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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EDWARD AMILCAR CHAVAC et al., Defendants and Appellants.	B269634 (Los Angeles County Super. Ct. No. BA410841)

APPEAL from judgments of the Superior Court of Los Angeles County, Sam Ohta, Judge. Judgments of conviction affirmed; remanded for further proceedings.

Paul Kleven, under appointment by the Court of Appeal, for Defendant and Appellant Edward A. Chavac.

Lise M. Breakey, under appointment by the Court of Appeal, for Defendant and Appellant Jose E. Ruiz.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant Moreno R. Alvarado.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants and appellants Edward Amilcar Chavac, Jose Efrain Ruiz, and Moreno Ruben Alvarado of the willful, deliberate, and premeditated attempted murder of Gabriela D., and found true gang and firearm allegations. Appellants contend the trial court erred by admitting a photograph taken from a social media site; the Penal Code section 186.22[1] gang enhancements were not supported by substantial evidence; the prosecutor committed *Griffin* error[2] during closing argument; and the trial court's response to a jury question was erroneous. In supplemental briefing, appellants contend the matter must be remanded to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancements pursuant to recently amended section 12022.53, subdivision (h), and the People aver that the court committed a minor sentencing error. We affirm the convictions, but remand the matter to allow the trial court to exercise its discretion and determine whether to strike or dismiss the firearm enhancements.

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

2 *Griffin v. California* (1965) 380 U.S. 609.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *Mara Salvatrucha, the casitas, and Gabriela D.*

Mara Salvatrucha is a criminal street gang, commonly known as "MS-13," that was formed in the early to mid-1980s, operates internationally, and has tens of thousands of members worldwide. In April 2013, MS-13 operated at least six "casitas" in Los Angeles, four of which were located in or near the Pico-Union district. A "casita," which means "little house" in Spanish, is an apartment or house used for illicit drug and alcohol sales and consumption, gambling, and prostitution. Gang members, as well as other persons, patronize the casitas, which provide a place to socialize and relax. Women may work in the casitas as either hostesses or prostitutes. Hostesses are paid for sitting and drinking with male patrons. Women may also assist with narcotics sales.

Four of the MS-13 casitas were operated by the Normandie Locos, or "Normandies," clique, or subset, of the MS-13 gang, and were run like a business.[3] They were located at (1) 3819 West 21st Street (the 21st Street casita); (2) 900 South Fedora Street (the Fedora casita); (3) 3209 West James M. Wood Boulevard (the Wood casita); and (4) Washington and Hobart Streets.

Kelvin Velado,[4] who went by the moniker "Directo," was responsible for operating these casitas. Velado was an MS-13 member in the Normandies subset. He was known to wear a

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[3] The Normandies subset is also known as the Normandie Locos or Normandies Locotes.

[4] In the record, Velado's first name is spelled both "Calvin" and "Kelvin."

bracelet engraved with the word "Directo," with an "M" on one side and an "S" on the other. Velado controlled who was allowed to enter and exit the casitas.

Appellants Chavac and Ruiz were both MS-13 members, and used the monikers "Nino" and "Flash," respectively. Velado "hung out" with Chavac and Ruiz. Appellant Alvarado used the moniker "Chele" and stayed in the Fedora casita, but was not an MS-13 member. Velado gave orders to persons at the casitas. For example, Velado on one occasion ordered Chavac to replenish the stock of drugs. Velado used the 21st Street casita for meetings with appellants, and appeared to be their "boss."

In December 2012, Gabriela D. was 17 years old and in the ninth grade. She met Diego Reyes at school, and they became romantically involved. Reyes, whose moniker was "Rider," had "MS" tattoos. Through her association with Reyes, Gabriela began visiting the casitas and regularly used crystal methamphetamine there. Reyes introduced Gabriela to Velado. She dropped out of school and, in approximately March 2013, began living at the 21st Street casita, along with Velado, a woman named Wendy, and Ana A. She assisted with drug sales and was paid to sit and drink with male patrons.

Gabriela had relatives and friends who were members of the 18th Street gang, a rival of the MS-13 gang. Gabriela sent and received text messages on her cellular telephone, and could access a Facebook application on it. Her phone was not password protected. Some of her text messages and Facebook information indicated her connection with 18th Street gang members. When Gabriela was at the casita, Reyes and Wendy usually took her phone away from her, and other persons in the casita used it to send and receive calls or texts. Gabriela was worried that MS-13

members would discover her ties to the 18th Street gang and harm her. She talked about this to Reyes, who told her not to worry.

In early April 2013, Gabriela stopped dating Reyes. At some point she had a single sexual encounter with appellant Ruiz. On April 21 or 22, 2013, Velado asked Gabriela to work at the casitas as a prostitute. She declined, and he became angry with her.

On April 23, 2013, at approximately 1:00 a.m., Velado told Gabriela and Ana that they could no longer live at the casita and had to leave. With nowhere to go, they borrowed money and stayed the night at the East West Hotel, which was less than two blocks away from the Fedora casita.

b. *The shooting*

Later that morning, Gabriela accompanied Ana to a court appearance, and then the two returned to the Fedora casita, where they hoped a friend of Ana's would loan them money. Alvarado was there when they arrived; Velado, Chavac, and Ruiz arrived shortly thereafter but did not talk to the women. Unable to borrow the money, Gabriela and Ana decided to leave. As they were exiting, Ruiz made a hand gesture to Gabriela, which, in hindsight, she believed was intended as a warning.

That afternoon the women walked back to the East West Hotel. When they exited, Gabriela saw Alvarado pacing back and forth in front of the hotel. Velado and some bald men drove past in a grey car. As the women walked toward the corner of 8th Street, Chavac approached; Ruiz was on the opposite corner. Chavac told Gabriela that she needed to accompany him to a meeting. She initially refused, asking why she had to attend if she was not a gang member. Ana, concerned that something was

not right, attempted to get Chavac to postpone the meeting or allow her to accompany Gabriela, but he refused. Gabriela agreed to go with Chavac after he assured her that her then-current boyfriend, "Panic," would be there. Ana took Gabriela's phone, agreeing to call her family if something happened.

Chavac and Gabriela walked towards San Marino Street. Ruiz and Alvarado walked parallel to them on the opposite side of the street. After walking for two blocks, Chavac stopped, stepped away from Gabriela, and talked on his cell phone. Meanwhile, Ruiz (who apparently crossed the street) talked with Gabriela. Alvarado stayed on the opposite corner, looking from side to side. After approximately 20 minutes, Chavac walked toward Gabriela, pulled out a small silver gun, told her she could leave, and said, " 'Aqui Rifa La Mara,' " which means " 'Mara rules here.' " He then shot her in the chest from a distance of two and one-half feet. Gabriela attempted to run, but fell in the street. She did not feel or hear any additional gunshots. While she was on the ground, Ruiz stood over her, straddling her body. He pointed a dark-colored gun at her, moved the gun from side to side, and laughed. Chavac, Ruiz, and Alvarado then left the scene.

Multiple persons in the area called 911, with the first calls coming in at approximately 3:36 p.m. Los Angeles Police Department (L.A.P.D.) Officer Carlos Ortega, who was in the area, responded immediately and summoned an ambulance. When he arrived, Gabriela was lying face down in the street. She had suffered multiple gunshot wounds, but was conscious and pleading for help. She had trouble breathing and enunciating her words, but tried to tell Ortega that "Nino from Normandie" shot her.

Gabriela underwent surgery and remained in a coma. She had suffered 13 gunshot wounds[5] to her chest, back, neck, and leg. One of the bullets missed her heart by a millimeter. She spent a month in the hospital. At the time of trial, she still limped and had multiple scars due to the gunshot wounds.

c. *The investigation*

When she awoke from her coma, Gabriela told a detective that Chavac shot her, Ruiz stood over her and pointed a gun at her, and Alvarado acted as a lookout. She identified all three appellants in six-pack photographic lineups.

An eyewitness testified that he had heard gunshots and a woman screaming. He looked out his window and saw Gabriela on the ground. A man was standing over her, pointing a gun at her, and appeared to be shooting her. Two other Hispanic men were on the other side of the street. All three ran off after the shooting.

Six expended shell casings were found at the scene. Forensic examination of the casings revealed that two guns were used in the shooting. One was likely fired from closer to Gabriela, and the other from farther away.

Cellular phone records indicated that between 2:53 and 3:37 p.m., 13 calls were made between Chavac's and Velado's cell phones. At the time, both phones were located in the area of Fedora Street south of San Marino. The last call between the two occurred at 3:37 p.m., within a minute after the first 911 call. Thereafter the phones left the area, travelling toward the 10 Freeway.

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[5] Gabriela testified that she suffered 17 gunshot wounds; her medical records suggest she suffered 13.

d. *Gang evidence*

(i) *Prosecution gang expert*

L.A.P.D. Detective Frank Flores testified as the prosecution's gang expert. After describing his experience and expertise regarding the MS-13 gang, including the fact he had spoken with over 2,000 MS-13 members during his career, Flores provided information about the MS-13 gang and the casitas, as discussed *ante*. Additionally, he testified as follows. The MS-13 gang's color is blue. MS-13 gang members use a distinctive hand sign, known as the devil's pitchfork. MS-13 graffiti is used to mark the gang's territory and intimidate the community and rivals; gang-related tattoos indicate gang membership and loyalty, and generally must be earned. MS-13 members use MS13, MS, Mara, Mareros, and other plays on the gang's name in tattoos and graffiti. Gang members may also tattoo themselves with their MS-13 clique, or subset. MS-13 graffiti was present near at least two of the casitas.

The MS-13 gang has many rivals, but their longstanding, primary rival is the 18th Street gang. In the Los Angeles area, several MS-13 subsets are active, including the Normandies, Francis, Leeward, Harvard, and Park View. The Normandie clique is known as "NLS." Its territory was roughly bordered by Wilshire Boulevard to the north, Olympic Boulevard to the south, Normandie Avenue to the west, and Hoover Street to the east. The MS-13 gang's primary activities were murder, attempted murder, robbery, extortion, narcotics sales, burglary, theft, and fraud.

A "shot caller" is a leader in a gang or subset. The shot caller's role is to keep order, maintain standards and protocols, order punishment for infractions, and help determine the gang's

or clique's activities. To become a shot caller, an individual must be well-established in the gang or clique and must be "vetted" by the gang. Different status levels exist in a gang, based on a member's reputation. To rise in status and remain in good standing, a member must "put in work," that is, commit violence against gang rivals or persons who are perceived to have disrespected the gang, or commit crimes that financially benefit the gang. Violent acts instill fear in the community, enabling the gang to maintain control of its territory. Younger or newer members must follow the shot caller's directives.

Velado was the shot caller for the MS-13 Normandies subset, and was "a very influential member of MS-13 within the organization." Acting in this capacity for MS-13, Velado was in a position of power and authority. In addition to his "Directo" bracelet, Velado had tattoos indicating MS-13 and Normandies membership, and photographs depicted him making MS-13 hand signs. Velado eventually fell out of favor with the gang, in part because his casitas kept being raided by police.

Flores opined that Chavac was also an MS-13 member in the Normandies subset. Chavac had a tattoo of a demonic clown with a gun, with "NLS" written on the clown's head, indicating membership in MS-13 and the Normandies subset, and photographs showed Chavac with other persons, including Velado, making MS-13 hand signs. A person who was unaffiliated with MS-13 would not have such a tattoo or make MS-13 hand signs while in the presence of an MS-13 shot caller.

Photographs also showed Ruiz making the MS-13 hand sign, posing with Velado and Chavac. Prior to May 2013, Ruiz did not have tattoos that Flores considered to be gang-related. After he was incarcerated for the instant offense, Ruiz obtained a

tattoo of an "M" and an "S" on his chest, indicating MS-13 membership.

Flores opined that Alvarado was not an MS-13 gang member at the time of the attempted murder.

Flores testified regarding three "predicate" offenses committed by MS-13 gang members.[6]

When given a hypothetical based on the evidence adduced, Flores opined that the attempted murder was committed in association with, at the direction of, and for the benefit of the MS-13 gang. A woman's return to the casita after being "kicked . . . out" would be perceived as disrespectful to the gang and to the shot-caller. The retaliatory shooting enhanced the gang's reputation by demonstrating how it dealt with disrespectful persons. The brazen, broad-daylight shooting cemented its control of the territory and would instill fear in the community. The statement " 'Aqui Rifa [L]a Mara' " benefitted the gang because it "punctuate[d]" the act and was akin to a trademark.

(ii) *Officer Bermudez's contact with Velado*

L.A.P.D. Officer Lucy Bermudez encountered Velado on April 24, 2013, near James M. Wood Boulevard and Normandie Avenue, and prepared a field identification (F.I.) card on him. She observed an "M" tattoo on his left calf and an "S" on his right; he was also wearing the "Directo" bracelet. He identified himself as Kelvin Naim Fattel Velado.

(iii) *Defense gang expert*

Martin Flores testified for the defense as Alvarado's gang expert. Among other things, he opined that Alvarado was not an

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[6] We discuss this evidence in more detail where relevant, *post*.

MS-13 gang member or associate, as demonstrated by, among other things, the absence of photographs showing Alvarado making gang signs, F.I. cards, and the like.

2. *Procedure*

A jury convicted Chavac, Ruiz, and Alvarado of the attempted willful, deliberate, and premeditated murder of Gabriela.[7] (§§ 664 & 187, subd. (a).) It found all three appellants committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)). The jury further found Chavac personally and intentionally used and discharged a firearm, causing great bodily injury (§ 12022.53, subds. (b), (c), (d)); Ruiz personally used a firearm (§ 12022.53, subd. (b)); and, as to all defendants, a principal personally used and discharged a firearm, causing great bodily injury (§ 12022.53, subds. (b), (c), (d), (e)(1)).

The trial court sentenced Chavac to life in prison for the attempted murder, with a 15-year parole eligibility minimum due to the section 186.22 gang enhancement, plus a consecutive term of 25 years to life for the section 12022.53, subdivision (d) firearm enhancement. It sentenced both Ruiz and Alvarado to life for the attempted murder, plus 25 years to life for the section 12022.53, subdivisions (d) and (e)(1) enhancement. As to all three defendants, the trial court imposed restitution fines, suspended parole revocation restitution fines, court operations assessments, and criminal conviction assessments. Chavac, Ruiz, and Alvarado appeal.

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[7] Velado was not tried with appellants, and is not a party to this appeal.

DISCUSSION

1. *Admission of the photograph of Chavac, Velado, and the gun was not error*

Chavac contends the trial court prejudicially erred by admitting a photograph of him posing with Velado, who was holding a gun. We disagree.

a. *Additional facts*

Without objection, the prosecution admitted into evidence several photographs, taken from Velado's Facebook social media site. However, Chavac objected to two additional photographs from the Facebook account. After the prosecution presented evidence authenticating the photographs, discussed immediately *post,* the court admitted one of them over defense objections. That photo showed Chavac and Velado, with Velado holding a small, silver gun.[8] Gabriela testified that the gun in the photo looked like the one Chavac used to shoot her. She had also seen the gun at the casita.

To authenticate the challenged Facebook photo, the prosecution presented the testimony, at an Evidence Code section 402 hearing, of L.A.P.D. Officer Owen Berger. Berger worked with the L.A.P.D.'s cyber support unit. He had been trained by Facebook regarding its website operations, its storage of electronic records, and how an account could be accessed and by whom. To create a Facebook account, a user must register with Facebook and provide certain information, such as an email, and create a password. A Facebook account holder is provided with

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[8] The original photograph showed Chavac was also holding a small, silver gun, but it was cropped before admission to eliminate the gun in Chavac's hand.

an electronic "wall," upon which he or she can post information such as photographs, texts, and updates. To access an account, a user must enter a user name and a password. The password must be entered each time the user signs on, unless a " 'remember me' " token is activated, keeping the account accessible for a week or month.

Facebook has several privacy settings. If the account or specific information is set to "only me," only the account holder – or someone with the account holder's password – can see the information. If an account is set to "friends," only the account holder and persons whom the account holder has approved as "friends" can see wall posts. If the account is set to "public," anyone can see the information.

Depending on the privacy settings chosen, persons other than the account holder can post information and photographs to the account holder's wall. However, only the account holder, or someone with the account holder's password, can log in to the account and upload photos or information to the wall. Facebook maintains the data users store or post in the ordinary course of business.

On May 8, 2013, in response to a search warrant, Facebook provided data on an account registered to Kelvin Naim Fattel. The email associated with the Facebook account was Kelvin.Fattel@facebook.com. The city the user provided was Los Angeles, California. Among the "friends" listed were "Normandies Locotes Salvatruchos" and Mara Salvatrucha. One of the "groups" listed was "The Big Time MS." The account included numerous photographs of Velado, some showing him with the same woman and child, others with persons making MS-13 gang signs, and others characterized as "selfies." Berger could

not determine the account's privacy settings, but, as with all Facebook accounts, to access the account an email and a password were required. All the photographs produced in response to the warrant were uploads, not wall posts, and therefore had to have been uploaded by the account holder or someone using the account holder's password. Berger opined that the photographs appeared to be true and accurate Facebook records of account holder Kelvin Fattel.

The prosecutor argued the Facebook records had been sufficiently authenticated. She pointed out that the name Velado gave to Officer Bermudez was Kelvin Naim Fattel Velado, and the photographs and other information in the account were self-authenticating. Chavac's counsel objected that the People had failed to provide sufficient authentication.[9] The trial court ruled the photograph was admissible. Berger's testimony demonstrated the Facebook account could not be easily manipulated by unauthorized persons. The content of the account demonstrated it was controlled by Velado. In totality, the evidence sufficiently demonstrated Velado placed the photographs on the wall. Therefore, the People met their threshold burden of demonstrating authenticity.

b. *Discussion*

A photograph is a writing, and must be authenticated before it can be admitted into evidence. (Evid. Code, §§ 250, 1401; *People v. Goldsmith* (2014) 59 Cal.4th 258, 266 (*Goldsmith*); *People v. Beckley* (2010) 185 Cal.App.4th 509, 514.) The proof required varies with the nature of the evidence the photograph is

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[9] Counsel also objected that the photograph constituted hearsay and impermissible character evidence. Chavac does not renew these arguments on appeal, and we do not address them.

being offered to prove, and with the degree of possibility of error. (*Goldsmith*, at p. 267; *In re K.B.* (2015) 238 Cal.App.4th 989, 995.) "The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered. [Citation.] Essentially, what is necessary is a prima facie case." (*Goldsmith*, at p. 267.) The authenticity of a document may be established by circumstantial evidence. (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435.) The author's, or photographer's, testimony is not required; authenticity may be established by the contents of the writing or by other means. (*Id.* at p. 1435; *In re K.B.*, at p. 995; Evid. Code, § 1411.)

The " 'fact that the judge permits [a] writing to be admitted in evidence does not necessarily establish the authenticity of the writing; all that the judge has determined is that there has been a sufficient showing of the authenticity of the writing to permit the trier of fact to find that it is authentic.' [Citation.]" (*People v. Valdez*, *supra*, 201 Cal.App.4th at pp. 1434–1435.) " 'As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' [Citation.]" (*Goldsmith*, *supra*, 59 Cal.4th at p. 267.) We review challenges to a trial court's ruling on the admissibility of evidence for abuse of discretion. (*Id.* at p. 266; *In re K.B.*, *supra,* 238 Cal.App.4th at p. 995.)

In *Valdez,* the appellate court concluded information from the defendant's "MySpace" social networking site was properly authenticated and admissible. (*People v. Valdez*, *supra,* 201 Cal.App.4th at p. 1435.) The MySpace page displayed photos of defendant's face and of him throwing a gang sign; contained

postings greeting him by name, and including personal details; and listed as an interest the gang to which he belonged. (*Id.* at pp. 1435–1436.) Although a MySpace page was publicly accessible, content could not be uploaded without a password. (*Id.* at p. 1436.) *Valdez* concluded the "consistent, mutually reinforcing content on the page helped authenticate the photograph and writings, with no evidence of incongruous elements to suggest planted or false material." (*Ibid.*) The fact the site was password protected "tended to suggest Valdez, as the owner of the page, controlled the posted material." (*Ibid.*)

In re K.B. concluded that cell phone "screenshots" of photos posted on an Instagram account were admissible. (*In re K.B., supra,* 238 Cal.App.4th at pp. 997–998.) There, a police officer saw Instagram posts showing the defendant and his companions brandishing firearms. When officers conducted a probation search a few hours later, defendant was wearing the same clothing, was in the same location, and was with some of the same companions seen in the Instagram post, and a cell phone seized from one of his companions contained screenshots of the same photos that had appeared on Instagram. (*Ibid.*) Based on this showing, as well as the facts that the account was password protected and no evidence suggested the photos were inaccurate, *In re K.B.* concluded the photographs were properly authenticated. (*Ibid.*)

Here, as in *Valdez* and *In re K.B.,* the People met their burden to establish a prima facie showing of authenticity. The name on the account matched the name Velado gave to Officer Bermudez. The account contained numerous photographs depicting Velado, who was known to and identified by Detective Flores. Velado was associated with the MS-13 gang and the

Normandies subset, and both were listed in the "friends" or "groups" sections of the account. Uploaded photographs showed Velado sporting the "Directo" bracelet, which he was known to wear, and in the company of Chavac and Ruiz, with whom he was known to associate. The account user's city matched Velado's. As in *Valdez,* a reasonable trier of fact could conclude the Facebook account belonged to Velado, and the "pervasive consistency" of the data suggested its authenticity. (*People v. Valdez, supra,* 201 Cal.App.4th at pp. 1435–1436.) The account was password protected, and only a person who had the password could have uploaded the photo. There was no evidence suggesting the photo had been altered or was inaccurate. Thus, the trial court did not err by admitting it. (See *Valdez*, at pp. 1436–1437; *In re K.B., supra,* 238 Cal.App.4th at pp. 997–998.)

In support of his argument, Chavac cites *People v. Beckley, supra,* 185 Cal.App.4th 509. There, the prosecution introduced a photograph of the defendant's girlfriend throwing a gang sign, downloaded from the defendant's MySpace page, to impeach her testimony. (*Id.* at p. 514.) *Beckley* held the evidence was insufficient to sustain a finding the photo was accurate. No expert testified the photo had not been faked, and "[s]uch expert testimony is . . . critical today to prevent the admission of manipulated images . . . ." (*Id.* at p. 515.) The court reasoned that digital images can readily be altered, and worried that hackers could adulterate the content of websites. (*Id.* at pp. 515–516.)

The present case is distinguishable from *Beckley*. As explained in *Valdez,* here "evidence of the password requirement for posting . . . content distinguishes *Beckley*, as does the

pervasive consistency of the content of the page, filled with personal photographs, communications, and other details tending together to identify and show owner-management of a page devoted to gang-related interests." (*People v. Valdez, supra,* 201 Cal.App.4th at p. 1436.) Moreover, as *In re K.B.* explained: "To the extent *Beckley*'s language can be read as requiring a conventional evidentiary foundation to show the authenticity of photographic images appearing online, i.e., testimony of the person who actually created and uploaded the image, or testimony from an expert witness that the image has not been altered, we cannot endorse it. Such an analysis . . . appears to be inconsistent with the most recent language in *Goldsmith* which explained that in authenticating photographic evidence, the evidentiary foundation 'may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. [Citations.]' [Citation.]" (*In re K.B., supra,* 238 Cal.App.4th at p. 997.) Moreover, to the extent *Beckley*'s analysis tended to improperly equate authentication with proof of genuineness, it overlooked the principle that the initial authenticity determination requires only a prima facie showing, and the trier of fact ultimately determines authenticity. (*Ibid.*)

Although Chavac finds it significant that the images in *Valdez* were taken from the defendant's own social networking account, whereas the photo challenged here was taken from Velado's account, we do not. Chavac complains that he had no control over Velado's account; there was no evidence showing who had the password, meaning persons other than Velado could have manipulated the image; and the People offered no expert testimony that the image had not been "faked." But Chavac's arguments properly go to the weight of the evidence, not the

threshold authentication requirement. (See *In re K.B., supra,* 238 Cal.App.4th at p. 997; *Goldsmith, supra,* 59 Cal.4th at p. 267; *People v. Valdez, supra,* 201 Cal.App.4th at pp. 1434–1435.)

2. *The evidence was sufficient to support the criminal street gang enhancements*

Appellants contend the evidence was insufficient to prove the criminal street gang enhancements. Chavac and Ruiz contend there was insufficient evidence to prove the pattern of criminal gang activity. Alvarado contends there was insufficient evidence to show he committed the crime for the benefit of, in association with, or at the direction of, the gang, with the requisite intent.

a. *Standard of review*

When determining whether the evidence was sufficient to sustain a criminal conviction or an enhancement, we " ' "review the whole record in the light most favorable to the judgment below to determine whether it discloses 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. [Citations.]" ' " (*People v. Salazar* (2016) 63 Cal.4th 214, 242.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " ' "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same standard of review applies when the prosecution relies primarily on circumstantial evidence. (*Salazar*, at p. 242.) We accept logical

inferences the trier of fact might have drawn from the evidence even if we would have concluded otherwise. (*Ibid*.)

b. *Appellants'* Prunty *claim lacks merit*

To establish that a group is a criminal street gang within the meaning of section 186.22, the People must prove, among other things, that its members engage in, or have engaged in, a pattern of criminal gang activity. (*People v. Prunty* (2015) 62 Cal.4th 59, 71 (*Prunty*); *People v. Sanchez* (2016) 63 Cal.4th 665, 698; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) "A 'pattern of criminal gang activity' is defined as gang members' individual or collective 'commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more' enumerated 'predicate offenses' during a statutorily defined time period. [Citations.]" (*Duran*, at p. 1457.)

To prove the pattern of criminal gang activity here, the prosecution presented evidence of three predicate offenses: January 2012 murder convictions suffered by Boris Bonilla and his half brother, Eduardo Hernandez, for a September 2008 murder; and a June 2008 murder conviction suffered by Pedro Armenta, for a March 2006 murder. Flores testified, based on his personal knowledge of the cases and of the men, that Bonilla, Hernandez, and Armenta were all MS-13 gang members. He did not identify Bonilla, Hernandez, or Armenta as being members of any particular MS-13 subset.

Relying on *Prunty* – which was decided after trial in the instant matter concluded – Chavac and Ruiz contend the evidence was insufficient to prove the pattern of criminal gang activity element because the People failed to establish (1) any link between their subset, the Normandies, and MS-13; and

(2) any link between the Normandies and "any subset involved in the predicate offenses." We disagree.

In *Prunty,* our Supreme Court considered what showing the prosecution must make to support a theory that various subsets constitute a single criminal street gang within the meaning of section 186.22, subdivision (f). (*Prunty, supra,* 62 Cal.4th at pp. 67, 71, fn. 2.) There, the prosecution's theory was that the defendant committed an assault to benefit the Sacramento-area Norteño street gang. Prunty identified as a Norteño, claimed membership in a particular Norteños subset, the Detroit Boulevard Norteños, and said "Norte" when committing the crime. (*Id*. at pp. 67, 68.) To prove the pattern of criminal activity, the expert testified about the "predicate activities of two local neighborhood subsets," the Varrio Gardenland Norteños and the Varrio Centro Norteños. (*Id.* at pp. 67, 69.) The expert did not offer "any specific testimony contending that these subsets' activities connected them to one another or to the Sacramento Norteño gang in general." (*Id.* at p. 67.)

In reversing the gang enhancement for insufficient evidence, *Prunty* found the prosecution had failed to prove the existence of a "single 'criminal street gang' " and establish a connection among the subsets it alleged comprised the gang. (*Prunty, supra,* 62 Cal.4th at pp. 68, 81.) The court explained: "when the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Id.* at pp. 67–68.) *Prunty* listed numerous potential avenues by which the prosecution

could make this showing. (*Id.* at pp. 77–81.) However, evidence of a common name, identifying symbol, color, common enemy, or "loose common ideology," are, by themselves, insufficient to prove such a connection between subsets, as is evidence that a local subset represented itself as an affiliate of a larger organization absent a showing that a connection exists in fact. (*Id.* at pp. 72, 74–75, 79.)

Here, the prosecution's theory was that appellants attempted to kill Gabriela for the benefit of the MS-13 gang. The evidence showed that immediately before shooting Gabriela, Chavac said "Aqui Rifa La Mara," or "Mara rules here," and the gang expert testified that in this country, the reference to Mara is "immediately" associated with MS-13. At trial the parties did not generally differentiate between MS-13 and the Normandies subset, and there was no suggestion the crime was committed to benefit the Normandies separately and apart from MS-13. Thus, the prosecution was required to prove that MS-13 met the requirements of section 186.22, subdivision (f). Chavac and Ruiz limit their sufficiency challenge to the pattern of criminal activity element. The prosecution met its burden to prove that element by demonstrating that appellants and the perpetrators of the predicate offenses were all members of the MS-13 organization.

There was ample evidence that the Normandies subset was connected to and part of MS-13. Flores, who had extensive experience investigating the MS-13 gang, testified that MS-13 operated the casitas, and that Velado was "a very influential member of MS-13 within the organization" and was the Normandies subset's shot caller. Gabriela stated that Velado was in charge of the casitas and "everybody would listen to what he says." Ana believed Velado was all three appellants' boss, and

saw Velado holding meetings with them at one of the casitas. At or near the Wood casita, the Fedora casita, the East West Hotel, and a nearby restaurant, there was graffiti with "MS13" and "NLS" (the subset symbol), indicating the territory was "MS-13 affiliated." This graffiti demonstrated that MS-13 and the Normandies subset shared the same "turf," a factor that, under *Prunty*, may demonstrate an individual subset is part of the larger group. (*Prunty, supra,* 62 Cal.4th at pp. 73–74.)

The connection between MS-13 and the Normandies was also demonstrated by Velado's, Chavac's, and Ruiz's self-identification with both. (*Prunty, supra,* 62 Cal.4th at p. 71; see *People v. Garcia* (2017) 9 Cal.App.5th 364, 378.) In addition to his "M" and "S" leg tattoos, Velado also had "Normandies" on his abdomen, and "mareros" – a word showing MS-13 membership – on his forearm. On Velado's bracelet, his moniker – "Directo" – was bracketed by an "M" and an "S," reflecting his role as MS-13's person in charge of the Normandies subset. Chavac's demonic clown tattoo included "NLS," which Flores testified indicated "Normandie Locos affiliated with Mara Salvatrucha." After the shooting Ruiz had a large "M" and an "S" tattooed on his chest. (See *Garcia*, at p. 379 [defendant's tattoos were a "corporeal representation of the association between the gang and one of its subsets"].) According to both gang experts, non-members of MS-13 would not have MS-13 tattoos, because this would show disrespect to the MS-13 gang; indeed, Alvarado's expert testified it "would be a fatal move" for a non-member to display such a tattoo in Los Angeles. Photographs showed Velado, Chavac, and Ruiz making MS-13 hand signs, also demonstrating MS-13 membership. And, Alvarado's gang expert

testified that Mara Salvatrucha was a "close-knit group of individuals."

From the foregoing, the jury could readily infer that Velado, a prominent MS-13 member and Normandies shot caller, was operating a business endeavor – the casitas – on behalf of the MS-13 gang; that Ruiz and Chavac, also members of MS-13 and the Normandies subset, were his subordinates in that enterprise; and that MS-13 and the Normandies subset acted as a single organization or association, with shared activities and unity of purpose. (See *Prunty, supra,* 62 Cal.4th at pp. 72–73.)

In our view, no *Prunty* issue arises in regard to proof of the predicate offenses. Certainly, it is "axiomatic that those who commit the predicate acts must belong to the same gang that the defendant acts to benefit." (*Prunty, supra,* 62 Cal.4th at p. 76.) But this requirement was met here. According to Flores, the predicate offenses were committed by known MS-13 members. Unlike in *Prunty*, the prosecution did not allege the predicates were committed by persons in unrelated subsets; instead, the evidence showed the predicates were committed by members of MS-13, the same gang the People alleged the crime was committed to benefit, and the same gang to which appellants Chavac and Ruiz belonged.[10] (See *People v. Pettie* (2017)

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[10] Chavac and Ruiz request that we take judicial notice of our unpublished opinion in *People v. Armenta* (Dec. 10, 2010, B209693), for the proposition that Armenta was actually a member of the Hollywood Locos subset of the MS-13 gang. We decline to do so. We cannot take judicial notice of the truth of factual findings made in an unrelated case. (See *Duarte v. Pacific Specialty Ins. Co.* (2017) 13 Cal.App.5th 45, 51, fn. 6; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1569; *Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112,

16 Cal.App.5th 23, 49–50 [evidence sufficient to establish the Norteños were a criminal street gang, even though prosecution also presented evidence of various Norteño cliques; theory was that defendants were Norteños, not members of a subset, and predicate offenses were committed by Norteño gang members, who were not identified as members of any subset].) Given that Chavac and Ruiz were members of MS-13, the Normandies subset was carrying on activities in conjunction with MS-13, and the predicates were committed by members of MS-13, *Prunty* does not require any additional showing. (See *Pettie*, at pp. 49–50; *People v. Ewing* (2016) 244 Cal.App.4th 359, 372 [*Prunty* addresses only the proof required when the prosecution seeks to prove the defendant committed the crime for the benefit of a broader umbrella gang and attempts to establish the predicates " 'with evidence of felonies committed by members of subsets to the umbrella gang' "].)

People v. Nicholes (2016) 246 Cal.App.4th 836, does not compel a different result. There the defendant was affiliated with a Sacramento Norteño subgroup, but the predicate offenses occurred in a different county. (*Id.* at pp. 845–846.) Such is not the case here. And, the fact MS-13 is a large, multinational gang with several subsets in the Los Angeles area is of no moment. *Prunty* did not suggest that a large gang, such as MS-13, cannot be a criminal street gang for purposes of section 186.22. (*Prunty, supra,* 62 Cal.4th at p. 85 ["nothing in this opinion reflects any skepticism regarding the general factual question of whether the

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120.) No evidence was introduced in the instant case showing any of the persons who committed the predicate offenses were members of any particular MS-13 subset.

Norteños exist . . . . We have previously upheld gang enhancements where the 'criminal street gang' in question was a geographically dispersed group"]; see *People v. Pettie, supra,* 16 Cal.App.5th at p. 49.)

c. *The evidence was sufficient to prove Alvarado committed the crime in association with the gang, with the requisite intent*

Alvarado contends the evidence was insufficient to support the section 186.22 gang enhancement as to him, because there was no showing he was involved with MS-13 and no evidence the attempted murder was committed for the benefit of, at the direction of, or in association with MS-13. He points out that he was not shown to be an MS-13 gang member: he had no gang-related tattoos, there were no photographs of him throwing gang signs, and there were no F.I. cards or similar records pertaining to him. Further, he urges, the attempted murder was not gang-related but instead was the result of a personal dispute between Gabriela and Velado, and there was no showing the attempted murder actually benefitted MS-13.

To establish a section 186.22 allegation, the prosecution must prove that (1) the offense was "gang related," that is, that it was "committed for the benefit of, at the direction of, or in association with any criminal street gang"; and (2) the defendant committed the offense with the specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b); *People v. Albillar* (2010) 51 Cal.4th 47, 59; *People v. Weddington* (2016) 246 Cal.App.4th 468, 484.) Because the first element is worded in the disjunctive, it may be established by evidence that two or more gang members committed the crime together, unless there is evidence they were on a " 'frolic and detour' " unrelated to the gang. (*Weddington*, at

p. 484.) Because there is rarely direct evidence that a crime was committed for a gang's benefit, " 'we routinely draw inferences about intent' " from a defendant's actions. (*People v. Miranda* (2011) 192 Cal.App.4th 398, 411; *People v. Franklin* (2016) 248 Cal.App.4th 938, 949.)

There was ample evidence the attempted murder was not merely a personal dispute, but was gang-related, that is, committed for the benefit of, at the direction or, or in association with, MS-13. The shooter, Chavac, said "Aqui Rifa La Mara," or "Mara rules here," immediately before shooting Gabriela. As noted, Flores testified that in the United States, the reference to "Mara" is immediately associated with MS-13, and was akin to an MS-13 trademark. Chavac's reference to MS-13 just as he shot provided strong evidence the crime was for the gang's benefit.

A day or two prior to the shooting, Gabriela had refused Velado's request that she serve as a casita prostitute, making him angry, and she had returned to the casita after Velado kicked her out. The jury could infer Velado found both these actions disrespectful to MS-13 and to him in his role as the casita boss, necessitating retaliation to preserve the gang's status. There was also evidence MS-13 gang members were aware of her connections to its chief rival, the 18th Street gang, providing another potential gang-related impetus for the shooting. The jury could infer MS-13 targeted her for a variety of gang-related reasons.

The circumstances of the shooting showed a prearranged, coordinated plan to kill Gabriela: Chavac lured her to the shooting location on false pretenses; Alvarado and Ruiz acted as lookouts or backup; and Ruiz attempted to warn Gabriela she was in danger beforehand. Cell phone records showed Velado

and Chavac were talking on the telephone before the shooting, with their last call ending just after Chavac shot Gabriela. From these facts, the jury could readily infer that Chavac shot Gabriela, with Ruiz's and Alvarado's assistance, on Velado's orders because she had offended Velado and, therefore, had offended MS-13.

Further, gang expert Flores opined, when given a hypothetical based on the facts of the case, that a shooting committed under these circumstances benefitted the gang and the individual participants, and was committed in association with the gang. The brazen, broad-daylight shooting demonstrated the gang would deal harshly with persons who disrespected the shot caller, and therefore "the gang as a whole." The shooting cemented the gang's reputation, indicated the gang's control over the area, and instilled fear in the community, thereby maintaining the gang's power and allowing unfettered gang activities in the area. Additionally, the shot caller and the shooter communicated immediately before the shooting. Expert opinion that particular criminal conduct benefitted a gang is "not only permissible but can be sufficient to support the . . . gang enhancement." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; *People v. Albillar, supra,* 51 Cal.4th at p. 63.)

There was also sufficient evidence Alvarado had the requisite intent. The prosecution was required to show Alvarado had the specific intent to promote, further, or assist gang members who themselves were engaged in criminal conduct. A specific intent to benefit the *gang* is not required; all that is necessary is that the defendant has the intent to promote, further, or assist in any criminal conduct by gang *members*. (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1362; *People v. Morales*

(2003) 112 Cal.App.4th 1176, 1198.) Alvarado stayed in an MS-13 casita, and therefore the jury could infer he was an MS-13 associate and knew Chavac, Ruiz, and Velado were MS-13 members.

Alvarado paced back and forth in front of the hotel, suggesting he was keeping tabs on Gabriela and Ana to ensure Gabriela did not leave before Chavac could commit the shooting. As Chavac and Gabriela walked down the street, Alvarado walked parallel to them, across the street. When Chavac stopped and talked on the phone to Velado, Alvarado waited across the street, looking back and forth. From this evidence jurors could readily infer Alvarado knew about the plan to shoot Gabriela, had coordinated his actions with Ruiz and Chavac, and was acting as a lookout, with the intent to assist the two gang members with their criminal conduct. (*People v. Morales, supra,* 112 Cal.App.4th at p. 1198 [ordinarily, the intent to aid a perpetrator can be inferred from a person's actions with knowledge of the perpetrator's criminal purpose].) Indeed, it is difficult to reconcile the evidence with any other conclusion. " 'Commission 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. Miranda, supra*, 192 Cal.App.4th at p. 412.) That Alvarado was not himself an MS-13 gang member is not significant: "[E]vidence of gang membership is 'neither necessary nor sufficient to establish any element of the gang enhancement.' " (*Prunty, supra,* 62 Cal.4th at p. 84; *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1366 [section 186.22, subdivision (b)(1) enhancement " 'does not . . . depend on membership in a gang at

all. Rather, it applies when a defendant has personally committed a gang-related felony with the specific intent *to aid members of that gang' "*].)

This case is unlike *People v. Ramon* (2009) 175 Cal.App.4th 843, *People v. Ochoa* (2009) 179 Cal.App.4th 650, and *In re Daniel C., supra,* 195 Cal.App.4th 1350, cited by Alvarado. In *Ramon*, the only evidence supporting the enhancement was the gang expert's testimony that the defendant and his codefendant were members of the same gang and were stopped driving a stolen vehicle, a crime typical of their gang, in their gang's territory. (*Ramon*, at pp. 847–849.) In *Ochoa*, the defendant committed a carjacking alone; he made no gang signs or otherwise engaged in gang behavior during the crime's commission. (*Ochoa*, at p. 662.) In *In re Daniel C.*, the defendant attempted to steal a bottle of liquor, but his two companions had already left the store, and he did nothing showing association with a gang, other than wearing clothing with red on it. (*In re Daniel C.*, at pp. 1353, 1361–1363.) In contrast, here the evidence showed a coordinated shooting of a victim who had offended the gang's shot caller, carried out by a gang member, accompanied by an uttered reference to the gang. Alvarado's citation to other cases, in which stronger evidence was purportedly presented, is unavailing. That different evidence was present in other cases does not establish the evidence was insufficient here; each case must be considered on its own facts. (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1010.)

3. *The prosecutor did not commit* Griffin *error*

Alvarado contends that during argument, the prosecutor indirectly commented on his failure to testify, in violation of *Griffin v. California*, *supra*, 380 U.S. 609. We disagree.

The prosecutor described events leading up to the shooting, as follows: "So . . . when the girls are at the hotel, what do the guys do? We know Flash is already sort of conveying some sort of warning to her. So he knows this plan that is in motion. . . . [¶] And when the girls go to leave the hotel . . . who is outside but Mr. Alvarado, and he's pacing back and forth in front of the hotel. *Why? Why does Mr. Alvarado feel the need to go pace back and forth in front of Gaby's hotel? Was he catching a bus? Was he jogging? Did he have a reason to be there?* [¶] . . . . And as the girls . . . . get down toward Normandie, Mr. Alvarado, who had just been pacing in front of the hotel for some unexplained reason, with Flash catty-corner, and Nino follows the girls across the street to go and talk to them." (Italics added.)

Alvarado's counsel moved for a mistrial on the ground the italicized portion of the argument constituted *Griffin* error, in that the prosecutor implied Alvarado "need[ed] to take the stand and explain why he's walking back and forth." The prosecutor explained her rhetorical questions were not a comment on Alvarado's failure to testify, but were intended to point out "why would somebody be pacing back and forth for no logical reason," other than to participate in the planned shooting. The trial court concluded the prosecutor was simply drawing permissible inferences from Alvarado's actions, and denied the mistrial motion.

The Fifth Amendment prohibits a prosecutor from commenting, directly or indirectly, on a defendant's failure to testify at trial. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1117–1118; *People v. Thomas* (2012) 54 Cal.4th 908, 945; *Griffin v. California, supra*, 380 U.S. at pp. 613–615.) Accordingly, a prosecutor may not refer to the absence of evidence that only the

defendant's testimony could provide. (*Thomas,* at p. 945; *People v. Brady* (2010) 50 Cal.4th 547, 565–566.) However, a prosecutor may comment on the state of the evidence or on the defense's failure to call logical witnesses or introduce material evidence. (*Brady,* at p. 566; *Thomas,* at p. 945.) When reviewing a claim of *Griffin* error, we consider whether there is a reasonable likelihood jurors understood the prosecutor's comments to refer to the defendant's failure to testify. (*People v. Lewis* (2001) 25 Cal.4th 610, 671; *People v. Denard* (2015) 242 Cal.App.4th 1012, 1020.)

Alvarado argues that the prosecutor indirectly commented on his failure to testify because only he could have explained what he was doing in front of the hotel. But this is a strained reading of the prosecutor's argument. The prosecutor made no reference, express or implied, to Alvarado's failure to testify, and there is no reasonable probability the jury would have understood her argument this way. In context, jurors would have understood the point to be that Alvarado's conduct was inconsistent with an innocent explanation and, as a matter of common sense, the only reasonable inference was that he was acting as a lookout. This was a fair comment on the evidence, not a comment on Alvarado's failure to personally provide an explanation. (See, e.g., *People v. Lancaster* (2007) 41 Cal.4th 50, 84 [prosecutor's argument that the defense failed to explain how defendant's fingerprints were found on a bottle was "a fair comment on the state of the evidence, rather than a comment on defendant's failure to personally provide an alternative explanation"]; *People v. Hughes* (2002) 27 Cal.4th 287, 374–375 [prosecutor's rhetorical question, " 'Why do you bring a knife if you don't intend to use it" was a "fair comment on the evidence" rather than "a veiled attempt to

highlight defendant's failure to testify"]; *People v. Medina* (1995) 11 Cal.4th 694, 755–756 [prosecutor's rhetorical questions, " 'Where was [defense counsel's] . . . rational explanation? How does he explain away the evidence . . . .?' " were not *Griffin* error].)

The authorities cited by Alvarado do not compel the result he seeks. In *People v. Guzman* (2000) 80 Cal.App.4th 1282, 1288, the prosecutor contrasted the fact that the victim spoke to police with the fact that the defendant fled, thereby alerting the jury that the defendant was unwilling to explain his side of the story in court. In *People v. Northern* (1967) 256 Cal.App.2d 28, 31–32, the prosecutor argued that the defendant, who participated in a drug transaction with an undercover officer, had failed to refute the prosecution's evidence, a statement the court interpreted as a direct reference to defendant's failure to take the witness stand. In *People v. Medina* (1974) 41 Cal.App.3d 438, 457–458, the prosecutor pointed out that of the five percipient witnesses to the crime, only the defendants failed to testify. Here, in contrast to these cases, the prosecutor's argument did not highlight Alvarado's failure to testify.

4. *The court's response to the jury's question was not error*

a. *Facts and contentions*

During deliberations, the jury submitted the following request for "[c]larification of the allegation 'that the attempted murder was willful, deliberate & premeditated for defend[a]nt #2 Ruiz[.] [¶] Does this allegation mean that we find 'true/not true that Ruiz's role was willful[,] deliberate & premeditated, or we find that the attempted 'murder' was willful, deliberate & premeditated[?]" (Underlining in original.)

The trial court provided the following response: "The court cannot answer the jury's question as to a specific defendant as posed. [¶] On the general legal question on the jurors' duty as to the willful, deliberate and premeditated allegation, the following rule applies[:] section 664(a) does not require that a person charged with an attempted murder personally act with willfulness, deliberation and premeditation – only that the attempted murder must have been willful, deliberate and premeditated. Thus an aider and abettor of an attempted murder need not personally act with willfulness, deliberation and premeditation."

Ruiz objected to the court's answer and requested that the jury be instructed that each defendant had to act willfully, deliberately, and with premeditation. The court declined to do so. Alvarado did not object to the court's response.

Alvarado, joined by Ruiz, contends the trial court's answer was misleading, incomplete, and diluted the prosecution's burden of proof, because it described only the requirements for directly aiding and abetting attempted willful, deliberate and premeditated murder, but did not explain that under the natural and probable consequences doctrine, a defendant cannot be convicted of the nontarget offense of attempted premeditated murder, only of attempted second degree murder.[11] We discern no error.

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[11] The People contend Alvarado has forfeited his challenge to the instructions given because he failed to object below. Despite a defendant's failure to preserve an instructional issue for appeal, we may review a claim of error that affects the defendant's substantial rights. (§ 1259; *People v. Salcido* (2008) 44 Cal.4th 93, 155; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) Because Alvarado makes such a claim here, we examine the

b. *Standard of review and applicable legal principles*

A trial court has a duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. (*People v. Townsel* (2016) 63 Cal.4th 25, 58.) When a jury asks a question after retiring for deliberation, section 1138 requires that the court provide information the jury desires on points of law. (*People v. Hodges* (2013) 213 Cal.App.4th 531, 539; *People v. Montero* (2007) 155 Cal.App.4th 1170, 1179.) "When the original instructions are themselves full and complete, the trial court has discretion to determine what additional explanation is sufficient to satisfy a jury request for further information. [Citation.]" (*People v. Elder* (2017) 11 Cal.App.5th 123, 137.) We independently determine whether the instructions given were correct and adequate. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088; *People v. Riley* (2010) 185 Cal.App.4th 754, 767.)

To address appellants' claims, we must briefly trace the legal principles regarding attempted murder as they relate to aiding and abetting liability. "There are two distinct forms of culpability for aiders and abettors." (*People v. Chiu* (2014) 59 Cal.4th 155, 158 (*Chiu*).) First, to be liable as a *direct* aider and abettor to murder, the prosecution must show the defendant aided or encouraged the commission of the murder with knowledge of the perpetrator's unlawful purpose, and with the intent or purpose of committing, encouraging, or facilitating its commission. (*Id*. at pp. 166–167.) Consequently, the aider and

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merits to the extent necessary to ascertain whether any alleged error occurred or was prejudicial. (*Andersen,* at p. 1249; *Salcido,* at p. 155.)

abettor must have the intent to kill. (*People v. Lee* (2003) 31 Cal.4th 613, 624 (*Lee*).) Second, under the natural and probable consequences doctrine, a " ' "person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime," ' " that is, that was reasonably foreseeable. (*Chiu,* at p. 161.) "Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117; *Chiu, supra,* 59 Cal.4th at p. 161.)

Under section 664, subdivision (a), a person guilty of attempted murder generally will be punished by a term of five, seven, or nine years. However, if the People plead and prove that the attempted murder was willful, deliberate, and premeditated, the punishment is life in prison. (*Lee*, *supra*, 31 Cal.4th at p. 616; *People v. Gallardo* (2017) 18 Cal.App.5th 51, 82 (*Gallardo*).)

In *Lee*, the defendant, who was tried for first degree murder as a *direct* aider and abettor, contended section 664 required that an attempted murderer must *personally* act with willfulness, deliberation, and premeditation, and that the trial court erred by failing to so instruct the jury. (*Lee, supra*, 31 Cal.4th at pp. 616, 618, 621–623.) *Lee* disagreed, concluding that based on the statutory language, "section 664(a) properly must be interpreted to require only that the murder attempted was willful, deliberate, and premeditated, but not to require that an attempted murderer personally acted [willfully and] with . . . , deliberation, and premeditation, even if he or she is guilty as an

aider and abettor." (*Id.* at pp. 615, 626–627.) Accordingly, "the trial court did not err by failing to instruct the jury to determine personal willfulness, deliberation, and premeditation in the case of an aider and abettor." (*Id.* at p. 628.)

People v. Favor (2012) 54 Cal.4th 868, came to the same conclusion when a defendant is tried under the natural and probable consequences theory, holding that "the jury need not be instructed that a premeditated attempt to murder must have been a natural and probable consequence of the target offense." (*Id.* at p. 872; *Chiu, supra,* 59 Cal.4th at p. 162.) *Favor* reasoned that section 664, subdivision (a), did not create a greater degree of attempted murder, but constituted a penalty provision that prescribes an increased punishment. (*Favor*, at pp. 876–877.)

Subsequently, *Chiu* held that "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles." (*Chiu*, *supra*, 59 Cal.4th at pp. 158–159.) *Chiu* concluded that "punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime" based on "the natural and probable consequences doctrine." (*Id.* at p. 166.) *Chui* explained, however, that "[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles." (*Ibid.*)

Given the foregoing, we discern no error in the instructions given or the trial court's response to the jury's question. The jury was properly instructed on the principles of aiding and abetting liability and attempted murder. (CALJIC Nos. 3.00, 3.01, 3.31, 8.66, 8.67.) The jury was also told the instructions were to be

considered as a whole. The court properly declined Ruiz's request to instruct that "each defendant acted willfully, deliberate[ly], and with premeditation" because such an instruction would have been contrary to the law as set forth in *Lee*. A court has no duty to give a legally incorrect instruction. (*People v. Kelly* (1992) 1 Cal.4th 495, 532; *People v. Zavala* (2005) 130 Cal.App.4th 758, 769.) Indeed, Alvarado acknowledges that under *Favor* and *Lee*, the trial court's instructions were correct.

However, appellants contend that *Lee* and *Favor* have been called into question by *Chiu* and by *Alleyne v. United States* (2013) 570 U.S. 99 [133 S.Ct. 2151].) In *Alleyne*, the United States Supreme Court held, based on *Apprendi v. New Jersey* (2000) 530 U.S. 466, that any fact that increases a mandatory minimum sentence qualifies as an element of the crime and must be submitted to the jury. (*Alleyne,* at p. 103 [133 S.Ct. at p. 2155].) Appellants argue that "after *Alleyne* and *Chiu*, a jury can never convict an aider and abettor of the nontarget offense of attempted *premeditated* murder under the natural and probable consequences doctrine, but instead may only convict the aider and abettor of attempted *second degree* murder under that doctrine. Alternatively, at a minimum, after *Alleyne,* a jury cannot convict an aider and abettor of the nontarget offense of attempted premeditated murder under the natural and probable consequences doctrine unless the jury is instructed it must first find the premeditated murder was a natural and probable consequence of the target offense."

Appellants' argument fails because the natural and probable consequences doctrine was not at issue here. Ruiz and Alvarado were convicted as direct aiders and abettors, not under the natural and probable consequences doctrine. The prosecution

did not pursue a natural and probable consequences theory. Defendants did not request that the jury be instructed on the natural and probable consequences doctrine. No instructions on the doctrine were given. Thus, the jury could not have found appellants guilty under that theory. Nor was there evidence supporting such a theory. On the facts of this case, there was no "nontarget" offense at issue. Nothing in the record suggested Alvarado and Ruiz intended to commit a crime other than Gabriela's murder. Based on the evidence presented, their liability was premised entirely on their assistance with a prearranged plan to kill Gabriela by shooting her. Where the natural and probable consequences doctrine is not at issue, the court has no duty to instruct upon it. (See *People v. Elder, supra,* 11 Cal.App.5th at p. 135 [trial court properly refuses an instruction that states a principle of law not applicable to the case]; *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1290 ["It is error to instruct a jury on a theory of guilt without evidentiary support"].) And, even assuming *Chiu*'s analysis applies to attempted murder, because appellants were not convicted on a natural and probable consequences theory, *Chiu*'s holding that an aider and abettor cannot be convicted of premeditated murder under that theory has no application. As explained, *Chiu* expressly stated that aiders and abettors may still be liable for first degree premeditated murder based on "direct aiding and abetting principles." (*Chiu, supra,* 59 Cal.4th at p. 166.)

To the extent appellants intend to argue *Alleyne* and *Chiu* call into question the holdings in *Favor* and *Lee* and require that the jury be instructed it must find direct aiders and abettors *personally* premeditated and deliberated an attempted murder, their argument is unavailing. As noted, under *Favor* and *Lee,* an

"aider and abettor need not share the heightened mental state of the direct perpetrator for the applicability of section 664(a)'s penalty provision." (*Favor, supra,* 54 Cal.4th at p. 879; *Lee, supra,* 31 Cal.4th at pp. 621–622.) This is so, *Favor* explained, because "section 664(a) 'requires only that the attempted murder itself was willful, deliberate, and premeditated' " and therefore it is sufficient that " 'one of the perpetrators' " had the " 'requisite state of mind.' " (*Favor,* at p. 879.) Our Supreme Court is currently considering the effect of *Alleyne* on *Favor* when the natural and probable consequences doctrine is at issue. (*People v. Mateo* (Feb. 10, 2016, B258333 [nonpub. opn.]), review granted May 11, 2016, S232674.)

But as our colleagues in Division Seven have explained: "*Alleyne* was decided approximately one year before *Chiu*. Although *Chiu* addressed *Lee* and *Favor* at length, it did not mention *Alleyne*, or provide any indication that *Alleyne* had undermined its prior holdings in those cases. We presume the Supreme Court was aware of *Alleyne* when it issued *Chiu*. [¶] Moreover, at least as applied in this case, we fail to see how section 664, subdivision (a)'s sentencing enhancement for attempted premeditated murder violates the rule of *Alleyne*. Under the statute, a defendant cannot be subjected to the enhanced penalty provision unless the jury finds two facts beyond a reasonable doubt: (1) the defendant committed an attempted murder; and (2) the defendant or his accomplice committed the attempted murder with premeditation. . . . Thus, an enhanced penalty cannot be imposed under section 664, subdivision (a) unless the jury makes a true finding on the question of premeditation." (*People v. Gallardo, supra,* 18 Cal.App.5th at pp. 85–86, fn. omitted.) We agree with *Gallardo*'s reasoning on

this point. In any event, *Favor* and *Lee* remain good law, and unless and until our Supreme Court overrules them, they preclude appellants' argument. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

5. *The firearm enhancements and Senate Bill No. 620*

The trial court imposed additional 25-years-to-life sentences on Ruiz and Alvarado pursuant to section 12022.53, subdivisions (d) and (e), based on the jury's true finding on the section 186.22, subdivision (b) gang enhancement, coupled with the findings that a principal discharged a firearm, causing great bodily injury. As to Chavac, the actual shooter, it imposed a 25-years-to-life sentence pursuant to section 12022.53, subdivision (d). Rather than staying the section 12022.53, subdivision (e) enhancements for Chavac, the court held them "in abeyance."

We requested supplemental briefing on two issues: (1) whether the matter should be remanded in light of Senate Bill No. 620; and (2) whether the trial court erred by holding the section 12022.53, subdivision (e) enhancements for Chavac in abeyance, rather than staying them. We have read and considered the supplemental briefing provided by the parties, and conclude the matter must be remanded to allow the trial court the opportunity to exercise its discretion to strike the firearm enhancements pursuant to amended section 12022.53.

a. *Remand is required in light of amended section 12022.53, subdivision (h)*

When appellants were sentenced in January 2016, imposition of a section 12022.53 enhancement was mandatory, and the trial court lacked discretion to strike it. (See former § 12022.53, subd. (c), Stats. 2010, ch. 711, § 5; *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363.) Effective January 1,

2018, the Legislature amended section 12022.53 to give trial courts authority to strike firearm enhancements in the interest of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2.) As amended, section 12022.53 provides in pertinent part: "(h) 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." Appellants contend the matter must be remanded to the trial court to allow the court to exercise its discretion to strike the firearm enhancements.

As the People correctly concede, the amendment to section 12022.53 applies to cases, such as appellants', that were not final when the amendment became operative. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091.) Under *In re Estrada* (1965) 63 Cal.2d 740, we assume that, absent contrary evidence, an amendment reducing punishment for a crime applies retroactively to all nonfinal judgments. (*Id.* at p. 745; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306.) The *Estrada* rule has been applied to penalty enhancements, as well as to amendments giving the court discretion to impose a lesser penalty. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792; *People v. Francis* (1969) 71 Cal.2d 66, 75–76.)

Although the People concede the amendments to section 12022.53 apply retroactively, they urge that remand is unnecessary because the record suggests the court would not have exercised its discretion to strike any appellant's firearm enhancement here. (See *People v. Gutierrez* (1996) 48

Cal.App.4th 1894, 1896.) We disagree. Generally, "when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion."[12] (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) Remand is required to allow the trial court to exercise its discretion, unless remand would be an idle act because the record shows the court would not have exercised its discretion even if it could have done so. (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901.)

Contrary to the People's argument, the record does not reflect that remand would be an idle act. At sentencing, the trial court observed that the sentences to be imposed were "fairly straightforward." We do not interpret this remark as an indication the trial court would inevitably have imposed the firearm enhancements, as the People appear to suggest. The court's remarks appear to reflect the fact that when sentence was imposed, the court had little discretion under the applicable statutes. Nothing in the record indicates whether it would have imposed the firearm enhancement had it possessed the discretion not to do so. (See *People v. Deloza* (1998) 18 Cal.4th 585, 599-600 [remand for resentencing appropriate where trial court did not

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[12] Here, of course, the trial court did not misunderstand the scope of its discretion; it did not have discretion to strike the firearm enhancement prior to Senate Bill No. 620's effective date.

understand it had discretion to impose concurrent rather than consecutive sentences].) Accordingly, the trial court must be given the opportunity to exercise the discretion conferred by Senate Bill No. 620. We express no opinion about how the court's discretion should be exercised.

b. *Chavac's sentence*

For the attempted premeditated murder, the trial court imposed on Chavac, the actual shooter, a sentence of life in prison. Based on the jury's true finding on the section 186.22, subdivision (b) street gang enhancement, it imposed a 15-year minimum parole eligibility period. (§ 186.22, subd. (b)(5).) For the section 12022.53, subdivision (d) firearm enhancement, it imposed a consecutive sentence of 25 years to life. (See §§ 12022.53, subds. (f), (e)(2); *People v. Brookfield* (2009) 47 Cal.4th 583, 590.) The court properly imposed and stayed the section 12022.53, subdivisions (b) and (c) enhancements. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1122–1123.)

The jury also found true the section 12022.53, subdivision (e)(1) armed principal enhancements, that is, a principal used and discharged a firearm during commission of the offense, proximately causing great bodily injury. (§ 12022.53, subds. (e)(1), (b), (c), & (d).) The trial court reasoned that it was precluded from imposing and staying the subdivision (e) enhancements, explaining: "[s]ince the court imposed the gang enhancement under Penal Code [s]ection 186.22, subdivision (b), paragraph (5), to increase the minimum term, the court is precluded from triggering the principal firearm enhancements under Penal Code [s]ection 12022.53(e). Thus, the trial court cannot impose the [subdivision (e)] enhancements because of the double use problem." The court indicated it did not wish to strike

the enhancements entirely because this would make it more difficult to impose and execute the term in the event resentencing might be required after appeal. (See *People v. Gonzalez, supra,* 43 Cal.4th at p. 1128.) Therefore the court held the "three gun enhancements pursuant to . . . [s]ection 12022.53, subdivision (e), in abeyance pending the completion of the California appellate process. Imposition of each of the principal firearm enhancements are to be stricken automatically upon completion of the California appellate process."

In supplemental briefing requested by this court, the People contend the sentence imposed on Chavac was unauthorized because section 12022.53, subdivisions (h) and (g), at the time of sentencing, prohibited suspending execution of sentence or striking a section 12022.53 enhancement. (§ 12022.53, subd. (g), former subd. (h).) Chavac avers that the trial court correctly reasoned it would be improper to impose and stay both the section 12022.53, subdivision (e) enhancement and the section 186.22 15-year parole eligibility minimum when both were based on the same fact, that is, that the crime was committed for the benefit of a criminal street gang.

As the law stood at the time of sentencing, the section 12022.53, subdivision (e) enhancements should have been imposed and stayed. Section 12022.53, subdivisions (b), (c), and (d), provide for escalating penalties when a defendant personally uses or discharges a firearm during commission of a crime. Although these enhancements ordinarily apply only when a defendant *personally* uses or discharges a firearm, subdivision (e) provides an exception to the personal use requirement when the jury finds a street gang enhancement true, and that a *principal* personally used or discharged a firearm. (See *People v.*

Brookfield, supra, 47 Cal.4th at p. 590; *People v. Gonzalez* (2010) 180 Cal.App.4th 1420, 1424–1425.) Section 12022.53, subdivision (f), provides that only one additional term of imprisonment under section 12022.53 may be imposed per person, per crime. If more than one section 12022.53 enhancement is found true, the court must impose only the enhancement that provides the longest term of imprisonment. (§ 12022.53, subd. (f).) In *Gonzalez,* our Supreme Court resolved an ambiguity in section 12022.53's language and held that "after a trial court imposes punishment for the section 12022.53 firearm enhancement with the longest term of imprisonment, the remaining section 12022.53 firearm enhancements . . . that were found true for the same crime must be imposed and then stayed." (*People v. Gonzalez, supra,* 43 Cal.4th at pp. 1122–1123.) At the time of sentencing, section 12022.53 precluded a court from striking a section 12022.53 enhancement. (§ 12022.53, former subd. (h).)

Here, the jury found six section 12022.53 firearm enhancements true as to Chavac: that he personally, and as a principal, used and discharged a firearm, causing great bodily injury. (§ 12022.53, subds. (b), (c), (d), (e)(1).) In declining to impose and stay the three enhancements arising under subdivision (e), the trial court was apparently concerned about impermissible "bootstrapping." (See *People v. Briceno (*2004) 34 Cal.4th 451, 465 [improper to use the same gang-related conduct to define a crime as a serious felony and to obtain additional five-year sentence under section 186.22]; *People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1445, 1449 [an offense may be elevated to a felony by section 186.22, subdivision (d), but defendant may not also be subject to the additional penalties of subdivision (b)(1)].)

But section 12022.53, subdivision (e) by its own terms allows the subdivision (e) enhancements to be imposed and stayed. Section 12022.53, subdivision (e)(2) provides: "An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed *pursuant to this subdivision*, *unless the person personally* used or personally discharged a firearm in the commission of the offense." (Italics added.) In other words, subdivision (e) provides for "double use" of the section 186.22 enhancement in the case of the actual shooter, allowing imposition of both the section 186.22 enhancement *and* an enhancement pursuant to section 12022.53, subdivision (e). (See *People v. Brookfield, supra,* 47 Cal.4th at p. 590 [defendant who personally uses or discharges a firearm in commission of a gang-related offense is subject to both the increased punishment provided for in section 186.22, and the increased punishment provided for in section 12022.53]; *People v. Sinclair* (2008) 166 Cal.App.4th 848, 854 [section 12022.53, subdivision (e)(2) permits trial court to impose and stay gang enhancement even where defendant did not personally use firearm].)

Additionally, in *People v. Jones* (2009) 47 Cal.4th 566, our Supreme Court concluded it was not improper to use the fact the crime was committed for the benefit of a street gang under section 186.22, subdivision (b) both to elevate the defendant's offense to a life crime, and to impose a 20-year, section 12022.53, subdivision (c) enhancement. (*Id.* at pp. 572–573.) *Jones* distinguished *Briceno* and *Arroyas* on the ground that in those cases, the provisions that resulted in the "bootstrapping" were all enacted in a single initiative, and all pertained to criminal street gangs. (*Id.* at pp. 574–575.) As in *Jones,* here the relevant

provisions (sections 186.22 and 12022.53) were enacted at different times and pertained to different circumstances, that is, firearm use and street gangs. (*Jones,* at pp. 574–575; see also *People v. Rocco* (2012) 209 Cal.App.4th 1571, 1578–1579.)

As discussed, in light of Senate Bill No. 620's amendment to section 12022.53, subdivision (h), a trial court now has discretion to strike or dismiss a section 12022.53 enhancement in the interest of justice. Therefore, on remand, the trial court has discretion to impose and stay the subdivision (e) enhancements, or strike or dismiss them.

DISPOSITION

The judgments of conviction are affirmed. The matter is remanded to allow the trial court to exercise its discretion to determine whether to strike or dismiss the section 12022.53 firearm enhancements pursuant to section 12022.53, subdivision (h). As to Chavac, if the section 12022.53, subdivision (e) enhancements are not stricken or dismissed, they must be imposed and stayed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.*

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