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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROBERT BECERRA, Defendant and Appellant.	B285885 (Los Angeles County Super. Ct. No. BA439730)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy, Judge. Affirmed with corrections and remanded.

Joshua L. Siegel, 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, Marc A. Kohn and Peggy Z. Huang Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found appellant Robert Becerra guilty of charges arising from three separate gang-related shootings: one count of first degree murder, three counts of premeditated attempted murder, two counts of shooting at an occupied vehicle, two counts of assault with a firearm, and three counts of possession of a firearm by a felon. He appeals the trial court's judgment and sentence, alleging the following: (1) the prosecutor committed misconduct in misstating the burden of proof during closing argument; (2) the trial court failed to instruct the jury on voluntary manslaughter; (3) the errors were cumulatively prejudicial as to the murder conviction; (4) there is insufficient evidence to support the gang enhancement on the murder conviction; (5) the sentencing court must be permitted to exercise its newly-granted discretion to strike or dismiss firearm enhancements under Senate Bill No. 620 (2017-2018 Reg. Sess.); and (6) the abstract of judgment contains a clerical error that must be corrected. We remand the case to the trial court for the sole purpose of correcting the abstract of judgment. In all other respects, we affirm.

STATEMENT OF THE CASE

An information filed March 27, 2017 charged appellant with murder (Pen. Code, § 187, subd. (a); count 1),[1] three counts of willful, deliberate, and premeditated attempted murder (§§ 664/187, subd. (a), 187; counts 3, 7, & 11), two counts of shooting at an occupied vehicle (§ 246; counts 4 & 8), two counts of assault with a firearm (§ 245, subd. (a)(2); counts 5 & 9), and

[1] All further statutory citations are to the Penal Code, unless otherwise indicated.

four counts of possession of a firearm by a felon (§ 29800, subd. (a)(1); counts 2, 6, 10, & 12). The information further alleged that as to all counts, the offenses were gang related (§ 186.22, subd. (b)) and appellant served a prior prison term (§ 667.5, subd. (b).) As to counts 1, 3, 4, 7, 8, and 11, it was also alleged that appellant personally and intentionally discharged a firearm. (§ 12022.53, subds. (c)-(d).) As to counts 5 and 9, it was further alleged that appellant personally used a firearm. (§ 12022.5, subds. (a), (d).) Appellant pleaded not guilty and denied all special allegations.

Trial was by jury. The trial court severed the issue of appellant's prior conviction prior to trial. Appellant subsequently admitted the prior felony conviction and prior prison term. The trial court granted appellant's motion to dismiss count 10 and the prosecution's motion to dismiss gang enhancements as to counts 2, 6, and 12. Appellant was found guilty of the charged offenses, including first degree murder, and the firearm and gang enhancements were found true. The trial court sentenced appellant to a total sentence of five years, four months, plus 116 years to life in prison. Appellant timely appealed.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant is a member of Metro 13, a criminal gang that claims its territory in East Los Angeles, and his moniker is "Lil Dopey." Appellant was charged with offenses arising from three separate shootings that occurred within a 16-day period: (1) on August 21, 2015, Ernesto Lara was shot and permanently paralyzed (counts 11 and 12); (2) on September 1, 2015, Ernest Ramos was shot and killed (counts 1 & 2); and (3) on September

5, 2015, Nicholas Esparza was the victim of a drive-by shooting (counts 3-9).

At the time of the shootings, appellant was 19 years old. In a rap song uploaded online and played for the jury, a voice identified as appellant's introduces himself as "Lil Dopey" and sings in graphic terms about Metro's superiority over a rival gang, asserted through acts of violence such as shootings and killing "for thrills."

A. *Prosecution Evidence*

1. *Ernesto Lara* (*Counts 11 & 12*)

Ernesto Lara and appellant used to be close childhood friends and saw each other occasionally as teenagers. They spent time together at Lara's house after Lara was released from Juvenile Hall, a year before the shooting. A few weeks before the shooting, appellant came to Lara's house angrily looking for someone. Lara tried to calm him down, but appellant punched him in the face and left.

On the night of August 21, 2015, Lara was outside a neighbor's house in Azusa to pick up his younger brother, I.L. As he waited, he played with his BB gun, put it down, and talked to some girls. Lara saw a black four-door car approach about 15 to 20 feet away, and appellant exited the front passenger seat. Appellant said, "Where you from," which Lara understood to be a question about what gang Lara represented. Lara did not belong to a gang, and answered "nowhere." Appellant then identified his gang, "Metro," and shot Lara four times. He got back in the car and drove away, leaving Lara injured on the floor. Lara was 17 years old at the time of the shooting, and has since been paralyzed.

Police arrived shortly after the shooting. Although he had recognized appellant, Lara did not tell the police who the shooter was because he was scared. At the hospital, Lara's sister Catalina asked him who the shooter was. Communicating through text messages on September 10, Lara told her that "Robert" from Metro had shot him. At Lara's request, Catalina told Los Angeles County Sheriff's Detective Chris Franks. Catalina was Facebook friends with appellant, but after the shooting she noticed he had deleted her as a friend.

On September 24, Detective Franks interviewed Lara at the hospital. Fearing for his family's safety, Lara showed Detective Franks a Facebook photo of appellant and identified him as the shooter. Lara could not definitively identify appellant in a photographic six-pack he was shown. Unbeknownst to Detective Franks, the six-pack photograph of appellant was outdated and showed him with a moustache and without any tattoos. At the time of the shooting, appellant had visible Metro-related tattoos on his face, chin and neck.

Lara's younger brother I.L. was with him at the time of the shooting. I.L., who was 13 years old at the time of the shooting and 15 at the time of trial, testified and confirmed the key events: a man got out of a black car, asked his brother "where are you from," shot Lara after he responded "nowhere," got back in the car and left. I.L. told police that day that the shooter was a young male, white or light-skinned Hispanic with short hair and a tattoo on his neck that started with the letters "MX." Though I.L.'s description had inconsistencies, it generally matched appellant. I.L. had seen appellant at his house the day appellant punched Lara in the face, and identified appellant as the shooter during trial. I.L. had not recognized appellant on the night of the

shooting. However, Catalina testified that I.L. had told her the shooter looked familiar, like someone they had known when they were younger. Later, I.L. identified appellant as the shooter in an updated six-pack Detective Franks showed him.

2. *Ernest Ramos* (*Counts 1 & 2*)

Ernest Ramos had formerly dated Gloria Porras, appellant's girlfriend at the time of the shooting, and had two children with her. Cellphone data recovered from Ramos's phone established a series of text messages on August 29 through August 31, 2015 between Ramos's phone, a phone number registered to Gloria, and a third phone number ending in 4227 which was used by Lil Dopey. The text messages indicated the following: Ramos tried to reestablish contact with Gloria, calling himself her "daddy," but Gloria said her daddy was now Lil Dopey. Gloria loved Lil Dopey and wanted Ramos to leave her alone. But Ramos asked to see the kids, and reminded her "there kids involved . . . so it's going to be hard just to give up." On August 31, Ramos texted the 4227 number and said, "Look how you make your varrio look . . . stay away from my family bitch," to which the 4227 number responded, "Make me."[2] They exchanged threats and insults, and the 4227 number texted, "You and your goons gonna get hurt" and finally, "I'll be playing you a visit. [Gloria] taking me to your pad. And nah, she mines. And those kids are too. You ain't got no kids anymore. I say when you get to see them. And now you gotta call me daddy. Ha ha ha."

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[2] The prosecution's gang expert testified that the term "varrio," or "neighborhood," is interchangeable with "Metro 13" to its members.

Cell phone data was also recovered showing a series of text messages between a phone number belonging to Raul Trinidad and the 4227 number used by "Dopey." On August 31, Raul asked the 4227 number for a Metro tattoo, suggesting that Raul was a fellow Metro gang member. On the afternoon of September 1, the 4227 number asked Raul for a "burner." The prosecution's gang expert explained that a "burner" was a gun.

On the evening of September 1, 2015, Celia Hernandez observed her son, Ramos, being shot. She was standing at the front door of her house, in the city of Commerce, when she saw Ramos on the sidewalk walking backwards. Ramos carried no weapon, and was facing and backing away from two men, one of whom she identified in court as appellant. Appellant stood approximately 12 feet away from her, and she had a clear view. Hernandez heard appellant say "Orale" (or, "go on"), and witnessed appellant shoot Ramos multiple times. Hernandez screamed, and saw the men turn to look at her before running away in the same direction that they came. Ramos walked a few steps toward her and fell on the floor. Hernandez administered CPR and her daughter, Denise Ramos, called 911 at 8:48 p.m. At some point, Hernandez noticed a "van" she recognized as Gloria's drive away, identifiable by the names of her grandchildren on the back window.

Ramos suffered four fatal gunshot wounds. Cell phone data established that Gloria's and appellant's phones were used near Ramos's house at the time of the shooting, and moved away from the area toward Metro territory immediately after the shooting. A surveillance camera recorded Gloria's Ford Explorer SUV arriving on Ramos's street at 8:46 pm. The SUV was driven by a woman who matched a description of Gloria, and three other

males rode as passengers. After the SUV parked, the three male passengers were seen exiting the SUV. Two minutes later, at the same time the 911 call came in, they were captured running and reentering the SUV before it drove away.

Hernandez was interviewed by the police and provided a description of the shooter that generally matched appellant. She did not see or describe any tattoos on the shooter's face. She later identified appellant as the shooter, after recognizing appellant in court at a pretrial hearing and having learned that he was the man arrested for her son's shooting.

3. *Nicholas Esparza* (*Counts 3-9*)

On the evening of September 5, 2015, Nicholas Esparza, a Los Angeles Police Department (LAPD) deputy probation officer, was driving home in the city of Los Angeles. When he reached an intersection, a black Mazda approached him at a stop sign, and the driver yelled "Metro gang." Esparza understood that he had been "gang banged," slang for what gang members do to identify themselves and claim their territory. Esparza saw five male Hispanics with shaved heads in the Mazda, and felt afraid. He avoided going home and drove down another street, but soon the black Mazda was in front of him and fired three shots at him. The bullets, which seemed to be fired from the rear passenger side, shattered his windshield and damaged his hood. Esparza sped up and got the Mazda's license plate number, then he drove away. He immediately called 911 and reported the incident and license plate number.

Esparza attempted to drive home through a different route, but he saw the Mazda a second time a few cars ahead of him. He called 911 again. The Mazda made a right turn on Cabrillo Street, and Esparza continued driving. But as he passed Cabrillo

Street, Esparza turned his head and saw three people standing outside the Mazda. One of them fired shots at him, which this time did not strike his vehicle. Esparza described what had happened to the 911 dispatcher, and agreed to meet the police at a nearby convenience store. On his way there, he saw the Mazda a third time at an intersection. Esparza turned around and drove to a gas station, where police arrived a few minutes later.

Later that night, Azusa police pulled over the Mazda and took its three occupants into custody, including the driver, Raul Trinidad. Appellant was not in the Mazda, which was registered to Raul's father, but a loaded gun was found inside. Police also recovered Raul's phone from the Mazda, which contained photos of appellant holding a gun. The prosecution's firearms expert determined that the gun recovered from the Mazda looked similar to the gun appellant held in the photos. In her ballistics analysis, she concluded that the gun was the source of a bullet that had been fired during Ramos's shooting. The three occupants in the Mazda tested negative for gunshot residue. A police detective testified that unless they had washed their hands, it would be likely they would test positive for gunshot residue if they had fired the gun. No fingerprints or DNA were found on the gun, but appellant's fingerprints were found on the front passenger side door handle of the Mazda.

Esparza could not clearly see the faces of anyone inside the black Mazda because it was dark. He could not identify appellant as the shooter at trial.

4. *Gang Evidence*

The prosecution's gang expert testified that Metro 13 is a local gang that claims its territory in the Metropolitan Hills neighborhood of East Los Angeles. Its primary activities include

"robberies," "selling drugs," "drive-by shootings," "assault with [a] deadly weapon[]" and "murders." The expert explained that gangs such as Metro 13 assert their identity and claim over a certain territory by "tagging" property with graffiti, wearing tattoos with their gang symbol, and committing violent crimes. The concept of respect is paramount to a gang, and gang members demand respect by committing violent crimes, challenging law enforcement, and instilling fear and intimidation in the community. If a member representing the gang commits a crime, it raises his status within the gang and also earns the respect of rival gangs. The more violent the crime, the more respect is earned.

When presented with hypotheticals of the three shootings at issue, the expert opined that all three shootings were committed in association with and/or to benefit Metro 13. With regard to the hypothetical resembling Ramos's shooting, the expert based his opinion on the type of crime committed, and the other individuals who were present and presumably aided in its commission. He explained that the victim need not be a gang member, and the primary purpose of the shooting need not be gang-related, for the crime to benefit the gang and increase its status.

5. *Arrest and Confession*

Appellant left the country at some point after the shootings, but was located and arrested on April 15, 2016.

On May 26, he participated in a custodial interview with LAPD detectives, which was recorded and played for the jury at trial. During the interview, appellant admitted that he was the driver and shooter in a drive-by shooting that occurred in September 2015. Without being told, he knew that the victim

was a "'probation officer,'" and said: "I banged the hood on that fool and he followed me." He described firing "a lot" of shots, and unloading and reloading the gun. Appellant thought Esparza was a rival gang member because of his "bald head." He admitted he got out of the car before the police detained his friends that night.

B. *Defense Evidence*

Detective Franks was the only defense witness. Defense counsel questioned him about inconsistencies in I.L's description of the shooter on the night of Lara's shooting. Counsel also questioned Detective Franks on Lara's inability to identify appellant in the outdated six-pack he was shown at the hospital. Detective Franks learned about appellant's tattoos for the first time during his interview with Lara at the hospital, three weeks after the shooting.

C. *Trial Proceedings*

1. *Jury Instructions*

While discussing jury instructions with the parties before deliberations, the trial court raised the issue of manslaughter instructions: "What about any – oh, now lesser includeds. I prepared for first and second degree murder. I didn't think that there was any justification for any sort of manslaughter." Defense counsel responded: "There isn't. I concur." The jury was instructed only on first and second degree murder.

The jury was instructed on the prosecution's burden to prove a defendant guilty beyond a reasonable doubt, and each allegation supporting each offense beyond a reasonable doubt. The jury also was instructed that both direct and circumstantial

evidence were acceptable to prove or disprove the elements of a charge. Regarding circumstantial evidence, the instructions stated, per CALCRIM No. 224: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. [¶] If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. [¶] However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

2. *Closing Arguments*

During closing arguments, the prosecutor highlighted all the evidence that pointed to appellant's guilt, including eyewitness testimony and identification, forensic analysis of text messages, cell phone mapping, surveillance video, testimony from gang experts as to the manner and motive of the crime, ballistics analysis of the bullets and the gun recovered, photos of appellant with seemingly the same gun, fingerprint analysis, gunshot residue testing, and appellant's own recorded confession.

Appellant contends that the prosecutor misstated the burden of proof when he argued during closing:

> "It would be unreasonable at this point, with the evidence we have already discussed, to think that the defendant threatened to go to Ramos' house with

> Gloria to do him harm the day before the shooting, that Gloria's car was at Ramos' house at the time of the shooting, the exact time of the shooting and not before and not after, that the defendant was identified as the shooter by somebody standing twelve feet away and watched him do it and who he looked directly at immediately after shooting Ernest Ramos, that his cell phone was within a mile of Ramos' house at the time of the shooting and the defendant was not the shooter. [¶] That's unreasonable. It is an unreasonable conclusion. And if it's not reasonable, it's proven beyond a reasonable doubt. That's the law."

Defense counsel did not object. The prosecutor then explained the elements of murder per CALCRIM No. 520, reiterated that he must prove each element "beyond a reasonable doubt," and instructed that if he made any error during closing argument, the jury should adhere to the elements of murder as explained in the jury instructions.

According to appellant, the prosecutor again misstated the burden of proof, when he argued during rebuttal: "So it would be a miracle if it wasn't him. And that's not the burden of proof here. I cannot be held to beyond a miracle standard of proof. It's beyond a reasonable doubt. And it is unreasonable to think anybody other than the defendant murdered Ernest Ramos." Again, defense counsel did not object.

During closing argument, defense counsel emphasized that "[the prosecution] must establish each and every element of all the crimes, allegations and enhancements to [the jury] beyond a reasonable doubt." He further explained: "The burden of proof is not, is it possible? Is it possible that he did it? Do I think he did it? I'm speculating that he did it; he probably did it. Not good

enough . . . that's not the standard of proof." Defense counsel challenged the accuracy of Hernandez's identification of appellant because she did not mention appellant's tattoos and was not shown a six-pack. He also pointed to the fact that appellant had no motive to shoot Lara, who did not identify appellant as the shooter immediately after the shooting or in the first six-pack he was shown. Regarding Esparza's shooting, defense counsel argued that appellant's fingerprints were not found on the gun, appellant was not in the Mazda when it was stopped, and his confession was not consistent with Esparza's account of the shooting. Addressing the prosecution's use of circumstantial evidence, defense counsel reiterated CALCRIM No. 224 and explained that "each and every element must be established beyond a reasonable doubt. You can't connect dots by assuming, guessing or speculating. It must be proven. Connect the dots, but you have to prove it."

3. *Verdict*

The jury found appellant guilty of the charged offenses, including first degree murder, and the firearm and gang enhancements were found true.

D. *Sentencing*

At sentencing, the trial court was aware of the ongoing threat appellant posed even while in custody. Before trial, he had been charged with battery by a prisoner for the attempted stabbing of a deputy while in custody. He had also used his ankle chains and a pencil to deface his entire cell with Metro 13 graffiti.[3]

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[3] At the sentencing hearing, the prosecutor represented that appellant had pleaded guilty to the battery charge.

The trial court imposed the maximum and/or mandatory sentence on all counts: 25 years to life with the possibility of parole plus 25 years to life for the firearm enhancement on count one; a consecutive high term of three years on count two; a consecutive term of life with the possibility of parole plus 20 years to life for the firearm enhancement on count three; a consecutive one-third the midterm, or eight months, on count six; a consecutive term of life with the possibility of parole plus 20 years to life for the firearm enhancement on count seven; a consecutive life term with the possibility of parole plus 25 years to life for the firearm enhancement on count 11; a consecutive one-third the midterm, or eight months, on count 12; and an additional one year for his prior conviction. Counts 4, 5, 8, and 9 were stayed per section 654. He was also sentenced to a consecutive one-third the midterm, or one year, on the battery by a prisoner charge.

The judge noted that "[t]hese are among the most brutal and senseless crimes that this court has seen." She emphasized the absence of "any conceivable justification for any of these crimes," noting that they were ruthlessly committed in front of family members, against victims who were unarmed, vulnerable, and posed no threat to appellant. In the middle of her remarks, the judge told appellant to "stop the smirking and laughing." Appellant responded: "You ain't going to tell me what to do, bitch. You better fuckin' tone it down. What's wrong with you?" The judge then ordered appellant removed from the courtroom. Before being escorted out, he said: "I would do it again too. Metro."

The court designated count two (possession of a firearm by a convicted felon) as the principal term and imposed a high term

sentence, observing that "the crimes are of increasing seriousness and violence." It designated counts six and twelve (possession of a firearm by a convicted felon) as subordinate terms, remarking that "the [appellant] apparently is armed all the time with a gun and uses it whenever he wants."

DISCUSSION

A. *Appellant Forfeited His Claim of Prosecutorial Misconduct, Which Also Fails on the Merits.*

Appellant argues that his convictions must be reversed due to prosecutorial misconduct during closing argument. Respondent argues defendant forfeited this claim by failing to raise an objection in the trial court, and the claim is meritless. We agree appellant forfeited this issue for appeal. In examining the merits, we also conclude the prosecutor committed no misconduct.

1. *Appellant Forfeited His Claim.*

A claim of prosecutorial error may be forfeited by a failure to object. Generally, "'"[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety."' [Citations.] The defendant's failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct." [Citation.]"' (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*.).) "A prosecutor's misstatements of law are generally curable by an admonition from the court" unless the prosecutor's argument is "so extreme or pervasive" that a prompt objection and admonition will not be curative. (*Ibid.*)

The record reflects appellant did not object to the prosecutor's disputed statements during closing. There is nothing indicating that any colorable objection would have been fruitless, or that an admonition would not have been curative. As a result, appellant has forfeited this issue for appeal. Nevertheless, we also address the merits of appellant's contention.

2. *The Prosecutor Did Not Commit Misconduct.*

A prosecutor "enjoys wide latitude in commenting on the evidence, including urging the jury to make reasonable inferences and deductions therefrom." (*People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353 (*Ellison*).) However, "'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements [citation].' [Citation.]" (*Centeno*, *supra*, 60 Cal.4th at p. 666.) To establish prosecutorial misconduct during closing argument, appellant must show that "'[*i*]*n the context of the whole argument and the instructions'* [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' [Citation.]" (*Id.* at p. 667, italics added.)

Appellant draws a comparison to *Ellison,* in which the defendant appealed a conviction of carrying a concealed firearm in a vehicle. The *Ellison* prosecutor made "several incorrect references to the reasonable doubt standard" during closing argument, starting with:

> "'[Prosecutor:] The basis for reasonable doubt. This seems obvious, but [it] is whether the doubt that you have is reasonable. There's all kinds of possibilities. The Judge told you that it's not beyond all possible doubt. Is it possible that Cesar S[.] and Eric H[.] somehow conspired together when nothing happened to call 911 and report a friend for making threats and pointing a gun at their face? And the gun is found? Yeah, it's possible. There's lots of possibilities, but it's not reasonable. People don't do that when nothing happens with nothing to provoke it. It's—you have to look at whether or not it's reasonable or unreasonable for the defendant to be innocent.'"

(Ellison, supra, 196 Cal.App.4th at p. 1351.)

When defense counsel objected, the court admonished the jury to follow the jury instructions. The prosecutor continued: "'There's—what it is, is the jury instructions tell you that if there's two reasonable interpretations of the evidence, one points to guilt, one points to innocence. You have to vote not guilty because that's fair, because that means it's reasonable that the defendant is innocent . . . .'" (*Ibid.*) Defense counsel objected a second time, and the court admonished the jury to vote guilty only if they were convinced beyond a reasonable doubt. (*Id.* at p. 1352.)

As the prosecutor explained that the jury had to "'look at what's reasonable and what's unreasonable'" and used a water bottle to illustrate, defense counsel objected a third time, but the court overruled the objection. (*Ellison*, *supra*, 196 Cal.App.4th at p. 1352.) During rebuttal, the prosecutor continued: "'And reasonable doubt doesn't equate to "I want more evidence." Reasonable doubt is with the evidence that you're given. . . . Is it reasonable that the defendant's innocent[?]'" (*Ibid.*) Defense

counsel objected a fourth time, and the court clarified: "'That's incorrect. It's not a question of whether or not it's reasonable. . . . The question is whether or not the charges have been proven beyond a reasonable doubt.'" (*Ibid.*) The prosecutor continued that the jury must "'look at the evidence that has been presented and whether that evidence . . . proves each of the elements beyond a reasonable doubt.'" (*Ibid.*) Defense counsel objected a fifth time, and the judge instructed the jury to rely on the instructions. (*Ibid.*)

The appellate court concluded that the prosecution had committed misconduct by attempting to lessen the burden of proof by arguing that "the beyond-reasonable-doubt standard required the jury to determine whether defendant's innocence was reasonable," despite multiple objections and curative instructions from the court. (*Ellison*, *supra*, 196 Cal.App.4th at p. 1353.) However, the error did not require reversal of the conviction because: (1) the jury was properly instructed on the presumption of innocence and the requirement of proof beyond a reasonable doubt; (2) prior to the improper statements, the prosecutor reminded the jury that the law "'comes from the [j]udge'"; (3) after defense counsel's objections, the court gave curative instructions and admonished the jury to follow the instructions; and (4) the jury demonstrated it understood the burden of proof when it acquitted the defendant of the three most serious charges. (*Ibid.*) The court also noted that because the defendant had admitted the elements of the crime, it was not "reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error." (*Ibid.*)

Appellant also urges us to consider *Centeno*. The *Centeno* defendant appealed his conviction for committing lewd or lascivious acts upon a child. (*Centeno*, *supra*, 60 Cal.4th at p. 664.) During rebuttal, the prosecutor used a diagram outline of California to illustrate the standard of proof. In the prosecutor's hypothetical trial, different witnesses testified to what state the diagram represented. *(Id.* at pp. 665-666.) The prosecutor explained the burden of proof: "'You can have missing evidence, you can have questions, you can have inaccurate information and still reach a decision beyond a reasonable doubt. What you are looking at when you are looking at reasonable doubt is you are looking at a world of possibilities. There is the impossible, which you must reject, the impossible [*sic*] but unreasonable, which you must also reject, and the reasonable possibilities, and your decision has to be in the middle. It has to be based on reason. It has to be a reasonable account.'" (*Ibid.*)

Turning to the facts of the case, the *Centeno* prosecutor argued:

> "'Is it reasonable to believe that a shy, scared child who can't even name the body parts made up an embarrassing, humiliating sexual abuse, came and testified to this in a room full of strangers or the defendant abused Jane Doe[?] That is what is reasonable, that he abused her. [¶] Is it reasonable to believe that Jane Doe is lying to set-up the defendant for no reason or is the defendant guilty?' . . . 'Is it reasonable to believe that there is an innocent explanation for a grown man laying on a seven year old? No, that is not reasonable. Is it reasonable to believe that there is an innocent explanation for the defendant taking his penis out of his pants when he's on top of a seven-year-old child? No, that is not reasonable. Is it reasonable to believe

> that the defendant is being set-up in what is really a very unsophisticated conspiracy led by an officer who has never met the defendant or he['s] good for it? That is what is reasonable. He's good for it.'"

(*Centeno*, *supra*, 60 Cal.4th at p. 666.)

The Supreme Court held that the prosecutor had committed misconduct because it was reasonably likely she had misled the jury about the standard of proof, and reversed the conviction. (*Centeno*, *supra*, 60 Cal.4th at pp. 674, 677.) At the outset, the court remarked that it is "permissible to argue that the jury may reject impossible or unreasonable interpretations of the evidence," per CALCRIM No. 224. (*Id.* at p. 672 [approving argument in *People v. Romero* (2008) 44 Cal.4th 386, 416 that the jury must """decide what is reasonable to believe versus unreasonable to believe""" and """accept the reasonable and reject the unreasonable."""].) However, drawing "reasonably possible interpretations" of the evidence is only a "starting point." (*Ibid.*) The court explained: "It is not sufficient that the jury simply believe that a conclusion is reasonable. It must be convinced that all necessary facts have been proven beyond a reasonable doubt." (*Ibid.*) Thus, it was error for the prosecutor to "suggest that a 'reasonable' account of the evidence [*satisfie*[*d*] *the prosecutor's burden of proof*." (*Ibid.*) The prosecutor had not simply urged the jury to """accept the reasonable and reject the unreasonable,""" but had "confounded the concept of rejecting unreasonable inferences with the standard of proof beyond a reasonable doubt. She repeatedly suggested that the jury could find defendant guilty based on a 'reasonable' account of the evidence. These remarks clearly diluted the People's burden." (*Centeno*, *supra*, 60 Cal.4th at p. 673, italics omitted.) The court based its decision on

both the prosecutor's use of the diagram and her remarks during argument. (*Id.* at p. 674.) It found the use of an iconic, immediately recognizable image like the California diagram, unrelated to the facts of the case, a "flawed way to demonstrate the process of proving guilt beyond a reasonable doubt." (*Id.* at p. 669.)

With the exception noted below, the prosecutor's remarks fell within the range of permissible argument. The bulk of the argument preceding the objected-to statements focused on the evidence pointing toward appellant's guilt as Ramos's killer, including eyewitness testimony, cell phone records, ballistics analysis, and surveillance video. Asking the jury to draw reasonable inferences from such evidence was proper. As *Centeno* makes clear, urging the jury to """accept the reasonable and reject the unreasonable""" is wholly appropriate. (*Centeno, supra,* 60 Cal.4th at p. 672.) We find no error in the prosecutor's suggestion that it would be unreasonable for the jury to ignore the compelling evidence he had just recounted. Moreover, the prosecutor left no doubt that his burden was to prove each element of the alleged murder of Ramos beyond a reasonable doubt, addressing each element and the evidence that supported it.

The prosecutor's comment that "if it's not reasonable, it's proven beyond a reasonable doubt" was at best confusing and at worst an erroneous statement of the law. Taken in the context of the entire argument, however, it is clear the prosecutor was not attempting to lessen the People's burden. Even in noting that the burden was not "beyond a miracle," he emphasized that it was "beyond a reasonable doubt," and directed the jury to the court's instructions, which explained in detail the prosecution's burden

of proof. In short, on this record we find no likelihood that "the jury understood or applied the complained-of comments in an improper or erroneous manner." Accordingly, we reject appellant's claim of prosecutorial misconduct.

3. *Appellant Suffered No Prejudice.*

Even assuming prosecutorial misconduct, reversal is not required unless "the misconduct can be said to have contributed materially to the verdict in a closely balanced case or is of such a nature that it could not have been cured by a proper and timely admonition." (*People v. McDaniel* (1976) 16 Cal.3d 156, 176.) "[W]e do not reverse a defendant's conviction because of prosecutorial misconduct unless it is reasonably probable the result would have been more favorable to the defendant in the absence of the misconduct." (*Ellison, supra,* 196 Cal.App.4th at p. 1353.) In analyzing the prejudice to the defendant, the *Centeno* court noted the absence of "saving factors," such as curative instructions, admonitions from the court, and the overall strength of the evidence. (*Centeno*, *supra*, 60 Cal.4th at p. 676.) *Centeno* was a "very close case" that involved "starkly contrasting evidence." (*Id.* at pp. 670, 677.) The prosecution's case rested almost entirely on the child victim's credibility, but her account of the incidents changed over time, and at trial she refused to answer questions, admitted the questions confused her, and denied the defendant had touched her. (*Id.* at p. 677.) The closeness of the case was an important consideration in assessing the prejudicial effect of the misconduct.

In light of the abundant evidence pointing to appellant's guilt, it is not "reasonably probable" that the jury would have reached a different verdict but for the prosecutor's remarks. As discussed, the prosecutor's remarks were counterbalanced by

instructions from the court, the prosecutor, and defense counsel regarding the applicable standard of proof for each element of the charged offenses. Unlike *Centeno*, this was not a "very close case" that rested almost entirely on the testimony of one unreliable witness. Both Ramos's and Lara's shootings were witnessed at close range by bystanders who identified appellant as the shooter. Cell phone mapping placed the phone used by appellant in the vicinity of Ramos's shooting at the time it occurred. Surveillance video suggested Gloria drove appellant to Ramos's house and quickly moved away toward Metro territory immediately following the shooting. Forensic analysis of text messages indicated appellant and Ramos exchanged a series of text messages preceding the shooting, in which appellant threatened to harm Ramos. The day of the shooting, appellant asked Raul for a gun. Ballistics analysis determined that the bullet fired at Ramos came from the gun recovered from Raul's car on the night of Esparza's shooting. Appellant's fingerprints were found on the car's door handle. Photos found on Raul's phone showed appellant holding what appeared to be the same gun. Lastly, appellant confessed to the drive-by shooting of a "probation officer," without being told who the victim was. The manner of the shootings, and their likely motive, was consistent with the gang expert's testimony about Metro's penchant for violence, and appellant's own lyrics about killing "for thrills." Thus, in light of all the evidence establishing appellant's guilt, we discern no likelihood that appellant suffered prejudice as a result of the prosecutor's remarks.

4. *Appellant's Alternative Claim of Ineffective Assistance of Counsel Also Fails.*

We have concluded that the prosecutor did not commit misconduct. As there was no misconduct, defense counsel could not have been expected to raise an objection, and was not ineffective for failing to do so. Accordingly, we conclude defense counsel did not render ineffective assistance.

In any event, to establish the ineffective assistance of counsel, appellant bears the burden of showing prejudice – that is, a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*Centeno*, *supra*, 60 Cal.4th at p. 676, citing *Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).) For the reasons explained above, appellant cannot do so.

B. *The Trial Court Did Not Err by Failing to Instruct on Voluntary Manslaughter in Count One, and Any Claim of Error is Barred.*

1. *Appellant's Claim is Barred by the Invited Error Doctrine.*

"'When a defense attorney makes a "conscious, deliberate tactical choice" to [request or] forego a particular instruction, the invited error doctrine bars an argument on appeal that the instruction was [given or] omitted in error.' [Citations.]" (*People v. McKinnon* (2011) 52 Cal.4th 610, 675 (*McKinnon*).) The record must show more than "'mere unconsidered acquiescence.'" (*People v. Horning* (2004) 34 Cal.4th 871, 905 (*Horning*).) However, when trial counsel "expresse[s] no deliberate tactical purpose in failing to request [a jury instruction], the invited error doctrine does not apply." (*McKinnon, supra,* at p. 675 [no

"express tactical objection" where counsel was "silent" during discussions]; *People v. Wickersham* (1982) 32 Cal.3d 307, 333 (*Wickersham*) [no "express tactical objection" where the trial court "never asked counsel for an opinion" regarding jury instructions, and counsel never requested one], disapproved of on other grounds by *People v. Barton* (1995) 12 Cal.4th 186 (*Barton*).) A tactical purpose may be implied from a defense counsel's affirmative action. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49.) For example, a tactical purpose exists when a defendant declines instruction on a lesser included offense because it is inconsistent with his defense that he did not commit any crime. (*Horning*, *supra*, at p. 905.)

In *People v. Valdez* (2004) 32 Cal.4th 73, the defense counsel had informed the court, after consulting with the defendant, that they did "'not want to request any lessers.'" (*Id.* at p. 115.) On appeal, the defendant argued that the trial court's failure to instruct on second-degree murder as a lesser included offense of felony murder violated his constitutional rights. (*Id.* at pp. 114-115.) The Supreme Court recognized that "'the obligation to instruct on [lesser] offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction, but expressly objects to its being given.'" (*Id.* at p. 115.) Regardless, the court still considered whether the invited error doctrine applied. Because it was "ambiguous" whether the defense counsel was referring to second-degree murder when he declined "any lessers," the court did not find invited error. (*Id.* at pp. 115-116.) *Valdez* implies that a court's sua sponte duty to instruct, even over the defendant's objection, is still subject to the invited error doctrine. A defense counsel's articulated,

nonambiguous expression to forego instructions on a particular offense will invoke the invited error doctrine.

In relying on *People v. Walker* (2015) 237 Cal.App.4th 111, 118 (*Walker*), appellant glosses over an important distinction. In *Walker*, the defense counsel's acquiescence to forego instructions on a lesser included offense was questionable and based on the trial court's mistaken belief that the lesser-included offense could not be tried to the jury. (*Id.* at p. 119.) A failure to request or object to an instruction due to mistake or ignorance cannot form the basis of an invited error argument. (*Ibid.*) Furthermore, the trial court never specifically asked the defense counsel her opinion on the instructions, and her assent was in response to a long monologue by the trial judge regarding this mistaken assumption and proposed trial procedures. (*Ibid.*) In the present case, defense counsel did not passively acquiesce, but expressed a considered agreement with the court's assessment that the evidence presented did not support manslaughter instructions. A tactical purpose may be implied from defense counsel's affirmative action. Indeed, as in *Horning*, any instruction on voluntary manslaughter would have been inconsistent with appellant's defense that he was misidentified as the shooter and did not commit any crime. Thus, appellant is barred from claiming any error by the trial court.

2. *There Was No Substantial Evidence of Heat of Passion.*

Nevertheless, we address the merits of appellant's argument that the trial court failed to instruct on voluntary manslaughter in count one (first degree murder of Ramos). "'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law

relevant to the issues raised by the evidence. [Citations.] . . . " That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.'" (*Wickersham*, *supra*, 32 Cal.3d at pp. 323-324.) "A trial court's sua sponte duty to instruct on lesser included offenses arises . . . not from the arguments of counsel but from the evidence at trial. . . . The trial court must instruct on lesser included offenses when there is *substantial evidence* to support the instruction, regardless of the theories of the case proffered by the parties." (*Barton*, *supra*, 12 Cal.4th at p. 203, italics added.) In our view, no substantial evidence of heat of passion manslaughter existed here.

"'Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of . . . voluntary manslaughter. (§ 192.)' [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 153.) An intentional killing is voluntary manslaughter if "'shown to have been committed in a heat of passion upon sufficient provocation.'" (*Wickersham, supra*, 32 Cal.3d at p. 325.) Heat of passion manslaughter has both an objective and subjective component. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) The defendant must actually and subjectively kill under the heat of passion, but the circumstances giving rise to the heat of passion are also evaluated objectively. (*Id.* at pp. 1252-1253.) "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to

act rashly and without deliberation and reflection, and from such passion rather than from judgment.'" (*Barton*, *supra*, 12 Cal.4th at p. 201.) However, "if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter." (*Wickersham, supra,* at p. 327.)

There was no substantial evidence that Ramos's killing was other than first degree murder. First degree murder involves a "cold, calculated judgment, including one arrived at quickly [citation], and is evidenced by planning activity, a motive to kill, or an exacting manner of death." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.) First, there was no substantial evidence that appellant acted under the heat of passion at the time of the killing. There was no heated dispute or physical altercation between appellant and Ramos on the night of the killing. The evidence suggested that appellant intended to catch an unarmed Ramos by surprise, and that appellant was calm as he pointed and fired the gun at Ramos. The evidence also suggested that appellant arrived at Ramos's house with at least one accomplice to serve as a lookout. The driver waited in the car to ensure that appellant could quickly escape after the shooting. None of this evinces a heat of passion.

Appellant's actions leading up to and culminating in Ramos's death also demonstrated premeditation. In their text messages before the shooting, appellant and Ramos insulted one another in evident hostility and rivalry. Appellant then threatened to go to Ramos's house, with Gloria as his ride, to inflict harm on Ramos. Hours before the shooting, he sought a gun from a fellow Metro member in apparent preparation. Any inference that Ramos died as a result of an impulsive, fitful act is

undermined by the conformity of appellant's actions to his previously announced plans. Furthermore, the manner of killing – multiple bullets fired from close range at an unsuspecting victim attempting to escape – suggests a malicious, "calculated design to ensure death, rather than an unconsidered explosion of violence." (*Horning*, *supra*, 34 Cal.4th at pp. 902-903.) Evaluated in the context of a string of gang-related shootings, Ramos's killing also conforms to a larger plan and motive within Metro culture. This is sufficient evidence of premeditation and deliberation.

Second, there was no substantial evidence of "sufficient provocation" that would incite a reasonable person to act in the heat of passion. (See *Wickersham, supra*, 32 Cal.3d at p. 326.) The text messages that appellant and Ramos exchanged in the days leading up to the shooting reflected petty insults, posturing, rivalry, and hostility, but fell far short of establishing sufficient provocation for voluntary manslaughter. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144 [voluntary manslaughter instruction not justified where the defendant planned his trip to the victim's house, "outfitted himself with the weapons," "calmly waited" in a van in the vicinity, gained entry to the house and fatally shot the unsuspecting victim several times; "defendant appears to have acted out of a *passion for revenge*, which will not serve to reduce murder to manslaughter"]; *People v. Manriquez* (2005) 37 Cal.4th 547, 585, 586 [no provocation where defendant calmly shot bar patron who insulted and taunted him into firing, asking defendant "whether he had a gun and daring him to use it," which "plainly [was] insufficient to cause an average person to become so inflamed as to lose reason and judgment"]; *People v. Hyde* (1985) 166 Cal.App.3d 463, 473 ["to warrant the giving of a

voluntary manslaughter instruction, the evidence of defendant's jealousy must be such as to suggest he did not either intend to kill or act in conscious disregard of a substantial probability that death would result"; defendant's "elaborate plan indicates that 'sufficient time [had] elapsed . . . for passion to subside and reason to return'")].)[4]

Finally, appellant himself did not suggest Ramos's killing was anything but premeditated. Rather, his primary defense was that Hernandez misidentified him as the shooter, because she never mentioned his tattoos and her identification occurred under suggestive circumstances. In short, there was insufficient evidence to support the voluntary manslaughter instruction.

Finally, even had we found error, we would deem it harmless. (See *Chapman v. California* (1967) 386 U.S. 18, 24;

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[4] None of the cases appellant cited in support of his argument are on point because each found ample evidence of heat of passion upon sufficient provocation. In *People v. Berry* (1976) 18 Cal.3d 509, the defendant was "in a state of uncontrollable rage" at the time of the killing, provoked by the history of sexually violent conduct with the victim, including "taunting him into jealous rages in an unconscious desire" to consummate her own suicidal tendencies. (*Id.* at pp. 512, 514.) In *People v. Bridgehouse* (1956) 47 Cal.2d 406, the defendant, who had a reputation for peace, became visibly upset, pale, and shaken when he unexpectedly encountered the man his wife was having an affair with, after she had refused a divorce and threatened to kill the defendant if he tried to take their children away from her. (*Id.* at pp. 407-412.) Lastly, in *People v. Borchers* (1958) 50 Cal.2d 321, the defendant shot the victim after she had produced a gun, threatened to shoot the defendant, and dared him to shoot her, despite the defendant's efforts to calm her down. The defendant had also learned of her infidelity and possible plan to kill him to obtain insurance money. (*Id.* at pp. 323-326, 328-329.)

People v. Watson (1956) 46 Cal.2d 818, 836; but see *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1143 ["Whether the federal standard applies in assessing prejudice when a trial court fails to give sua sponte a heat-of-passion instruction in a noncapital murder case is unresolved."].) ""[E]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions."" (*People v. Beames* (2007) 40 Cal.4th 907, 928.) As the record discloses, the evidence supporting the jury's verdict of guilt of first degree murder was so strong that it is not reasonably probable the alleged error affected the result.

3. *Appellant's Alternative Claim of Ineffective Assistance of Counsel Also Fails.*

We have concluded that the trial court did not err in failing to instruct on voluntary manslaughter because there was no substantial evidence to support such an instruction. As there was no error, defense counsel was not ineffective for concurring in the court's conclusion that no such instruction was warranted. Again, we conclude defense counsel did not render ineffective assistance. Moreover, under the previously discussed *Strickland* standard, appellant cannot establish that he suffered prejudice. (See *Strickland, supra,* 466 U.S. at p. 694.)

C. *There is No Cumulative Error in Count One.*

Appellant argues the cumulative effect of the errors requires reversal of count one. We have rejected appellant's claims of prosecutorial misconduct, failure to instruct on voluntary manslaughter, and ineffective assistance of counsel.

Whether considered individually or together, we find no prejudicial error.

D. *Substantial Evidence Supports the Gang Enhancement in Count One.*

Appellant argues there is insufficient evidence to support the gang enhancement in count one (first degree murder of Ramos). We disagree.

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence." (*People v. Medina* (2009) 46 Cal.4th 913, 919.) We do not "reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses." (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13, disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248.) "'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. [Citation.]'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

When a section 186.22 gang enhancement is alleged, the prosecution must prove that the underlying felony was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members"

(§ 186.22, subd. (b)(1).) In other words, the underlying crime must be gang related. (*Albillar, supra*, 51 Cal.4th at p. 60 ["Not every crime committed by gang members is related to a gang."].) "[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Id.* at p. 68.)

A trier of fact may rely on "expert testimony about gang culture and habits to reach a finding on a gang allegation." (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.) The prosecution expert opined, through a hypothetical scenario resembling Ramos's shooting, that the murder was committed in association with and to benefit Metro 13. Sufficient evidence supported this conclusion. Surveillance video captured the arrival of appellant and two other men on Ramos's street two minutes before the shooting occurred, and their sudden departure at the exact time that Ramos's sister called 911 for help. Ramos's mother saw appellant and at least one other man at the time of the shooting. The expert reasonably inferred, in the hypothetical, that the men who accompanied the shooter were other gang members who served as lookouts and aided in the commission of the crime. He explained that gang members typically commit violent crimes with other gang members because of the "trust factor" between them.

Our Supreme Court, in affirming a gang enhancement, also explained why gang members are likely to commit crimes in association with each other. Not only does it increase the success of the crime, nurture a culture of intimidation in the community, and reinforce a bond of secrecy, but practically, having witnesses

who can tell others about the crime and attest to its occurrence increases the members' status within the gang. (*Albillar*, *supra*, 51 Cal.4th. at p. 61.) Indeed, at each of the three shootings here, appellant was accompanied by others and did not act alone. Furthermore, as defense counsel acknowledged in closing argument, Raul was most likely a fellow Metro 13 gang member. The evidence suggests he played an integral role in Ramos's murder. The very day of the shooting, appellant asked Raul for a "burner." The gun later recovered in Raul's car was determined to be the source of a bullet fired at Ramos. It was a reasonable conclusion that appellant relied on Metro's network for the completion and success of the crime.

"Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1)." (*Albillar*, *supra*, 51 Cal.4th at p. 63, citing *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354 [relying on expert opinion that the murder of a nongang member benefited the gang because "violent crimes like murder elevate the status of the gang within gang culture and intimidate neighborhood residents" from cooperating with law enforcement].) However, "'purely conclusory and factually unsupported opinions' that the charged crimes are for the benefit of the gang because any violent crime enhances the gang's reputation is insufficient to support a gang enhancement." (*People v. Perez* (2017) 18 Cal.App.5th 598, 608.)

On this record, it was reasonable to conclude that appellant's crime benefited Metro. As the expert explained, the more violent the crime, the more respect it would earn, even

when the victim was not a gang member, and the crime was personally motivated. The brazenness of Ramos's killing, as part of a string of gang-related shootings, would surely have enhanced Metro's reputation for violence. And the expert's opinion that it did so raised an inference that the crime was committed for the benefit of the gang. The facts also suggest that appellant may have been insulted by Ramos's "varrio" comment, and acted to defend Metro's reputation. Thus, there was sufficient evidence for the jury to conclude that appellant committed Ramos's murder in association with and to benefit the gang for purposes of the gang enhancement.[5]

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[5] The cases cited by appellant are distinguishable because they relied almost exclusively on the prosecution's expert testimony. *In re Frank S., supra,* 141 Cal.App.4th 1192 found no substantial evidence supporting the specific intent element of the gang enhancement, an issue reserved for the trier of fact which the prosecution expert had improperly testified to, without any supporting evidence. (*Id.* at p. 1199.) In *People v. Ramon* (2009) 175 Cal.App.4th 843, the gang enhancement was vacated on similar grounds, and the court noted that its analysis might differ if the expert had opined that the underlying offense, possession of a stolen vehicle, was one of the gang's primary activities. (*Id.* at pp. 851, 853.) Likewise, in *People v. Perez, supra,* 18 Cal.App.5th 598, the court found that "the evidence consists only of a gang member committing a violent crime alone" and highlighted the "glaring absence of evidence connecting the shooting to a gang, other than the mere fact that the perpetrator was a gang member" (*Id.* at pp. 610, 614.)

E. *Remand is Not Required as to Section 12022.53 Firearm Enhancements.*

The trial court imposed firearm enhancements under section 12022.53 on counts 1, 3, 7, and 11. Appellant was sentenced on September 21, 2017. Appellant contends that as a result of Senate Bill No. 620, signed by the Governor on October 11, 2017, this matter must be remanded for the trial court to exercise its newly-granted discretion whether to strike the section 12022.53 enhancements.

Senate Bill No. 620 provides that effective January 1, 2018, section 12022.53 is amended to permit the trial court to strike or dismiss a sentencing enhancement under that section. The new provision states: "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." (§ 12022.53, subd. (h).)

Respondent concedes that Senate Bill No. 620 applies retroactively. Senate Bill No. 620 went into effect while appellant's case was still pending in this court on direct appeal. Because appellant's conviction was not yet final when the amendment went into effect, he is eligible to have the matter remanded for resentencing. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1091 [amendment to section 12022.53, subd. (h) is retroactive]; *People v. Francis* (1969) 71 Cal.2d 66, 75-78 [where statute enacted during pending appeal gave trial court discretion to impose a lesser penalty, remand was required for resentencing].)

"[A] remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; accord, *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111.) Reliance on factors such as "the egregious nature of the defendant's crimes, the defendant's recidivism, and the fact that consecutive sentences were imposed . . . cannot alone establish what the court's discretionary decision would have been." (*McDaniels*, *supra*, at p. 427.) However, "the egregiousness of a defendant's crimes, a defendant's criminal history, and the court's sentencing options and rulings may prompt the court to express its intent to impose the maximum sentence permitted. When such an expression is reflected in the appellate record, a remand would be an idle act because the record contains a clear indication that the court will not exercise its discretion in the defendant's favor." (*Ibid*.)

Here, a remand is not necessary because the record makes sufficiently clear that the trial court would not have exercised its discretion to reduce appellant's firearm enhancements, which carried mandatory terms of 20 and 25 years to life. (§ 12022.53, subds. (c)-(d).) The trial court imposed the mandatory and/or maximum sentence on every count, including the principal term, and ordered all the terms to run consecutively. The court clearly considered the egregiousness of appellant's crimes, his serious threat to society and extensive criminal history, which included defacing property with graffiti and attacking a deputy while in custody. His continued allegiance to Metro, defiance of law enforcement, and lack of remorse for murdering one man, paralyzing another, and attempting to murder a third were

evident even at the sentencing hearing. His final words, in the presence of victims and family members, were "I would do it again too. Metro." Taken as a whole, the trial court's comments expressed its judgment that the sentence imposed was appropriate for appellant's crimes, and that a remand would be an idle act. Accordingly, we decline to remand the matter to the trial court.

F. *The Abstract of Judgment Must be Corrected.*

Appellant contends that the abstract of judgment should be corrected because it erroneously states that appellant was sentenced to life *without* the possibility of parole on counts 3, 7, and 11, whereas the trial court actually sentenced appellant on these counts to life sentences *with* the possibility of parole. Respondent agrees.

"An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) If an abstract of judgment fails to reflect the oral judgment pronounced by the trial court, the appellate court may order that the trial court correct this clerical error. (*Ibid.*) Accordingly, on remand, the trial court must prepare an amended abstract of judgment that accurately depicts the sentences imposed on counts 3, 7, and 11, and forward a certified copy to the Department of Corrections and Rehabilitation.

DISPOSITION

The matter is remanded to the trial court solely for the purpose of correcting the abstract of judgment. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

COLLINS, J.

MICON, J.*

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