870; *People v. Wallace* (2008) 44 Cal.4th 1032, 1070–1071.) Here, the prosecutor's comments did not amount to misconduct under this standard. First, he demonstrated repeatedly that he simply did not understand the difference between a perpetrator and an aider and abettor. He was genuinely confused. Second, by commenting that the natural and probable consequences theory was the only road to second degree murder, the prosecutor neglected any alternative for second degree murder. We cannot conclude that the prosecutor's statements were deceptive or reprehensible, even though they were incorrect.

Because the claim involves the prosecutor's comments before a jury, we must determine whether there is "a reasonable likelihood that the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.]" (*Centeno, supra*, 60 Cal.4th at p. 667; *Morales, supra*, 25 Cal.4th

at p. 44.) Again, the jury instructions prevented any erroneous understanding or application of the law.

As discussed earlier, the trial court instructed the jury on the laws of first and second degree murder and distinguished the role of a perpetrator from an aider and abettor. We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as attempts to persuade by an advocate. (*People v. Forrest* (2017) 7 Cal.App.5th 1074, 1083; *People v. Osband* (1996) 13 Cal.4th 622, 717.) We also presume the jurors were able "to understand and correlate instructions and are further presumed to have followed the court's instructions." (*Sanchez, supra*, 26 Cal.4th at p. 852.) Neither presumption was rebutted.

The jurors never asked any questions about the terms perpetrator or aider and abettor, or the elements of first or second degree murder. The evidence also supported the jury's conclusion that Ayala acted with premeditation and deliberation in assisting the killing of Jonathan V., as we have discussed. The conviction for first degree murder necessarily excludes the possibility that the jury relied on the natural and probable consequences doctrine.

Thus, we conclude it is not reasonably likely that the jury was misled by the prosecutor's misstatements regarding either the role of a perpetrator or theories of second degree murder. (*People v. Medina* (1995) 11 Cal.4th 694, 760.)

V. The Firearm Enhancement

Section 12022.53, subdivision (d), subjects a defendant to an additional term of 25 years to life for intentionally and personally discharging a firearm and proximately causing great bodily injury or death, during the commission of a crime

enumerated in subdivision (a). (§ 12022.53, subd. (d); *People v. Garcia* (2002) 28 Cal.4th 1166, 1171.) Section 12022.53, subdivision (e)(1), imposes vicarious liability for this firearm enhancement. Specifically, it provides for punishment of an aider and abettor to a qualifying crime, if he or she also violated the gang enhancement under section 186.22, subdivision (b). (§ 12022.53, subd. (e)(1); *Garcia*, at p. 1171.)

Effective January 1, 2018, the Legislature amended section 12022.53 by adding subdivision (h), which allows a court to exercise its discretion under section 1385 to strike or dismiss the personal use of a firearm enhancement at the time of sentencing. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2, p. 5104; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678.)

A trial court’s refusal or failure to dismiss an allegation pursuant to section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) The defendant must affirmatively demonstrate that the trial court misunderstood its sentencing discretion. (*People v. Lee* (2017) 16 Cal.App.5th 861, 866; *People v. Davis* (1996) 50 Cal.App.4th 168, 172.) Unless the defendant clearly shows that a sentencing decision was irrational or arbitrary, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978; *Lee*, at p. 866.) We will not reverse a decision because reasonable persons might disagree. (*Carmony*, at pp. 376–377.)

Ayala’s sentencing occurred on July 19, 2018, after Senate Bill No. 620 went into effect. The trial court was aware of the

change in the law. After considering the probation officer's report and sentencing memoranda filed by the prosecutor and by the defense, the trial court denied Ayala's request to strike the firearm enhancement.

The trial court found multiple aggravating factors.²⁴ First, the court noted that the crimes involved great violence and great bodily harm, which consisted of killing Jonathan V. and injuring Urvano S.C. The latter injury involved surgery and a month-long stay at a rehabilitation center. Moreover, Urvano S.C. testified that he constantly felt as if he had a spike in him from the bullet which remained inside of him after surgery. Second, the court found the crimes were gang-related with Ochoa using a weapon in the commission of the crimes. Third, the court found that the victims were vulnerable. It commented that Jonathan V. was just standing there when Ochoa shot him. Similarly, Urvano S.C. was engaged in ordinary activity with his grandchild. The trial court's comments confirm its finding that they were defenseless, unguarded, and unprotected. (*People v. Bloom* (1983) 142 Cal.App.3d 310, 321.)

In mitigation, the trial court found that Ayala did cooperate with the police. First, he made a statement to Detective Bucknell, which revealed the shooter's identity. Second, Ayala participated in the recorded conversation with Ochoa, who admitted his culpability.

²⁴ The trial court limited its consideration of Ayala's criminal history to convictions, and omitted arrests. It also stated that it rejected the prosecutor's assertion that Ayala was induced to participate in the crime. The trial court must have intended to reject the assertion that Ayala induced others to participate in the crime. (Cal. Rules of Court, rule 4.421(a)(4).)

Ayala appears to argue that the trial court improperly considered the same facts in the underlying murder to deny his request to strike the punishment for the firearm enhancement. Specifically, the facts to which he refers are those used to support the aggravating factors of great violence and great bodily harm, the gang-related nature of the crime, and weapon use.

The prohibition against the dual use of facts does not apply here. There is no prohibition against the dual use of facts to impose an indeterminate sentence on murder and to deny a request to strike punishment on a firearm enhancement. The prohibition against dual use of facts is limited to situations involving determinate sentencing, which are not before us.²⁵ (*Scott, supra*, 9 Cal.4th at p. 350.)

We conclude that the trial court considered the appropriate factors when it sentenced Ayala. The denial of Ayala's request to strike the firearm enhancement fell within the bounds of the trial court's discretion. Accordingly, the trial court did not abuse its discretion.

²⁵ "The statutes and rules impose few explicit bans on the dual use of sentencing factors." (*People v. Scott* (1994) 9 Cal.4th 331, 350, fn. 12 (*Scott*).) First, the court may not impose the upper term by using the fact of any enhancement upon which sentence is imposed. (*Id.* at p. 350; Cal. Rules of Court, rule 4.420(c).) Second, a fact that is an element of the crime may not be used to impose a greater term. (*Scott*, at p. 350; Cal. Rules of Court, rule 4.420(d).) Third, the court cannot rely on the same fact to impose both the upper term and a consecutive sentence. (*Scott*, at p. 350, fn. 12.)

VI. Proper Full-Term Sentence on Count 4

Ayala contends that the trial court erred by sentencing him to three years on count 4, rather than one-third of the midterm. We disagree.

If a court sentences a defendant on multiple counts—one or more under the Indeterminate Sentencing Law and one or more under the Determinate Sentencing Law—the indeterminate and determinate sentences are to be considered and calculated separately. (*People v. Reyes* (1989) 212 Cal.App.3d 852, 856; *People v. Day* (1981) 117 Cal.App.3d 932, 936–937; *People v. Garcia* (1997) 59 Cal.App.4th 834, 838; *People v. McGahuey* (1981) 121 Cal.App.3d 524, 530–531.) Under the Determinate Sentencing Law, at least one determinate sentence must be designated as the principal term for which a full-term sentence must be imposed. (§ 1170.1.)

The trial court sentenced Ayala on the murder conviction to an indeterminate sentence. The assault with a semiautomatic firearm conviction in count 4 was the only offense for which Ayala could be sentenced under the Determinate Sentencing Law. The sentence on count 4 was thus the principal term under the Determinate Sentencing Law. Accordingly, the trial court correctly sentenced Ayala to the full term on count 4, pursuant to the Determinate Sentencing Law.

VII. Other Sentencing Errors

We address the following sentencing errors, even though neither party has raised them. It is well established that the reviewing court can correct legal errors resulting in an unauthorized sentence at any time. (*People v. Sanders* (2012) 55 Cal.4th 731, 743, fn. 13; *Scott, supra*, 9 Cal.4th at p. 354.)

A. The Gang Enhancement as to Count 1

As to the murder charge in count 1, the jury found true the gang enhancement alleged under section 186.22, subdivision (b)(1)(C). However, the trial court took no action as to this enhancement.

Section 186.22, subdivision (b)(5)—not section 186.22, subdivision (b)(1)(C)—properly applies to count 1 because murder is “a felony punishable by imprisonment in the state prison for life.” (§ 186.22, subd. (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1006–1007.) Section 186.22, subdivision (b)(5), represents a penalty provision—rather than an enhancement—which sets a 15-year parole eligibility period for an indeterminate term. This minimum parole eligibility period is used in lieu of the 10-year gang enhancement in section 186.22, subdivision (b)(1)(C). (*Lopez*, at p. 1007; *People v. Fiu* (2008) 165 Cal.App.4th 360, 390.)

Even if the correct gang penalty provision was alleged, it would have had no practical consequence. Section 12022.53, subdivision (e)(2), prohibits the imposition of both the vicarious firearm enhancement and the gang enhancement or penalty provision. (§ 12022.53, subd. (e)(2); *People v. Brookfield* (2009) 47 Cal.4th 583, 595; *People v. Gonzalez* (2010) 180 Cal.App.4th 1420, 1427.) The minimum 15-year parole eligibility period from the gang penalty provision could not be imposed in addition to the 25-year firearm enhancement.²⁶ (*Gonzalez*, at p. 1427.)

Thus, the customary penalty of 25 years to life for first degree murder (§ 190, subd. (a)) remains as the sentence for

²⁶ Moreover, because it is greater, the penalty of 25 years to life for first degree murder (§ 190, subd. (a)) applies in lieu of the penalty of 15 years to life in section 186.22, subdivision (b)(5). (*Lopez*, *supra*, 34 Cal.4th at pp. 1008–1009.)

count 1, along with the additional 25 years to life for the firearm enhancement. Accordingly, we strike the gang enhancement as to count 1. (*Ibid.*)

B. The Gang Enhancement as to Count 4

The trial court “stayed” the term for the gang enhancement as to the assault with a semiautomatic firearm charge in count 4. It reasoned that the sentence imposed was “more than sufficient to satisfy the requirements of the law.”

Punishment under this enhancement can either be imposed or stricken under section 1385. (§ 186.22, subd. (g); *People v. Vega* (2013) 214 Cal.App.4th 1387, 1397.) The functional effect of the trial court’s order was striking the punishment because it was unconditional.²⁷ (*People v. Santana* (1986) 182 Cal.App.3d 185, 191; *People v. Lopez* (1983) 147 Cal.App.3d 162, 165.) Accordingly, the abstract of judgment must be corrected to reflect that the punishment was stricken, rather than stayed.

C. The Remaining Firearm Enhancements

In addition to the allegation that Ayala was vicariously liable for the intentional discharge of a firearm, causing Jonathan V.’s death (§ 12022.53, subds. (d), (e)(1)), the jury found true that he was vicariously liable for the intentional discharge and use of a firearm in the commission of the murder (§ 12022.53, subds. (b), (c)). The trial court did not impose and stay these latter two enhancements, as required by § 12022.53, subdivision (f). (*People v. Gonzalez* (2008) 43 Cal.4th. 1118, 1130.) The failure to impose and stay an enhancement results in a legally unauthorized sentence subject to correction for the first time on

²⁷ The Attorney General does not contend that the trial court abused its discretion.

appeal. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1473.)
Accordingly, the terms for section 12022.53, subdivisions (b) and
(c), must be imposed and stayed.

DISPOSITION

As to count 1, the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C), is stricken. The 10-year and 20-year firearm enhancements under section 12022.53, subdivisions (b) and (c), respectively, are imposed and stayed. The clerk of the superior court is to amend the abstract of judgment accordingly.

As to count 4, the clerk of the superior court is to amend the abstract of judgment to reflect the punishment stricken for the gang enhancement under section 186.22, subdivision (b)(1)(C).

The clerk of the superior court is to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

As modified, the judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL
REPORTS**

HANASONO, J.*

We concur:

EDMON, P. J.

EGERTON, J.

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