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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. SPENCER NYAKO, Defendant and Appellant.	B282785 (Los Angeles County Super. Ct. No. BA436141)

APPEAL from a judgment of the Superior Court of Los Angeles County, Shelly B. Torrealba, Judge. Affirmed as modified.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Colleen M. Tiedemann and Ilana Herscovitz Reid, Deputy Attorneys General, for Plaintiff and Respondent.

Spencer Nyako (defendant) went to trial on a single charge of willful, deliberate, and premeditated attempted murder. The jury found him not guilty of that charge but guilty of the lesser included offense of attempted voluntary manslaughter and the lesser related offense of assault with a semiautomatic firearm. The jury also found true associated sentencing allegations: that the crimes were gang-related, that defendant personally used a firearm, and that he inflicted great bodily injury on victim Eugene Cooley (Cooley). We consider whether substantial evidence supports the jury's finding that the crimes were not committed in perfect self-defense and the jury's true finding on the gang allegation. We also decide several sentencing-related issues, including whether defendant's sentence could be enhanced for all three of the sentencing allegations the jury found true.

I. BACKGROUND

A. Evidence at Trial

1. The prosecution's case

In the evening on April 1, 2015, Cooley stopped to get gas for his motor bike at a gas station near the intersection of La Brea Avenue and Adams Boulevard in Los Angeles. Cooley was a member of the West Boulevard Crips criminal street gang, and the gas station was located in territory claimed by the gang.

While Cooley was pumping gas, four men approached Cooley. One of the men asked Cooley where he was from (a common gang challenge or "words of war," according to an expert

who testified at trial), and Cooley responded "I'm from West Boulevard Crip."[1]

Surveillance video cameras at the gas station captured the confrontation at the gas pump (the footage was played for the jury at trial). As depicted in the video footage, when one of the men gets close to Cooley, another man wearing a white t-shirt (later identified as defendant) also moves closer while holding a handgun down by his own midsection. At that point, Cooley turns away from the men and starts to run. After taking several steps, however, Cooley pauses and turns back toward the men, and Cooley's hands appear near his waistband. Defendant raises his handgun and points it at Cooley, and Cooley again turns away and runs off. Defendant and the other men then quickly make their way back to two cars and drive off in the opposite direction.

Cooley was shown the video footage during his testimony at trial. He testified he first started to run away out of fear because he was outnumbered, but he turned around because his motor bike was still there and he thought "whatever's going to happen is going to happen." He saw one of the men (defendant) with a gun when he turned around, and that "caused [him] to act like [he] had one [i.e., a gun]" by making a motion toward his waist or his pocket. Cooley was not armed, but he knew one of the four men had a gun and he hoped his motion might scare them—it was "basically a bluff."

"[A] little bit after" Cooley reached for his waist or his pocket, he felt burning pain in his upper chest and tasted blood.

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[1] Cooley had been a member of the gang for "twenty plus" years and had sustained at least three prior felony convictions, one of which involved use of a firearm.

He figured he had been shot, and he continued running to a nearby liquor store to seek help. When he arrived, he lay down on the floor, told the owner (who he knew from prior interactions at the store) that he had been shot, and asked the owner to call his cousin. Paramedics arrived soon thereafter and transported Cooley to the hospital, where he underwent surgery and stayed to recuperate for over ten days.

Police detectives questioned Cooley during his hospital stay and commenced an investigation into the shooting. Investigators recovered a .45 caliber bullet casing at the gas station and obtained a copy of the surveillance video footage. In reviewing the footage, detective Felipe Rodriguez recognized three of the four men "right off the bat" from prior encounters: defendant, Ryon James and Quanshawn Hart (Hart).[2] From their own admissions to the detective, he knew them all to be members of the Black P Stones criminal street gang, a "blood" gang and a rival of the West Boulevard Crips.

The prosecution's gang expert at trial, detective Kenneth Sanchez, testified the gas station where Cooley was shot was within the borders of territory claimed by the West Boulevard Crips; the neighboring territory to the east was claimed by the Black P Stones gang. Confronted with a hypothetical question from the prosecution that tracked the evidence presented at trial, detective Sanchez opined the hypothetical shooter committed the

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[2] The fourth man was later identified as Derrick Henderson (Henderson). Detective Rodriguez was not familiar with Henderson when he initially reviewed the surveillance videos. In the course of the investigation, detective Rodriguez became familiar with Henderson through monitored jail calls. Henderson was a member of the Black P Stones criminal street gang.

crime for the benefit of, and in association with, the Black P Stones gang. With regard to benefit, detective Sanchez explained four Black P Stones gang members who travel "way into West Boulevard Crip territory" are "looking to set up a confrontation" and know that if they "find someone [they] better handle [their] business." The shooting itself would benefit the Black P Stones gang by "instilling that fear within West Boulevard Crip" and among the larger community because "[i]n the gang world events like this spread like wild fire . . . ."[3] As for association, detective Sanchez testified the four men would increase their notoriety and demonstrate their association with the gang by "being there" for the confrontation and shooting.

On cross-examination, the defense asked detective Sanchez whether his answer to the prosecution's hypothetical question would change if he further assumed that the Black P Stones gang member who shot the West Boulevard Crip believed the crip was reaching for a gun. Detective Sanchez testified that the additional fact would not change his opinion that the shooting was done for the benefit of, or in association with, the gang because it was the Black P Stones gang members who went into the territory of "one of their biggest rivals," the West Boulevard Crips.

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[3] Detective Sanchez explained criminal street gangs find it important to instill fear in the community because "[t]he more fear you have, the more respect [you have]." By instilling fear in others, it makes them more likely to "turn the other . . . way when you're out committing a crime" and reluctant to testify in court.

2. The defense case

Defendant put on a substantial defense case at trial. He called fellow Black P Stones gang member Hart as a witness, and defendant also testified himself.

Hart testified he went with defendant to the gas station at Adams and La Brea to purchase marijuana. He knew the gas station was in rival West Boulevard Crip territory, but he decided to go anyway despite being worried about meeting his marijuana contact there. Hart saw Cooley at the gas station and Hart was the first to speak, asking Cooley, "What you looking at?" because Hart believed Cooley was staring at him. According to Hart, Cooley responded, "What you doing over here? Why you in my hood?" Hart replied he could go anywhere he wanted because it was "a free country" and Hart told the other men with him that Cooley was "talking stuff."

Hart then "walked towards [Cooley] like to fight him." Hart testified Cooley started running and then turned around and "like went in his waistband like he had a gun." According to Hart, once Cooley did that, Hart turned around and ran because he "was scared for [his] life." After that, Hart heard one gunshot and then got in a car and drove away. Hart testified he did not remember defendant (or anyone else) having a gun that night.

During defendant's testimony, he admitted he was at the gas station on the evening in question with a few of his fellow Black P Stones gang members. Like Hart, defendant claimed they went to the gas station in West Boulevard Crip territory to purchase marijuana.

Defendant testified he heard Hart and Cooley having an "altercation" at the gas station and he (defendant) decided to walk over to see what was going on. On direct examination,

defendant said he observed Cooley start to run away before he turned and "went to his waistband"; this caused defendant to be afraid Cooley was going for a gun, and defendant testified he "removed [his gun] from [his] pocket and then that's what I seen him reaching for his gun, so that's when I shot him one time."[4] Defendant testified he fired only one shot, rather than three or four, because he "shot out of fear" rather than because Cooley was a rival gang member.

On cross-examination, the prosecution asked defendant if he regularly carried a handgun, and when defendant denied he did, the prosecution asked why defendant was armed on the night in question. Defendant answered, "Just that day I was feeling kinda like I needed one that day." The prosecution also confronted defendant with still photographs from the gas station video footage to focus on defendant's direct examination testimony about when he pulled out his handgun. After viewing the photographs, defendant conceded he had his gun out as he walked over to the gas pump where Cooley was standing, i.e., he had drawn his gun before Cooley turned back toward the four men and made a motion toward his waistband. Defendant admitted he pulled the trigger on the gun he was holding, but he told the jury he thought the gun's safety mechanism was engaged and he claimed he "would never in [my] mind think about using a handgun to hurt anybody and that's what happened.

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[4] Defendant's attorney sought to clarify the sequence of events and asked defendant if he removed his gun from his pocket after he saw Cooley reach for his waistband or before. Defendant testified (on direct examination): "When he reached that's when I grabbed my gun and then that's when I fired one shot."

B. Jury Instructions, Argument, Verdict, and Sentencing

The parties and the court conferred regarding jury instructions. At defendant's request, the court agreed to give instructions on the lesser crimes of attempted voluntary manslaughter by virtue of imperfect self-defense and assault with a semiautomatic firearm.

The prosecution, in closing argument, urged the jury to convict defendant of premeditated attempted murder. The prosecution argued defendant did not act in self-defense because he had pulled his gun and was "ready to kill" even before Cooley first began to run away. The prosecution further argued that even if defendant honestly believed in the need to shoot in self-defense, the belief was unreasonable under the circumstances and defendant would still be guilty of attempted voluntary manslaughter and the lesser related crime of assault with a semiautomatic firearm.[5]

The defense, of course, argued the contrary, contending defendant reasonably believed he was in imminent danger of being killed when Cooley turned and moved his hands toward his waistband or pocket. The defense emphasized defendant fired

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[5] The prosecutor stated: "You may disagree with me and say that his intent to kill wasn't there but he believed he was in danger but his belief was unreasonable, so it's attempted voluntary manslaughter. [¶] And I can live with that, ladies and gentlemen. But this is not a self-defense acquittal. . . . [Defendant] had no right to start a quarrel with a victim he never knew. He had no right to pull up that gun and fire it once into the chest of . . . Cooley simply because he made some life-saving, quick-turn motion into his waist.

only one shot and highlighted Cooley's testimony that he was trying to bluff the other men into thinking he was armed.

The jury found defendant not guilty of attempted murder but guilty of the two lesser offenses on which defendant requested jury instructions: attempted voluntary manslaughter (Pen. Code, §§ 664, 192, subd. (a)[6]) and assault with a semiautomatic handgun (§ 245, subd. (b)). As to both of the lesser crime convictions, the jury returned true findings that defendant personally used a firearm (§ 12022.5, subd. (a)); personally inflicted great bodily injury upon Cooley (§ 12022.7, subd. (a)); and committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). At a later bifurcated bench trial, the court found two prior prison term allegations true (§ 667.5, subd. (b)).

The trial court sentenced defendant to 34 years in prison, which as the court stated, was "[t]he maximum period of confinement that [defendant] can be sentenced on this matter . . . ." The sentence was calculated as follows: the high term of nine years for the assault with a semiautomatic firearm conviction, plus ten years for the personal use of a firearm enhancement, plus ten years for the gang enhancement, plus three years for the great bodily injury enhancement, plus two years for the prior prison term allegations. The court imposed and stayed (pursuant to section 654) a one-third-the-mid-term sentence for the attempted voluntary manslaughter conviction. Defendant was ordered to pay restitution, a $30 court facilities assessment, and a $40 court operations assessment.

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[6] Undesignated statutory references that follow are to the Penal Code.

II. DISCUSSION

Defendant raises sufficiency of the evidence challenges to his convictions and the associated gang enhancement. We reject both. The challenge to his convictions is premised on the argument the prosecution introduced no substantial evidence to permit the jury to conclude the shooting was an *unreasonable* act of self-defense. There was evidence, however, that Cooley was some distance away from defendant, outnumbered, and outgunned (defendant had already drawn his weapon and had it ready before Cooley made the feint toward his waist or pocket in the midst of fleeing). Under the circumstances, a rational jury could find it was unreasonable for defendant to use deadly force, at least without actually seeing Cooley with a weapon, which defendant never did. Defendant's separate challenge to the gang enhancement is likewise unpersuasive because the evidence allowed the jury to infer the shooting was done to benefit the Black P Stones gang and any inconsistency between that finding and the jury's lesser crime verdicts does not warrant reversal.

Defendant also raises several sentencing contentions, only one of which has some merit. He asserts the trial court erred by enhancing his sentence based on both the gang allegation and the firearm use allegation, but the law does not prohibit such dual use. The law does, however, permit that dual use when a great bodily injury enhancement is added to the sentence imposed, and we shall accordingly modify the judgment to stay the three-year term imposed as a result of the great bodily injury enhancement.[7] Defendant additionally contends the trial court improperly

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[7] We will also modify the judgment, as the Attorney General argues we should, to correct the amount of certain court assessments the trial court imposed.

justified imposing an upper-term sentence, but we hold the court's sentence was adequately supported by a valid factor in aggravation, and only one such factor is necessary. Last, defendant seeks a remand to permit the trial court an opportunity to exercise its newly conferred discretion to strike the firearm enhancement imposed, but we believe such a remand would be pointless because the trial court repeatedly stated on the record that it was committed to imposing the maximum permissible sentence.

A. Substantial Evidence Supports Defendant's Convictions and the Gang Enhancement True Finding

1. Standard of review

When considering a challenge to the sufficiency of the evidence to support a conviction or a sentencing enhancement, ""'we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.]'" (*People v. Williams* (2015) 61 Cal.4th 1244, 1281; accord, *People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).)

2. Defendant's convictions

"If a person kills or attempts to kill in the unreasonable but good faith belief in having to act in self-defense, the belief negates what would otherwise be malice, and that person is guilty of voluntary manslaughter or attempted voluntary manslaughter, not murder or attempted murder." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116.) In other words, if a person actually, subjectively believes in the need to defend but that belief is unreasonable, an attempted killing by that person is committed in "imperfect" self-defense and he or she can be convicted of, at most, attempted voluntary manslaughter; to constitute "perfect" self-defense that would exonerate the person completely, the belief in the need to defend must be objectively reasonable. (See *People v. Simon* (2016) 1 Cal.5th 98, 132; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 (*Humphrey*); see also CALCRIM No. 571.)

Imperfect self-defense principles apply, however, only in case of a killing or an attempted killing. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064, 1069 ["[T]his case involves an assault, not a homicide, and thus no question of *imperfect* self-defense is presented"].) For non-homicide crimes, only perfect self-defense (requiring both an actual *and* reasonable belief in the need to defend from an imminent threat) is available as a defense. (*Id.* at p. 1064 [""To justify an act of self-defense for [an assault charge under . . . section 245], the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him""]; see also CALCRIM No. 3470.)

When considering whether the prosecution has proven a defendant did not act in perfect self-defense, which requires an objectively reasonable belief in the need to defend, "a jury must

consider what 'would appear to be necessary to a reasonable person in a similar situation and with similar knowledge . . . .' [Citation.] It judges reasonableness 'from the point of view of a reasonable person in the position of defendant . . . .' [Citation.] To do this, it must consider all the ""facts and circumstances . . . in determining whether the defendant acted in a manner in which *a reasonable man* would act in protecting his own life or bodily safety."" [Citation.]" (*Humphrey*, *supra*, 13 Cal.4th at pp. 1082-1083.)

"[A]ny right of self-defense is limited to the use of such force as is reasonable under the circumstances. [Citation.] The right of self-defense [does] not provide [a] defendant with any justification or excuse for using deadly force to repel a nonlethal attack." (*People v. Pinholster* (1992) 1 Cal.4th 865, 966, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405.)

During defendant's trial, substantial evidence was presented that would entitle the jury to conclude he shot Cooley under circumstances evincing an unreasonable, albeit subjectively held, belief in the need to use deadly force. By Hart's own admission, defendant and his confederates initiated the confrontation with Cooley when Hart asked Cooley what he was looking at. Cooley testified one of the men in defendant's group also leveled the "where you from" gang challenge. At that point, Hart was moving toward Cooley intending (in Hart's words) to fight him. Defendant and the others with him followed, and defendant drew his semiautomatic firearm. Cooley's response was to turn and run, but he briefly stopped and turned, moving his hands toward his pocket or his waistband. At this critical juncture, the facts that were known by defendant were these:

Cooley was alone and possibly a rival gang member; defendant was accompanied by three of his fellow gang members; defendant's handgun was already drawn and held at the ready; Cooley's response once defendant and the others neared was to run away; but Cooley paused and might be going for a weapon, although no weapon could be seen.

In our judgment, a rational jury could conclude beyond a reasonable doubt that defendant subjectively believed he needed to use deadly force but a reasonable person in defendant's position would not have believed there was an imminent threat justifying such force. In particular, even assuming the jury found defendant a credible witness,[8] the jury could find defendant had an overwhelming tactical advantage over Cooley, both in terms of numbers and in terms of being ready to initiate a deadly confrontation (gun already drawn and standing stationary, as opposed to possibly trying to draw a weapon while turning and running). The testimony at trial also established Cooley had done little if anything to exhibit any aggression at the time he paused and turned around while trying to run away (at most, he had earlier stared at defendant's group and asked what they

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[8] There is good reason to think the jury thought otherwise, at least with regard to certain aspects of defendant's testimony. As we have already described, defendant claimed on direct examination that he did not draw his weapon until he saw Cooley turn around, but when confronted with the video evidence, defendant was forced to concede he drew his weapon well before that moment. Defendant's testimony also appeared implausible in other respects: he testified he brought a loaded firearm with him on the day in question just because he "was feeling kinda like I needed one that day" and he claimed he "would never in [my] mind think about using a handgun to hurt anybody and that's what happened."

were doing in his hood when Hart asked what he was looking at).[9] Under these circumstances, the jury could properly determine that defendant's decision to shoot was unreasonably premature.[10] And that determination justifies the jury's guilty verdicts on both the lesser crimes notwithstanding the defense of self-defense.

3. The gang enhancement

Section 186.22 provides for a ten-year sentencing enhancement for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association

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[9] Defendant emphasizes in his briefing on appeal that Cooley sustained prior felony convictions and admitted to using a gun in at least one of these prior crimes. He cites these facts to buttress his argument that defendant honestly *and* reasonably shot Cooley in self-defense. The problem, however, is there is no evidence defendant was aware of these facts when he shot Cooley. Hart testified at trial that he did not know who Cooley was and defendant testified he just heard Hart and Cooley (who he referred to as "the victim") "going back and forth" and did not hear Cooley say "where you from" or claim he was a West Boulevard Crip.

[10] On our view of the record, the prosecution had a strong case that a defense of self-defense, both perfect *and* imperfect, should have been foreclosed because defendant and his fellow gang members were responsible for provoking the confrontation with Cooley. (*People v. Enraca* (2012) 53 Cal.4th 735, 761-762; CALCRIM No. 3472.) It is possible the jury returned guilty verdicts on only the lesser crimes in an exercise of lenity, particularly given the prosecutor's statement in closing argument that he could "live with" an attempted voluntary manslaughter imperfect self-defense verdict. (See generally *People v. Abilez* (2007) 41 Cal.4th 472, 512-513 (*Abilez*).)

with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) Defendant's jury found this sentencing enhancement allegation true, and defendant argues the finding is unsupported by sufficient evidence, primarily because evidence of the first statutory element (a felony committed for the benefit of, at the direction of, or in association with a gang) was assertedly lacking.[11]

The core of defendant's argument is his belief that the only evidentiary support for the section 186.22 gang enhancement was detective Sanchez's generalized expert testimony. He states: "No evidence was presented that [defendant] or his friends presented signs of gang membership, wore gang-related clothing, or announced their presence before or after the offenses. No evidence was presented of gang members bragging about their involvement in the crimes or creating graffiti to take credit for them. . . . Further, no evidence was presented that any witness told anyone in the community about the incident."

Some of what defendant says is correct. There was no evidence defendant and his confederates wore gang colors, displayed gang hand signs, bragged about the shooting after the

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[11] Defendant also claims, in passing, that the evidence in support of section 186.22's specific intent element was speculative. In light of the facts concerning the involvement of other Black P Stones gang members in Cooley's shooting, the claim is meritless. (*Albillar*, *supra*, 51 Cal.4th at p. 68 ["if 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"].)

fact, or graffitied walls to refer to the crime. But defendant's view of the evidence is flawed because his gaze is too narrow. Defendant ignores circumstances of the shooting, including Cooley's interaction with defendant's group of Black P Stones gang members that would, as the gang expert testified, benefit the Black P Stones gang by instilling fear in members of the community and thereby make it easier for the gang to commit crimes knowing potential witnesses would be less likely to cooperate with law enforcement.

It was undisputed at trial that defendant and the three other men with him were all members of the Black P Stones gang and were "way into" rival West Boulevard Crip gang territory when they stopped at the gas station and encountered Cooley. The surveillance video footage at the gas station demonstrated others were present at the time of the shooting besides Cooley and defendant's four-man group. For reasons we will summarize, there was no question that those present at the scene of the shooting would understand it was gang-related, and those who heard or saw the shooting would naturally infer the Black P Stones gang was responsible.

One of the men in defendant's group started the confrontation by asking Cooley what he was looking at. The dialog that ensued left little if any doubt that defendant and the three men with him were gang members—and, importantly, rivals of the West Boulevard Crips. According to Black P Stones gang member Hart, Cooley asked him what he was doing "over here" and "in my hood." As gang expert Sanchez testified at trial, part of the Black P Stones gang's claimed territory was immediately adjacent to the territory claimed by the West Boulevard Crips. One of the men with defendant also asked

Cooley where he was from, a common gang challenge, and Cooley said he was from "West Boulevard Crip," which is what, according to Cooley, drew defendant and the others over to him and ultimately led to the shooting.

While defendant and the other Black P Stones gang members did not yell their gang's name or flash gang signs, they really did not need to under the circumstances. Those present when the crime occurred, including Cooley, would know the shooting was committed by a rival gang, and would naturally infer the members of "one of their biggest rivals"—the nearby Black P Stones gang that had been feuding with the West Boulevard Crips since the 1970s—were the likely culprits. Further, as gang expert Sanchez properly explained (*People v. Vang* (2011) 52 Cal.4th 1038, 1048), news of the shooting would spread through the gang community "like wild fire," benefitting the Black P Stones by "enhancing [the gang's] reputation for viciousness" (*Albillar*, *supra*, 51 Cal.4th at p. 63) and dissuading members of the community from talking to law enforcement about the Black P Stones gang.[12]

Although we therefore conclude substantial evidence supports the jury's true finding on the gang allegation, it is

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[12] Because we conclude there was substantial evidence to support a determination the shooting was committed for the benefit of the Black P Stones gang, we do not address the evidence that would bear on whether the shooting was also committed in association with the gang. (*Albillar*, *supra*, 51 Cal.4th at pp. 60, 62 [crimes committed in association with a criminal street gang when the defendants "came together *as gang members* to attack [the victim]" and "relied on their common gang membership and the apparatus of the gang" to commit the crimes].)

undeniable that the finding is at least in tension with the jury's verdict on the attempted murder charge. Put more concretely, if the jury believed defendant shot at Cooley in an honestly held but unreasonable belief in the need to use deadly force in self-defense, it is puzzling that the jury would simultaneously conclude defendant shot Cooley "for the benefit of" his (defendant's) gang.

Our Supreme Court has held, however, that this sort of puzzlement resulting from tension between jury findings does not warrant reversal. (*Abilez*, *supra*, 41 Cal.4th at pp. 512-513 [inherently inconsistent verdicts, including among enhancement findings and guilt determinations on a substantive offense, are allowed to stand].) This is because "'[a]n inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict.'" (*Id.* at p. 513.) Because we have found substantial evidence to support both defendant's convictions and the gang enhancement true finding, both must be affirmed.

B. Imposing All Three Sentencing Enhancements Was Improper; the Great Bodily Injury Enhancement Must Be Stayed

At sentencing, the trial court imposed prison time for three enhancements: ten years for personal use of a firearm under section 12022.5, ten years for crimes that were gang-related under section 186.22, and three years for infliction of great bodily injury under section 12022.7. The gang-related finding called for a ten-year enhancement under section 186.22, subdivision (b)(1)(C), as opposed to a lesser enhancement of anywhere from two to five years, because the assault with a semiautomatic

firearm conviction qualified as a violent felony within the meaning of section 667.5.

Defendant's assault with a semiautomatic firearm conviction qualified as a violent felony under section 667.5 for two independently sufficient reasons. First, section 667.5 deems any felony in which a defendant uses a firearm as specified in section 12022.5 to be a violent felony. (§ 667.5, subd. (c)(8).) Second, the same subdivision of section 667.5 also deems any felony in which a defendant inflicts great bodily injury on a person (other than an accomplice) within the meaning of section 12022.7 to be a violent felony.

Section 1170.1, subdivision (f) limits the circumstances under which a court may impose multiple firearm enhancements. It states that "[w]hen two or more enhancements may be imposed for being armed with or using . . . a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed . . . ." Defendant relies on this subdivision to argue the trial court made improper dual-use of the jury's personal use of a firearm finding by imposing both the ten-year firearm use enhancement under section 12022.5 and the ten-year gang enhancement, which applied, as defendant argues it, because the personal firearm use finding made the associated assault crime a violent felony.

Defendant's logic is faulty, and the proper result here is instead dictated by this court's prior decision in *People v. Vega* (2013) 214 Cal.App.4th 1387 (*Vega*). In that case, we confronted an argument identical to the argument defendant makes here: a claim that a defendant convicted of attempted voluntary manslaughter and shooting at an occupied vehicle—with gang, personal firearm use, and great bodily injury allegations all found

true—could be sentenced to an additional ten-year term for the gang allegation or the firearm use allegation, but not both. (*Id.* at pp. 1390, 1393.) We rejected the argument because the felony associated with the gang enhancement was a violent felony because *both* the firearm use and great bodily injury allegations were found true. In other words, the limitation of section 1170.1, subdivision (f) was inapplicable because the attempted voluntary manslaughter conviction would be a violent felony (by virtue of the great bodily injury finding) even if the jury had made no personal use of a firearm finding.[13] (*Id.* at p. 1395.)

Here, as in *Vega*, defendant's assault conviction is a violent felony even absent the firearm use finding because of the sustained great bodily injury finding. The trial court therefore did not err in imposing both the ten-year gang enhancement and the ten-year firearm use enhancement. But, as was the case in *Vega*, the trial court did err in imposing but not staying the three-year prison term for the great bodily injury finding. (*Vega*, *supra*, 214 Cal.App.4th at p. 1395 ["As discussed above, count 1, attempted voluntary manslaughter, was a violent felony because the jury sustained the section 12022.7, subdivision (a) great

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[13] *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*), cited by defendant, is inapposite. In *Rodriguez*, the jury found a personal firearm allegation and a gang allegation true, but there was no true finding on a great bodily injury allegation (or some other finding or conviction that independently triggered the violent felony definition in section 667.5). (*Id.* at pp. 508-509.) As *Vega* explains, and as distinguished from this case, "the only reason [the underlying crime in *Rodriguez*] was a violent felony and, hence, subject to the 10-year gang enhancement, was because the firearm use finding was sustained." (*Vega*, *supra*, 214 Cal.App.4th at p. 1395.)

bodily injury allegation. (§ 667.5, subd. (c)(8).) Based on that finding, the trial court properly imposed a 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). The trial court could not, however, also impose and leave unstayed the three-year great bodily injury enhancement under section 12022.7, subdivision (a)"]; see also § 1170.1, subd. (g).) We shall therefore modify the judgment to reflect the three-year great bodily injury enhancement is imposed and stayed.

C. The Trial Court Adequately Justified Its Selection of an Upper Term Sentence

During defendant's sentencing hearing, the trial court explained its reasons for imposing upper-term sentences for defendant's assault with a semiautomatic firearm conviction and the associated personal use of a firearm allegation. The court found the assault crime, which it viewed (notwithstanding the jury's not guilty finding on the greater crime) as arising from a plan by defendant and his cohorts to go into rival gang territory with a gun, involved a level of planning and sophistication that was of "grave concern." The court stated it believed the crime "involved great violence," and was a "a callous, a cruel act[,] shooting the unarmed Mr. Cooley in a gas station where he was just there minding his own business" without any attempt to render aid to Cooley after what happened. The court also relied on defendant's poor prior performance on probation after his 2010 grand theft auto conviction, which involved a return to prison for possessing a firearm, as well as his conviction for felony evading a law enforcement officer while on parole. And the trial court cited defendant's criminal history as further reason to impose the upper term, which it explained as follows: "[T]he court relies on

California Rule of Court 4.421(b)(3),[14] the defendant's criminal history is continuous and numerous and increasing in seriousness beginning in 2010 and culminating in the 2010 [*sic*] conviction."[15]

Defendant argues the trial court's explanation of the reasons for its upper-term sentence made improper dual use of defendant's prior prison terms, which otherwise added two years to his sentence under section 667.5, subdivision (b). In our view, the only colorable indication the trial court may have in fact made such dual use is the court's citation to California Rules of Court, rule 4.421(b)(3), which refers to the service of a prior term in prison. But, in context, we believe the court simply misspoke in its citation, referring to rule 4.421(b)(3) when it meant to refer to rule 4.421(b)(2).

This is the sort of issue that could have been easily clarified with an appropriate contemporaneous objection. No such objection was made, however, and the issue is therefore forfeited.

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[14] The rule the court cited, California Rules of Court, rule 4.421(b)(3), states that a circumstance in aggravation is the defendant's service of "a prior term in prison or county jail under section 1170(h)." The immediately prior subdivision, California Rules of Court, rule 4.421(b)(2), states the following is a circumstance in aggravation: "The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness."

[15] According to the record, defendant's adult criminal history includes a 2010 conviction for grand theft (for which he received a probationary sentence), a subsequent 2010 conviction for possession of a firearm by a felon (while on probation in the grand theft case), and a 2012 conviction for felony evading a peace officer (resulting in a two-year prison sentence).

(*People v. Scott* (1994) 9 Cal.4th 331, 353.) Even if the issue had been preserved, it is settled that "[o]nly a single aggravating factor is required to impose the upper term" (*People v. Osband* (1996) 13 Cal.4th 622, 728-729), and here, the trial court's use of defendant's prior performance on probation and parole as a factor in aggravation was on firm footing. (Cal. Rules of Court, rule 4.421(b)(5).) Reversal is unwarranted. (*People v. Price* (1991) 1 Cal.4th 324, 492.)

D. Remand to Allow the Trial Court to Exercise Discretion to Strike the Firearm Enhancement Would Be Pointless on This Record

At the time defendant was sentenced, imposition of a prison term for the personal use of a firearm enhancement under section 12022.5 was mandatory. Section 12022.5 has since been amended pursuant to Senate Bill No. 620 (2017-2018 Reg. Sess.), effective January 1, 2018, to allow a trial court to exercise its discretion to strike or dismiss a section 12022.5 enhancement in the interest of justice. (§ 12022.5, subd. (c).)

The Attorney General concedes, as the Courts of Appeal have held, that section 12022.5, subdivision (c) applies retroactively. (See, e.g., *People v. McVey* (2018) 24 Cal.App.5th 405, 418-419 (*McVey*).) However, the Attorney General argues a remand is unnecessary in this case because the record indicates the trial court "would not . . . have exercised its discretion to lessen the sentence." (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) The Attorney General has the right view of the record.

The trial court cited several factors in aggravation when imposing sentence and specifically chose the highest possible

term to impose for the personal firearm use enhancement itself. The trial court also registered its disagreement with, or at least its dubiousness regarding, the jury's decision to convict only on lesser crimes rather than the charged attempted murder offense. The trial court additionally stated, twice, that it believed the maximum possible sentence was appropriate for the crimes of conviction. On this record, the Court of Appeal's holding in *McVey*—declining to remand to allow the court to exercise section 12022.5, subdivision (c) discretion—is equally apt here: "In light of the trial court's express consideration of the factors in aggravation and mitigation, its pointed comments on the record, and its deliberate choice of the highest possible term for the firearm enhancement, there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether." (*McVey*, *supra*, 24 Cal.App.5th at p. 419.)

E. The Court Assessments Imposed Require Correction

The Attorney General asserts that because defendant suffered two convictions—one for the lesser included offense of attempted voluntary manslaughter and the other for the lesser related offense of assault with a semiautomatic firearm—the trial court should have imposed two (not one) $40 court operations assessments (§ 1465.8, subd. (a)(1)) and two (not one) $30 court facilities assessments (Gov. Code, § 70373). The Attorney General is correct, and because the error results in an unauthorized sentence (*People v. Hong* (1998) 64 Cal.App.4th 1071, 1084), we will modify the judgment accordingly.

It bears mentioning, at the outset, that the jury could properly find defendant guilty of two lesser offenses

notwithstanding the prosecution's decision to charge him with only a single count of attempted murder. (*People v. Eid* (2014) 59 Cal.4th 650, 657 ["The purposes underlying the rule requiring instruction on lesser included offenses are served by allowing the jury to convict on more than one lesser offense if, in the jury's determination, such convictions more accurately reflect the defendant's culpability in light of the evidence"].) Having properly convicted defendant of two offenses, the question of the requisite assessments becomes straightforward.

The court operations and court facilities assessments must be imposed for each conviction a defendant sustains. (§ 1465.8, subd. (a)(1) ["To assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense . . ."]; Gov. Code, § 70373, subd. (a)(1) ["To ensure and maintain adequate funding for court facilities, a [$30] assessment shall be imposed on every conviction for a criminal offense . . ."].) Defendant sustained two convictions, and both assessments should have been imposed for each. (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1372 ["The trial court should have imposed one $20 court security fee for *each* of defendant's four convictions, for a total of $80"].)

DISPOSITION

The judgment is modified to impose and stay the three-year enhancement for infliction of great bodily injury under section 12022.7, subdivision (a), and to impose a $40 court operations assessment and a $30 court facilities assessment in connection with defendant's attempted voluntary manslaughter conviction, resulting in total assessments of $80 pursuant to section 1465.8, subdivision (a)(1) and $60 pursuant to Government Code section 70373, subdivision (a)(1). As so modified, and in all other respects, the judgment is affirmed. The clerk of the superior court shall prepare an amended abstract of judgment that incorporates these modifications and makes reference to the trial court's imposition and section 654 stay of a one-third-the-mid-term sentence for attempted voluntary manslaughter in violation of sections 664 and 192, subdivision (a). The clerk shall deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

MOOR, J. JASKOL, J.*

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