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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ELDA NALLELI ROCHA,

Defendant and Appellant.

B269696

(Los Angeles County  
Super. Ct. No. BA415335)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Robert J. Perry, Judge. Affirmed.

Marvin E. Vallejo for Defendant and Appellant.

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## INTRODUCTION

Elda Rocha drove her boyfriend Jherome Higuera, a gang member, to an apartment building where he opened fire on a group of teenagers, killing one of them and severely injuring another. Rocha waited for Higuera while he committed the crimes and drove him away after the shooting.

A jury convicted Rocha of one count of second degree murder and three counts of attempted murder. The jury also found true gang-related firearms allegations under Penal Code section 12022.53, subdivisions (d) and (e)(1).<sup>1</sup>

Rocha argues that there was insufficient evidence she aided and abetted the crimes, that there was insufficient evidence to sustain the gang-related firearm enhancements, and that her counsel was ineffective for failing to call a gang expert. She also argues the trial court erred in imposing a term of 25 years to life under section 12022.53, subdivisions (d) and (e)(1), on each of the attempted murder convictions for the two individuals who did not sustain any injuries. We affirm.

## FACTUAL AND PROCEDURAL HISTORY

### A. *DIA*

DIA, which stands for “Down in Action,” is a criminal street gang that claims territory in an area west of downtown Los Angeles. Members of DIA vandalize property, spray paint the name of the gang in the neighborhoods the gang claims as its territory, carry weapons, and commit robberies and assaults with deadly weapons.

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<sup>1</sup> Statutory references are to the Penal Code.

Higuera was a member of DIA. He had several DIA tattoos, including the word “Diablo,” which was both his gang moniker and the name of a subset, or clique, of DIA.

Rocha began dating Higuera in June 2012, and she knew he was a member of DIA. On one occasion in early August 2012, Rocha, at Higuera’s request, picked up another DIA gang member who had been shot by a rival gang member and drove with Higuera to the scene of the shooting so Higuera could retaliate. Rocha knew that when Higuera told her, “We’re going to go driving,” Higuera meant he and his fellow gang members “were going to go drive around and either tag or, according to them, look for somebody to shoot up.”

#### B. *Retaliation*

On August 17, 2012 Higuera received a call from William Vasquez, whom Rocha knew as a leader of DIA who had guns in his house. Higuera told Rocha, “We’ve got something to do. . . . We’ve got to go to [Vasquez]. [Vasquez] is calling me . . . . I need your truck.” When Rocha said Higuera could use her truck, Higuera said, “I need you there.”

Higuera told Rocha to drive to Vasquez’s house, where they met a 13-year-old boy named Art T. and his friend J.G. Inside Vasquez’s house, Rocha saw pictures of dead DIA gang members. She heard Art T. say that he wanted to join the gang and that some people from another gang had made fun of him. Rocha told Higuera and Vasquez that, while the two men were “past the age of 15” and knew what they were doing, it was “kind of dumb” for Higuera and Vasquez to involve kids like Art T. and J.G. because they were “little kids” who “don’t even know” and “just want to be cool.” Rocha said to Higuera and Vasquez, “You guys are always talking about shooting people and . . . the stuff you guys have done . . . . Look at these little kids. Like, don’t you think, if you

guys ever take them and do something like the stuff I hear you guys say you guys do, don't you think that they're going to be traumatized, and maybe tell on you guys or something?" Vasquez told Rocha to "shut up" and to "mind [her] own business."

Art T. and J.G. got into the back seat of Rocha's car, and Higuera sat in the front passenger seat. Higuera and Vasquez told Rocha to start driving. Art T. told Higuera "a group of guys" had approached him and "beat him up." Higuera took a gun from a black box and said, "This has our backs." Higuera also took a bag of bullets from the glove compartment.

Higuera asked Art T. where he had been beaten up, and Art T. gave Rocha directions. When Rocha arrived at the location, Higuera said to Art T., "Let's go get these fuckers." Higuera told Rocha not to turn the engine off and to "[w]ait here for us." Rocha kept the engine running and said, "Okay, I'll be waiting here."

### C. *Shots*

Higuera, Art T., and J.G. got out of Rocha's car and began walking towards an apartment building. On the porch of the apartment building were four 17-year-olds socializing, "chilling and talking, drinking, playing music." The group consisted of Jonathan Lopez, Luis Rufino, Edwin Cruz, and Cruz's girlfriend, Kimberly Duarte. The three males were part of a tagging crew called "SCK" or "So Crazy Klan."

As Higuera approached the group of teenagers, Art T. and J.G. went to an alley next to the apartment building. Higuera walked up to the four teenagers and asked, "Where you from?" The three young men on the porch replied, "SCK." Higuera asked, "Where's your little homie, Kaos?" Cruz replied, "Oh, that's little homie." Higuera said, "I'm from Diablos" and "I'm from DIA." One of the teenagers said, "What the fuck is DIA?"

Higuera said, “I’m going to show you what DIA means,” and he took out a gun and started shooting at the group.

Duarte, who had been sitting on Cruz’s lap, fell to the ground and covered her head. Lopez ran to the door of the apartment building, which “luckily . . . was open,” ran inside, and asked someone to call the police. When Lopez came back out to the porch, he found Cruz on the floor, bleeding from multiple gunshot wounds. Cruz did not survive. Rufino was shot twice in both legs, and one of the bullets shattered his testicle. Lopez and Duarte escaped uninjured.

#### D. *Getaway*

After Higuera shot at the group on the porch, he, Art T., and J.G. ran back to Rocha’s car. As they approached the car, Rocha yelled, “Hurry up, hurry up.”

Rocha drove them back to Vasquez’s house. In the car, Art T. expressed concern he was going to get in trouble with his mother because it was late and she did not know where he was. Rocha spoke with Art T.’s mother on the phone and pretended to be J.G.’s mother so that Art T.’s mother would not find out Art T. had been involved in the shooting. Rocha dropped Art T. and J.G. off at Vasquez’s house while Higuera remained in the car.

#### E. *More DIA*

When Art T. and J.G. got out of Rocha’s car, another member of DIA got into the back seat of the car. Higuera told Rocha to “just drive” around. As Rocha drove, Higuera and the other gang member saw a man from a rival gang unrelated to the shooting in this case. Higuera and the other DIA gang member got out of Rocha’s car, and the other DIA gang member “started shooting like crazy.” The two men got back into Rocha’s car, and

Higuera told Rocha, “Drive, drive, drive.” Rocha drove Higuera and the other gang member back to Vasquez’s house.

Approximately three months later, police found Rocha in her car with the engine running near a location where Higuera had been spray painting DIA graffiti. The police also found an acrylic paint marker in her car.

#### F. *Charges*

The People charged Rocha with one count of murder and three counts of attempted murder on the theory she aided and abetted the crimes. The People alleged Rocha committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1). The People also alleged a principal in the commission of the crimes personally and intentionally discharged a firearm causing death to Cruz, within the meaning of section 12022.53, subdivisions (d) and (e)(1).

#### G. *Expert Testimony*

Detective Scott Frus, the prosecution’s gang expert, testified that “respect to a gang member is everything” and that a gang member earns respect within the gang by committing violent crimes. By committing violent crimes, gang members create fear in the community and discourage witnesses from testifying, which enables members of the gang to commit further crimes with impunity. Women can become involved in gang activity without becoming members of the gang by helping their boyfriends who are members of the gang commit crimes. Gangs like DIA use women in a “support role” to serve as lookouts and

to carry weapons, ammunition, and drugs. Gang members believe police officers are less likely to search women.

Based on a hypothetical with facts similar to those in this case, Frus testified the shooting was committed to benefit a criminal street gang because it spread fear in the community and bolstered the gang's esteem and reputation. Frus testified the driver's actions were in association with the gang because she drove a car carrying the gang members who committed the shooting and because she stored the ammunition used in the crime in the glove compartment of her car.

#### H. *Conviction*

The jury convicted Rocha of one count of second degree murder and three counts of attempted murder. The jury also found true the gang-related firearms allegations under section 12022.53, subdivisions (d) and (e)(1), for each count. The trial court sentenced Rocha to 40 years to life for the murder conviction (15 years to life for second degree murder plus 25 years to life for the gang-related firearm enhancement) and, for each of the attempted murder convictions concurrent terms of five years plus 25-years-to-life for the gang-related firearm enhancements. Rocha timely appealed.

## DISCUSSION

#### A. *Substantial Evidence Supports Rocha's Convictions*

Rocha contends “[t]here was no evidence [she] directly aided and abetted in the murder as there is no evidence [she] knew [Higuera] was going to shoot and kill anyone that night, nor did [she] have the intent to commit murder.” Rocha argues “there was no evidence that she knew what crimes [Higuera] intended to commit . . . or that she had the requisite intent to

commit those same crimes or for [Higuera] to commit said crimes.” Rocha, however, misstates the law of aider and abettor liability and misconstrues the evidence showing she aided and abetted Higuera in committing the crimes.

1. *The Applicable Law*

“To decide whether the evidence is sufficient to support a jury verdict, ‘a reviewing court reviews the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.’” (*People v. Sanchez* (2016) 63 Cal.4th 411, 453-454.) “In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.” (*People v. Sandoval* (2015) 62 Cal.4th 394, 423.) “A reversal for insufficient evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support’” the jury’s verdict.” (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

An aider and abettor is one who acts “with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.” (*People v. Chiu* (2014) 59 Cal.4th 155, 161.) “Establishing aider and abettor liability “requires proof in three distinct areas: (a) the direct perpetrator’s actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor’s mens rea—knowledge of the direct perpetrator’s unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor’s actus reus—conduct



by the aider and abettor that in fact assists the achievement of the crime.”” (*People v. Carrasco* (2014) 59 Cal.4th 924, 968-969.) Rocha challenges only the second element: her knowledge of Higuera’s intent to kill and her intent to assist him in achieving that end.

“When the crime at issue requires a specific intent, in order to be guilty as an aider and abettor the person ‘must share the specific intent of the [direct] perpetrator,’ that is to say, the person must ‘know[ ] the full extent of the [direct] perpetrator’s criminal purpose and [must] give[ ] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator’s commission of the crime.’” (*People v. Lee* (2003) 31 Cal.4th 613, 624; accord *People v. Pettie* (2017) 16 Cal.App.5th 23, 52.) The term “share” means “neither that the aider and abettor must be prepared to commit the offense by his or her own act should the perpetrator fail to do so, nor that the aider and abettor must seek to share the fruits of the crime.” (*People v. Beardslee* (1991) 53 Cal.3d 68, 90; see *People v. Ogg* (2013) 219 Cal.App.4th 173, 180-181.) “Implicit in the notion of someone ‘sharing’ another’s intent is knowledge of that intent and harboring the same purpose oneself.” (*People v. Williams* (1997) 16 Cal.4th 635, 676.) “[W]hen the crime is murder, the ‘aider and abettor must know and share the murderous intent of the actual perpetrator.”” (*People v. Maciel* (2013) 57 Cal.4th 482, 518; see *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164.)

“Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.” (*People v. Sanchez, supra*, 63 Cal.4th at p. 457.) Thus, “to be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator’s intent to kill and with

the purpose of facilitating the direct perpetrator's accomplishment of the intended killing—which means that the person guilty of attempted murder as an aider and abettor must intend to kill.” (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054.) “Evidence of a defendant’s state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.” (*Id.* at p. 1055; see *People v. White* (2014) 230 Cal.App.4th 305, 319 [in determining the state of mind of the aider and abettor, “[t]he existence of the requisite knowledge may be established by circumstantial evidence”].) “[I]ntent to kill or express malice, the mental state required to convict a defendant of attempted murder, may . . . be inferred from the defendant’s acts and the circumstances of the crime.” (*People v. Avila* (2009) 46 Cal.4th 680, 701, see *People v. Smith* (2005) 37 Cal.4th 733, 741.)

“Whether a person has aided and abetted in the commission of a crime ordinarily is a question of fact. [¶] . . . [¶] Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.” (*People v. Nguyen, supra*, 61 Cal.4th at p. 1054.) The jury may also consider a defendant’s failure to take steps to prevent the commission of the crime (*People v. Lara* (2017) 9 Cal.App.5th 296, 322) and flight (*People v. Medina* (2009) 46 Cal.4th 913, 924).

## 2. *The Substantial Evidence*

There was substantial evidence Rocha knew of and shared Higuera’s intent to kill. Rocha knew that Higuera was a member of DIA, a criminal street gang, and that Vasquez was a leader of the gang. Higuera had asked Rocha to serve as a driver in a gang-related shooting, a fact from which the jury could

reasonably infer Rocha knew Higuera was capable of killing. (See *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 296 [“[b]ecause [the defendant] had previously committed an armed robbery with [the co-defendant], a jury could reasonably infer [the defendant] knew [the co-defendant] was armed and capable of using deadly force”].) The jury could also reasonably infer that on the night of the shooting Rocha knew Higuera intended to kill because he had previously asked her to serve as the driver for a gang-related crime and she knew that, whenever Higuera and his fellow gang members said they were “going to go driving,” they meant they were going to shoot someone. In fact, Rocha essentially admitted she knew Higuera and Vasquez were planning a shooting when she expressed concern that Art T. and J.G. were too young to participate in that kind of gang activity.

Once Rocha, Higuera, and the two boys were in the car, the motive for and nature of the shooting became even clearer. Art T. talked about a group from a rival tagging crew who had attacked him the previous week, and Higuera brandished a firearm to show Art T. how he was going to even the score. Higuera also retrieved ammunition from the glove compartment of Rocha’s car and asked Art T. to give Rocha directions to the place he had been attacked. Rocha was present and heard the conversation between Higuera and Art T., which disclosed that the reason Rocha was driving Higuera and the two boys was to assist Higuera in avenging the attack on Art T. by shooting his assailants with bullets Rocha had in her car. Rocha’s decision to continue driving to the location of the planned retaliatory attack showed she knew and shared Higuera’s intent. (See *People v. Lee, supra*, 31 Cal.4th at p. 624.)

Once they arrived at the scene and Higuera got out of the car, Rocha promised Higuera she would keep the engine running to aid in their escape. After the attack, Rocha encouraged

Higuera to hurry as he ran back to the car. (See *People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743-744 [“one who is present for the purpose of diverting suspicion, or to serve as a lookout, or to give warning of anyone seeking to interfere, or to take charge of an automobile and to keep the engine running, or to drive the “getaway” car and to give direct aid to others in making their escape from the scene of the crime, is a principal in the crime committed”].) And the gang expert explained that gangs like DIA use women like Rocha to assist boyfriends who are gang members in committing crimes. (See *People v. Nguyen, supra*, 61 Cal.4th at p. 1055 [expert testimony may strengthen the inferences arising from other evidence specific to the defendant’s role as an aider and abettor].)

B. *Substantial Evidence Supports the Gang-Related  
Firearm Enhancements*

Rocha argues that “[t]here [was] insufficient evidence that [she] herself had both the knowledge and requisite intent to engage in gang related criminal activity on the night in question” and that there was insufficient evidence “the crimes were committed ‘with the specific intent to promote, further, or assist in any criminal conduct by gang members.’” Rocha argues that, because there was no substantial evidence to support the gang enhancement under section 186.22, the evidence “was insufficient to support the section 12022.53 gun enhancements.” Rocha, however, misstates the statutory requirements for the imposition of the gang-related firearm enhancements under section 12022.53, and there was substantial evidence she committed the

offenses for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1).<sup>2</sup>

1. *Firearm Enhancements for Aiders and Abettors of Gang-Related Crimes*

Section 12022.53, subdivision (d), provides in relevant part: “Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), . . . personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.”<sup>3</sup> Section 12022.53, subdivision (e)(1), provides: “The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) the person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).”<sup>4</sup>

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<sup>2</sup> The standard of review governing a challenge to the sufficiency of the evidence to support a true finding on a gang allegation under section 186.22 is the same as the standard governing a challenge to the sufficiency of the evidence to support a conviction. (See *People v. Albillar* (2010) 51 Cal.4th 47, 59-60; *People v. Rios* (2013) 222 Cal.App.4th 542, 564; *People v. Leon* (2008) 161 Cal.App.4th 149, 161.)

<sup>3</sup> Section 12022.53, subdivision (a), includes murder and attempted murder.

<sup>4</sup> “Under section 31, a ‘principal’ includes not only those persons who directly commit the act but also those who ‘aid and abet in its commission.’” (*People v. Hernandez* (2005) 134 Cal.App.4th 474, 480, fn. 36.)

Thus, “[s]ection 12022.53, subdivision (e)(1), expressly extends liability to aiders and abettors to crimes by a principal armed with a gun, for crimes committed in furtherance of the purposes of a criminal street gang. Its legislative history clearly reveals that this was the Legislature’s intent.” (*People v. Garcia* (2002) 28 Cal.4th 1166, 1176; see *People v. Miranda* (2011) 192 Cal.App.4th 398, 411 [“[t]he gun-use enhancements provided for in section 12022.53(e) apply to any person who is a principal in the commission of an offense (even if not the person using or discharging the weapon)” if “the ‘person violated subdivision (b) of Section 186.22’ [citation] and . . . a principal in the crime personally used the weapon”].) Rocha does not dispute that Higuera, a principal, discharged a firearm in the commission of the crimes in this case. She challenges only the sufficiency of the evidence to support the jury’s finding she violated section 186.22, subdivision (b)(1).

Section 186.22, subdivision (b)(1), applies to “any person who is convicted of a felony 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.” The enhancement “does not depend on membership in a gang . . . .” (*People v. Albillar, supra*, 51 Cal.4th at p. 68.) “Rather, it applies when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang.” (*Ibid.*; see *People v. Garcia* (2017) 9 Cal.App.5th 364, 379 [“section 186.22, subdivision (b)(1) describes what the prosecution must prove in the disjunctive, i.e., that the crime must be ‘committed for the benefit of, at the direction of, or in association with any criminal street gang’”].)

2. *There Was Substantial Evidence Rocha  
Committed the Offenses for the Benefit of,  
or in Association with, DIA*

“Expert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the . . . section 186.22, subdivision (b)(1), gang enhancement.” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; see *People v. Sanchez, supra*, 63 Cal.4th at p. 685 [a gang expert “can give an opinion based on a hypothetical including case-specific facts that are properly proven”]; *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1367 [an expert witness, “in response to a hypothetical question modeled after the alleged crime, may opine as to the motivation for the defendant’s actions if the opinion falls within the witness’s expertise regarding the culture of criminal gangs”]; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513 [an expert may properly testify about the “motivation for a particular crime, generally retaliation or intimidation,” and about “whether and how a crime was committed to benefit or promote a gang”].) The hypothetical question must be “rooted in facts shown by the evidence.” (*Vang*, at p. 1045; see *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4 “[a] gang expert may render an opinion that facts assumed to be true in a hypothetical question present a ‘classic’ example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence”].)

There was substantial evidence Rocha committed the crimes for the benefit of DIA. Frus testified DIA was a criminal street gang that committed acts of violence to intimidate rival gangs and instill fear in the community, and he described how women help boyfriends who are gang members commit crimes by serving as drivers, acting as lookouts, or carrying weapons. Frus stated his opinion that a shooting mirroring the facts of this case was committed for the benefit of the gang. Frus testified the

crime described by the hypothetical was “100 percent gang-related” because it involved an initial altercation between a young gang member and rival gang members, an agreement by an older gang member to bring the young gang member to the retaliatory shooting, and the older gang member announcing the name of his gang and his gang moniker at the shooting. Because Frus based his opinion on a hypothetical question “rooted in the facts shown by the evidence” (*People v. Vang, supra*, 52 Cal.4th at p. 1045), it was substantial evidence that the shooting, and Rocha’s role in it, benefitted the gang. (See *Albillar, supra*, 51 Cal.4th at p. 63 “[e]xpert 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)”]; *People v. Garcia, supra*, 9 Cal.App.5th at p. 380 [gang expert’s opinion on the importance of respect to gangs and the need to protect gang territory and comply with requests to commit act of violence from other gang members was substantial evidence the offenses were gang-related].)

There was also evidence Rocha knew Higuera needed a car for the retaliatory shooting ordered by Vasquez, and Higuera asked her to assist him in carrying out the crime by driving. Rocha not only drove Higuera to the location of the shooting, she facilitated his flight from the scene. Nor was this the only time Rocha assisted Higuera in committing gang-related crimes: Rocha drove Higuera to other gang shootings both before and after the August 17, 2012 shooting. The jury reasonably could have concluded from the evidence of Rocha’s conduct that she knew Higuera’s mission that evening was to kill members of the rival tagging crew for disrespecting Art T. and that her assistance would benefit the gang. (See *People v. Ewing* (2016)



244 Cal.App.4th 359, 379 [because “[t]here is rarely direct evidence that a crime was committed for the benefit of a gang” and “[w]e can discover mental state only from how people act and what they say,” courts “routinely draw inferences about intent from the predictable results of action”].)

There was also substantial evidence Rocha committed the crimes in association with DIA. Frus testified, based on the facts in the hypothetical, that the driver acted in association with a criminal street gang because she stored the bullets the gang member used in the gang-related crimes in the glove compartment of her car. Rocha also knew Higuera and Vasquez were planning a retaliatory gang shooting, she drove Higuera to the location of attack, and she aided Higuera’s escape. (See *People v. Weddington* (2016) 246 Cal.App.4th 468, 485 [“the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members”]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484-485 [evidence of a crime committed in retaliation for an earlier incident involving same gang supports a gang enhancement].) Although Rocha suggests she only drove Higuera to the scene because he was her boyfriend, there was substantial evidence supporting a contrary conclusion. (See *People v. Manibusan, supra*, 58 Cal.4th at p. 87 [“[w]here the circumstances reasonably justify the trier of fact’s findings, a reviewing court’s conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment’s reversal”]; *People v. Moore* (2010) 187 Cal.App.4th 937, 940 [“[w]e discard evidence that does not support the judgment as having been rejected by the trier of fact for lack of sufficient verity”].)

3. *There Was Substantial Evidence Rocha Had the Specific Intent To Promote, Further, or Assist in Criminal Conduct by Gang Members*

Rocha argues “there was no substantial evidence that [she] aided and abetted a murder with the specific intent to promote additional ‘criminal conduct’ by the DIA.” Rocha’s argument, however, misstates the second requirement of section 186.22, subdivision (b)(1), by inserting the word “additional.” Section 186.22, subdivision (b) “requires a showing of specific intent to promote, further, or assist in ‘any criminal conduct by gang members.’” (*People v. Albillar, supra*, 51 Cal.4th at p. 66.) ““There is no statutory requirement that this “criminal conduct by gang members” be distinct from the charged offense . . . .” (*Ibid.*) “[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; see *People v. Ewing, supra*, 244 Cal.App.4th at p. 379 [““[c]ommission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime””]; *People v. Morales, supra*, 112 Cal.App.4th at p. 1198 [“specific intent to benefit the gang is not required”].)

Moreover, as discussed, there was substantial evidence that Rocha intended to aid and abet Higuera’s commission of a retaliatory gang shooting and that she committed the offense “in concert” (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322) with Higuera, whom she knew was a member of the gang. The jury could reasonably infer that Rocha had the “specific intent to promote, further, or assist” Higuera’s criminal conduct. (*Albillar, supra*, at p. 68; see *Villalobos*, at p. 322 [girlfriend’s “intentional

acts, when combined with [her] knowledge that those acts would assist crimes by . . . gang members, afforded sufficient evidence of the requisite specific intent”].)

C. *Trial Counsel for Rocha Was Not Ineffective*

Rocha argues her trial counsel provided ineffective assistance by failing to call a gang expert to testify that Rocha “was not a gang member and was not bent on engaging in conduct for the benefit of, at the direction of, and in association with, the DIA gang.” Rocha also argues such expert testimony would have “buttressed the defense . . . that [she] was in fact a victim herself of a domineering gang member who was pressuring her and even forcing her to drive him around whilst unaware of the criminal conduct in which he was engaging.”

““In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel.”” (*People v. Brown* (2014) 59 Cal.4th 86, 109.)

On direct appeal, “[a]n appellate court’s ability to determine from the record whether an attorney has provided constitutionally deficient legal representation is in the usual case severely hampered by the absence of an explanation of an attorney’s strategy.’ [Citation.] For this reason . . . “[i]f the record on appeal fails to disclose why counsel acted or failed to

act in the instance asserted to be ineffective, unless counsel was asked for an explanation or failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. [Citation.]” [Citations.] The merits of such claims are more appropriately resolved, not on the basis of the appellate record, but rather by way of a petition for writ of habeas corpus.” (*People v. Johnson* (2016) 62 Cal.4th 600, 653.)

The decision whether to call certain witnesses is a “matter[ ] of trial tactics and strategy which a reviewing court generally may not second-guess.” (*People v. Carrasco, supra*, 59 Cal.4th at p. 989.) A contention that defense counsel was ineffective for failing to call an expert “must be supported by declarations or other proffered testimony establishing both the substance of the omitted evidence and its likelihood for exonerating the accused. [Citations.] We cannot evaluate alleged deficiencies in counsel’s representation solely on defendant’s unsubstantiated speculation.” (*People v. Bolin* (1998) 18 Cal.4th 297, 334; cf. *People v. Mai* (2013) 57 Cal.4th 986, 1018 [court could not evaluate counsel’s failure to object or to cross-examine witnesses because the defendant failed to identify the exculpatory or impeachment evidence further examination would have elicited].) Because Rocha has not provided any such declarations or proffered testimony, her assertion that a defense gang expert would have exonerated her is “unsubstantiated speculation” and does not show her trial counsel’s representation was objectively unreasonable. (*People v. Bolin*, at p. 334.)

Moreover, Rocha has failed to establish prejudice. “[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course

should be followed.” (*People v. Carrasco*, *supra*, 59 Cal.4th at p. 982; see *People v. Brown*, *supra*, 59 Cal.4th at p. 109.) Here, even if a defense gang expert had given an opinion Rocha was not a gang member, the result would not have been any different because membership in a gang is not an element of the gang enhancement. (See *Albillar*, *supra*, 51 Cal.4th at pp. 67-68.) In addition, the evidence Rocha acted in association with the gang and to benefit was overwhelming. Rocha knew Higuera’s plan was to participate in a gang-related shooting, and she actively assisted Higuera in carrying out the attack, as she had done before the shooting and as she continued to do after the shooting. There is no reasonable probability that, had counsel for Rocha called a gang expert, the result would have been any different. (See *In re Welch* (2015) 61 Cal.4th 489, 517 [“[i]n order to establish prejudice, a defendant ‘must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different’”]; accord, *People v. Martinez* (2017) 10 Cal.App.5th 686, 716.)

D. *The Trial Court Properly Sentenced Rocha Under Section 12022.53*

Rocha argues the trial court erred in imposing the enhancements under section 12022.53, subdivision (d), for the attempted murders of Lopez and Duarte because neither of these two victims suffered any, let alone great, bodily injury. The trial court, however, properly imposed the enhancements under section 12022.53, subdivisions (d) and (e)(1).

As noted, section 12022.53, subdivision (d), provides for a prison term of 25 years to life if the defendant personally discharges a firearm and proximately causes great bodily injury or death to someone other than an accomplice. Section 12022.53, subdivision (e)(1), extends this enhancement to any principal,

even if he or she did not personally discharge the firearm, if the crime was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b), and any principal used or discharged a firearm. (See *People v. Garcia*, *supra*, 28 Cal.4th at p. 1171 “[s]ection 12022.53, subdivision (e)(1), imposes vicarious liability . . . on aiders and abettors who commit crimes in participation of a criminal street gang”]; *People v. Hernandez* (2005) 134 Cal.App.4th 474, 480.) Section 12022.53, subdivision (f), provides that “[o]nly one additional term of imprisonment under this section shall be imposed per person for *each crime*,” and, “[i]f more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment.” (Italics added.)

In *People v. Oates* (2004) 32 Cal.4th 1048 the Supreme Court rejected the argument Rocha makes here. In that case the defendant fired two shots at a group of five people but hit and injured only one. (*Id.* at p. 1052.) The jury convicted the defendant of five counts of attempted murder, one for each person in the group. (*Ibid.*) The Supreme Court held that under these circumstances “[s]ection 12022.53 . . . call[s] for imposition of multiple subdivision (d) enhancements.” (*Id.* at p. 1055.) The Supreme Court explained: “Because the requirements of the subdivision (d) enhancements have been satisfied as to each of defendant’s attempted murder convictions, subdivision (f) of section 12022.53 *requires* that the enhancement be imposed as to each conviction.” (*Id.* at p. 1056; see *People v. Palacios* (2007) 41 Cal.4th 720, 733 [trial court properly imposed three great bodily injury enhancements on three qualifying offenses, even though the defendant fired only one shot at a single victim]; *People v. Reyes-Tornero* (2016) 4 Cal.App.5th 368, 379 [trial court properly imposed great bodily injury enhancement on the four assault

convictions, even though only one of four victims suffered an injury].)

Higuera fired multiple shots at a group of four people, but only killed one and injured one other. Although Lopez and Duarte escaped uninjured, the jury convicted Rocha of three counts of attempted murder and found true for each count the allegations that the offenses were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1), and that a principal discharged a firearm causing death to Cruz within the meaning of section 12022.53, subdivisions (d) and (e)(1). Therefore, the trial court properly imposed the section 12022.53 enhancement on the attempted murder convictions for Lopez and Duarte because the requirements of subdivision (d) were “satisfied as to each of [the] attempted murder convictions” (*Oates, supra*, 32 Cal.4th at p. 1056), and subdivision (e)(1) extended the enhancements to Rocha as an aider and abettor (see *People v. Garcia, supra*, 28 Cal.4th at p. 1171).

## DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

BENSINGER, J.\*

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