Filed 2/24/17 P. v. Parra CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. PETER PARRA et al., Defendants and Appellants.	B263792 (Los Angeles County Super. Ct. No. GA094259)

APPEAL from a judgment of the Superior Court of Los Angeles County, Drew E. Edwards, Judge. Affirmed as Modified.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant Peter Parra.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant Kevin Cabrera.

Paul Couenhoven, under appointment by the Court of Appeal, for Defendant and Appellant Raymond Conchas.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Stacy S. Schwartz and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

On the afternoon of January 15, 2013, as the result of a marijuana deal gone bad, Zane Goldstein was shot once in the head by a shotgun blast while in his jeep SUV on Maple Street near Chester in Pasadena. He died in the hospital two days later. Defendants Peter Parra, Kevin Cabrera, and Raymond Conchas, all members of the North Side Pasadena (NSP) gang, were charged in the case. In a joint trial, a jury convicted them of first degree murder of (Pen. Code, § 187, subd. (a); count 1)[1] and found true the alleged attempted-robbery-murder special circumstance (§ 190.2, subd. (a)(17)). The jury also convicted defendants of attempted second degree robbery (§§ 664/211; count 2), and conspiracy to commit robbery (§ 182, subd. (a)(1)). As to all counts, the jury found that a principal discharged a firearm (a shotgun) causing death (§ 12022.53, subds. (d) and (e)(1)), and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

The court imposed the following sentences on each defendant: count 1, the special circumstance murder (§§ 187, subd. (a), 190.2, subd. (a)(17)), life without the possibility of parole; count 2, attempted robbery (§§ 664/211), the mid-term of two years; and count 3, conspiracy to commit robbery (§ 182, subd. (a)(1)), life without the possibility of parole. As to each count and each defendant, the court imposed a consecutive term of 25 years to life for the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1), and imposed a minimum parole eligibility date of 15 years under section 186.22, subdivision

---

1 Undesignated section references are to the Penal Code.

(b)(1)(C). Under section 654, the court stayed the sentences on counts 2 and 3.

On appeal, defendants contend that under *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*), the evidence was insufficient to support the robbery-murder special circumstance because it failed to prove that they acted with reckless indifference to human life in aiding and abetting the attempted robbery of Zane. They also contend that under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), the bulk of the gang evidence was inadmissible, and that, even if admissible, was insufficient to support a finding that the crimes were committed to benefit a criminal street gang. We disagree with these contentions. Parra contends that because Conchas testified at trial and implicated him, the trial court erred in failing to instruct the jury sua sponte that if it determined Conchas was an accomplice, and if it considered any of his testimony as incriminating evidence against a non-testifying codefendant, that testimony must be corroborated and viewed with caution. We find no prejudicial error. Conchas contends that his trial attorney was ineffective, a contention we conclude has no merit. Finally, defendants raise various sentencing errors. We agree with those contentions as follows: (1) the sentence of life without parole on count 3, conspiracy to commit second degree robbery, must be stricken, and the case remanded for the trial court to resentence on count 3 by exercising its discretion to choose among the permissible terms: two, three, or five years (§§ 182, subd. (a), 213); (2) on count 3, the enhancement under section 12022.53 (25 years to life) must be stricken; (3) on all counts, the gang enhancement under section 186.22,

subdivision (b)(1)(C) (minimum parole eligibility date of 15 years) must be stricken; and (4) Conchas must be awarded 815, rather than 814, actual days of credit. In all other respects, we affirm the judgment.

BACKGROUND

A. Prosecution's Case

1. *Cell Phone Evidence*

The shooting occurred on the afternoon of January 15, 2013. That day, on the rear seat of the jeep in which Zane Goldstein[2] was shot, Pasadena police discovered a black Samsung cell phone belonging to defendant Conchas. Conchas was an NSP gang member known as "Duke," among other nicknames. Among the contacts listed on his phone were numbers for other NSP gang members: "White John" (the nickname of John Piepoli),[3] "Junior" (defendant Parra's nickname), and "Kato" (one of defendant Cabrera's nicknames.)

Conchas' cell phone revealed that at 1:42 p.m. on January 13, 2013, two days before the shooting, John Piepoli texted Conchas the phone number of "a white boy that sells weed. He lives near Connel's [referring to a restaurant in Pasadena]." The phone number Piepoli gave Conchas was for Zane's cell phone. Conchas replied to Piepoli at 2:17 p.m., "What's his name and tell him I know who[?]" Piepoli texted

---

[2] Because Zachary Goldstein, Zane's brother, testified at trial, we frequently refer to Zane and Zachary by their first names to avoid confusion.

[3] Piepoli was separately tried for Zane Goldstein's murder and is not involved in this appeal.

at 3:09 p.m., "Zane. You know, Rafa." At 3:18 p.m., Conchas asked, "Raphael from where?" At 3:19 p.m., Piepoli texted, "He lives on Buckeye," referring to a street in Pasadena.

The next day, January 14, 2013, at 11:04 a.m., Conchas called defendant Parra, but no duration was recorded for the call. At 11:20, he called Cabrera for a duration of five seconds. At 2:20 p.m., Conchas called Parra twice, the longer of the two calls lasting 17 seconds.

On the day of the murder, January 15, 2013, Conchas called Parra at 10:58 and 11:03 a.m., the longer of the two calls lasting 18 seconds. At 11:20, 11:28, and 11:46 a.m., he called Cabrera, the longest of the three calls lasting five seconds. At 11:48 a.m., he called Piepoli. The call lasted two minutes and 32 seconds. He called Piepoli again at noon (for 30 seconds). At 12:03 p.m., he called Cabrera (for four seconds), and Piepoli (for 41 seconds). Between 12:14 and 12:15 p.m., he called Parra (for 39 seconds) and Cabrera (for four seconds).

In the meantime, between 12:02 and 12:20 p.m., Conchas exchanged texts with Zane. Conchas texted, "What's up, homeboy? This Rafa homie, Chris. How much for the half," referring to a half ounce of marijuana. Zane replied, "150." Conchas asked, "Is that straight kush?", slang for marijuana. Zane responded, "fireeee," slang for high grade marijuana. Conchas asked about the price for an ounce, and Zane replied "300". Conchas asked, "You won't do it for 250?" Zane replied "300 [was the] lowest." Conchas texted that he did not "get off work till one, so let [me] check my funds first. For sure I'll do a half. . . . [If] I have enough for the whole one, I'll let you know." Conchas asked if

Zane would "be around like 1:30?" Zane replied he would. Conchas texted, "Cool. I hit you up then."

After this text exchange with Zane, at 12:33 p.m. Conchas called Piepoli. The call lasted eight minutes and 21 seconds. At 1:37 p.m., Piepoli texted Conchas, "Should I get ready to meet you?" At 1:45 p.m., Conchas texted Zane, "Can you do a whole for 290? That's all I got." Zane replied at 1:46 p.m., "Yeah, I can do it." Zane asked where Conchas worked. Conchas replied at 1:49 p.m., "At Target. Can you bring it? I have no car. I live on Holliston." Conchas gave the address of 431 North Holliston. At 1:57, Zane texted, "on my way" and said he would be there in "like 10, 15." In the meantime, at 1:56 p.m., Conchas missed a call from Piepoli.

2. *The Attempted Robbery and Murder*

Accompanied by his older brother Zachary, Zane drove his jeep to 431 North Holliston Avenue, an apartment complex. According to Zachary, they planned that Zane would pull up, have the buyer get in the back seat of his jeep with Zachary, and Zachary would hand over the marijuana after the buyer paid for it. The brothers were unarmed.

Zane pulled up to the curb next to the driveway of the apartment complex. At 2:06 p.m., he texted Conchas, "Here in a gray jeep." At 2:05 p.m., Conchas texted Zane (but no message was apparently recovered).

Meanwhile, at 2:11 p.m., Piepoli texted Conchas, "What's good." Conchas did not reply.

Zachary observed a heavy-set Hispanic man wearing a black sports jersey, whom Zachary identified as Cabrera, come to the jeep. He asked Zane if he was the person who had been communicating via text. Zane replied, "Yes." Cabrera then asked Zane to drive into the driveway because his neighbors were nosey and suspicious. Against Zachary's advice, Zane agreed.

Directed by Cabrera and with him following, Zane drove down the driveway and turned into a parking stall in a carport at the end. He left the engine running. As instructed by Zane, Cabrera entered the back seat behind the driver's side, next to Zachary.

As soon as he did so, before any words could be spoken, Zachary saw a taller, lankier, bald Hispanic man in a white tank top approach the driver's side of the jeep carrying a single barrel, sawed-off shotgun. Zachary identified this man as Conchas, the tallest of the three defendants. However, in a pretrial photo lineup, he had selected Cabrera's photo as looking most like the man with the shotgun. The man pointed the shotgun at Zane's face, and said, "Don't move or I'll blast you."[4] Immediately, Zane put the jeep in reverse, backed out of the parking space, and sped forward out of the driveway. Cabrera was still in the backseat.

Zane turned right on Holliston and then right on Maple. He stopped near the intersection with Chester, where Zane and Zachary

---

[4] Zachary identified the bald man as appellant Conchas at the preliminary hearing and trial, and was certain, but the only appellant with a shaven head in January 2013 was appellant Parra.

yelled at Cabrera to get out. Cabrera refused and demanded the marijuana. He said something to the effect that the man with the shotgun was his brother, that he did not know who Zane and Zachary were, and that it was "cool." Zane and Zachary demanded the money before showing the marijuana. Cabrera then said he had a gun, and told Zane, "Give me the weed. You want your homie [referring to Zachary] to get blasted?"

Zachary saw no weapon and thought Cabrera might be bluffing. Although he did not know whether Cabrera was armed, Zachary began pushing Cabrera out of the jeep, believing it was worth the risk. Cabrera resisted, holding onto the driver's head rest, but Zachary eventually was able to eject him.

At that point, Zachary heard "the sound of a weapon going off" and the shattering of glass, but did not see a shooter because his view was obstructed by the driver's seat. Zane's head snapped back against the driver's headrest, and Zachary was wounded in the forearm by a projectile. Zachary saw a four-door tan car stopped alongside the jeep. Cabrera got in the rear passenger side of the car, and the car drove off, heading west on Maple. Zachary saw two other people in the car, seated in front.[5]

---

[5] Another witness observed some of the relevant events. From his apartment on Holliston, William Gibbons heard a voice say, "Get the fuck out." He looked out his window, and saw two men next to an SUV. One of them had dark hair, and the second one was either bald or had a shaven head. The SUV "careened away" down Holliston, and turned right on Maple. After a few moments, Gibbons observed a four-door sedan drive by fast in the same direction, turning right on Maple. A minute or two later, Gibbons heard a "pop type sound."

Zachary got out of the jeep and checked on Zane. Zane's temple had a hole about half an inch in diameter (leading Zachary, who had no experience with firearms, to tell the police initially that he believed Cabrera had shot Zane with a pistol). Zane was not breathing, but then gasped for air. Zachary called 911, and police and paramedics arrived within minutes.[6]

At the hospital, Zane was on life support for two days without brain activity. At his family's request, he was taken off life support, after which he died. The cause of death was a single gunshot wound to the head. The autopsy revealed several irregularly shaped grain metal fragments imbedded in Zane's brain and left hand. The pathologist who performed the autopsy, Martina Kennedy, could not say definitively that the wound was from a shotgun blast, but she could not exclude a shotgun blast as the cause.

Christina Fish, a forensic specialist with the Pasadena Police Department, arrived at the crime scene at about 2:30 p.m. the day of the shooting. She observed that the windshield of Zane's jeep had an impact hole. The driver's window was halfway down, and there was apparent blood on the exterior. On the ground outside the jeep on the

---

[6] A recording of the 911 call was played for the jury. In the call, Zachary said that three Hispanic men tried to rob him and his brother, that one of them shot Zane in the head, that the men had a shotgun and a pistol, that the shooter got into the back seat of a tan car, and that he and his companions drove off. He reiterated to the police who came to the crime scene that he and Zane were robbed. Zachary saw that the bald Hispanic man in the getaway car had a sawed-off shotgun.

driver's side was wadding from a shotgun shell — part of the interior of a shotgun shell that is expelled which the shell is fired. Among other things, Fish found a metal pellet on the floorboard and Conchas' cell phone in the back seat of Zane's jeep.

3. *Surveillance Videos*

Detective David Duran obtained surveillance videos taken on January 15, 2013 by cameras located at 450 and 451 North Holliston. The videos, which were played for the jury at trial and narrated by Detective Duran, depicted events before and after the shooting, but were not clear enough to identify the faces of the people shown.

The videos showed Zane's jeep stopping in the street at 431 North Holliston. Three people were concealed behind a hedge at Tyler Alley, which opened onto North Holliston between the buildings at 439 and 451. One person left the hedge and approached the jeep. The two others, one of whom was kneeling, remained behind the hedge. The jeep then pulled into the driveway at 431 North Holliston. As soon as it did so, the two people behind the hedge walked southbound from Tyler Alley down Holliston and into the driveway where the jeep had gone.

The videos then depicted the jeep exiting the driveway and turning right on Holliston. One person ran north on Holliston back to Tyler Alley, and then down the alley. A second person followed the same route, walking with an apparent limp. Then two additional people approached walking southbound on Holliston. At that point, a four-door sedan backed out of Tyler Alley, and followed the same route as the jeep, turning onto Holliston and then right on Maple.

4. *Ashley Ceballos*

Ashley Ceballos, Cabrera's girlfriend and the mother of his nearly five-year-old son, was a reluctant prosecution witness. At trial, she was impeached by recorded statements she made when interviewed by Detective Ernie Devis and two other detectives on January 23, 2015. A recording of the interview was played for the jury.

In the interview, Ceballos referred to Conchas as "Duke," and Parra as "Jay" and "Junior." She admitted that Cabrera belonged to NSP. She said that she and Cabrera spent the night before the shooting at the home of a friend named Belin, which was walking distance from the crime scene. On the morning of the shooting, Ceballos wanted to buy marijuana at a medical marijuana shop, but her ride, Cabrera's friend Raymond Ramirez, known as "Biggs," did not arrive. Sometime after 12:00 p.m., Conchas, Parra, and Conchas' girlfriend, Stephanie Zacquez, showed up. Conchas said he knew someone with "good shit," so Ceballos gave him $20 to buy marijuana for her. Ceballos went to the bathroom, and when she came out, Conchas and Parra had left, and Cabrera left about five minutes later.

Zacquez remained behind and asked Ceballos to walk with her. They walked to the corner of Holliston near Villa Street, and Ceballos saw Conchas and Parra coming toward them. She asked them where Cabrera was, but they said nothing and jogged to Conchas' car, parked in Tyler Alley. Ceballos and Zacquez followed down the alley. The car backed out of the alley fast, almost striking Ceballos and Zacquez, and sped off on Holliston. Conchas was driving, and Parra was in the passenger seat. Wanting to see what was happening, Ceballos walked

down Holliston to Maple, then heard what sounded like a firecracker. She saw a jeep and a person standing outside the jeep on the phone.

She went back to Belin's house. Conchas, Parra and Cabrera were already there. Soon Conchas, Parra and Zacquez left in Conchas' car. Before leaving, Parra told Ceballos that "if I say anything, he was going to come after me and the people I love."

During the interview, the detectives played the surveillance videos and Ceballos identified defendants. In the video, Parra appeared to walk oddly, as if limping, when he walked to Holliston after Zane arrived, and when he returned walking, headed for Conchas' car. On viewing Parra's movements in the videos, Ceballos told the police that he had not walked like that when Ceballos had seen him at Belin's.

At trial, Ceballos also was impeached by her prior testimony at defendants' preliminary hearing in May 2013 in which she identified defendants, herself, and Stephanie Zacquez on the surveillance videos by clothing and by knowing the actions of the various participants. At the preliminary hearing, Ceballos testified that Cabrera used the nickname "Kato." She expressed fear of the NSP gang because she knew "about a gang like this."

As described by Ceballos at the preliminary hearing, the videos showed all three defendants standing near the hedge at the mouth of Tyler Alley. One of them, Cabrera, walked toward Maple while the other two, Conchas and Parra, remained at the hedge. Parra appeared to be kneeling down behind the hedge. Then Parra and Conchas walked around the hedge toward Maple.

Shortly afterward, Conchas ran back down the alley away from Holliston and went to his car. Ceballos and Zacquez came down the alley toward Holliston as Parra came up in the opposite direction. Conchas' tan Toyota Camry then traveled in reverse out of the alley, at which point it went forward on Holliston and turned right on Maple. According to Ceballos' preliminary hearing testimony, Conchas and Parra were in the car. She soon heard what she thought was the sound of a firework or gunshot. Afterward, Parra told Ceballos that he would "get [her]" if she talked.

Ceballos also was impeached by portions of her testimony in the separate trial of Piepoli in October 2014. In that trial, she testified that she knew Parra as "Junior." Further, Detective Ara Bzdigian was present when Ceballos testified at that trial. In her testimony, Ceballos said that she met Cabrera in 2007, and that from their first meeting he used the moniker Kato.

5. *Conchas' Car*

On the same day as the shooting, Detective Ara Bzdigian seized Conchas' tan Toyota Camry in an underground parking structure of an apartment complex in Pasadena where Conchas' mother and sister lived. The hubcaps had been removed, and the entire vehicle had had been wiped down.

6. *Gang Evidence*

a. *The North Side Pasadena Gang*

Officer David Garcia testified as the primary gang expert. In researching gangs operating in Pasadena, he spoke to senior gang officers, witnesses to gang crimes, informers who told him "what is going on in the streets," and gang members themselves. One of the Pasadena gangs he was familiar with was North Side Pasadena (NSP), based on having had personal contact with at least 10 NSP members, including Parra and Conchas, "reviewing Department resources and reports in the crimes they committed, and speaking with senior officers who handled those incidents."

According to Officer Garcia, in January 2013, NSP had "a little over ten" active members, with its membership number fluctuating over time. The Mar Vista Low Ends clique of the gang controlled the area where the attempted robbery and shooting of Zane occurred. NSP's primary activities included "cases such as murder, attempted murder [and] robbery."

b. *Defendants' Gang Membership*

i. *Cabrera*

Officers Edgar Sanchez, Carlo Montiglio, and Jordan Ling testified to encounters with Cabrera in which he admitted his gang membership. On September 8, 2012, Cabrera told Officer Sanchez that he was from the NSP gang and that he had the moniker "Big Ups." In October 2012, Cabrera told Officer Montiglio he was an NSP gang member. Cabrera said that he used to have the gang moniker "Big

Ups," but his subsequent moniker was "Fat Boy." Cabrera showed the officer an NSP gang tattoo on his left arm. In November 2012, Cabrera told Officer Ling that his gang moniker was "Fat Boy".

Photographs of Cabrera's tattoos were introduced into evidence, and Officer Garcia testified to their significance. On his left shoulder, Cabrera had tattoos of the letters "NSP" and the words, "MV Low End Clique" referring to the NSP gang and the Mar Vista Low Ends clique.[7] Also, a photograph introduced at trial showed Cabrera and a companion making hand signs for the NSP gang.

Based on field identification (FI) cards, including those prepared by Officers Ling and Sanchez, Cabrera's tattoos, and "department resources," Officer Garcia opined that Cabrera was an NSP member with four monikers: "Kato," "Big Ups," "Fat Boy" and "Lonely Boy."

According to Officer Garcia, gang members sometimes use different nicknames to confuse law enforcement.

ii. *Parra*

Officer Montiglio also testified to a contact he had with Parra on August 15, 2012. Parra said he was an NSP gang member with the moniker "Junior."

---

[7] At appellant Cabrera's May 2013 preliminary hearing, Officer Garcia observed a teardrop tattoo and a tattoo of his girlfriend's first name, "Ashley," on appellant Cabrera's face. These tattoos were not seen in a prior photograph. In gang culture, a teardrop tattoo usually signifies memorializing a homicide that the gang member committed.

Officer Garcia was present during that contact. Parra had an "N" tattooed on the right side of his stomach. Parra told Officer Garcia said that it stood for North Side Pasadena.

Based on the August 2012 contact and "department resources," including photographs of Parra and his tattoo, Officer Garcia opined that Parra was an NSP member with the moniker Junior.

iii. *Conchas*

Officer Milton White testified that he encountered defendant Conchas in a traffic stop.[8] Conchas had an NSP tattoo on his right forearm, and he admitted to Officer White that he was an NSP gang member with the moniker "Temper." In 2012, Officer Garcia had an encounter with Conchas in which Conchas told him he was an NSP gang member but did not give a moniker. At the time of Officer Sanchez' contact with Cabrera on September 8, 2012, Cabrera was in a car with defendant Conchas' father, Raymond Conchas Senior, who had told Officer Sanchez in a prior contact that he was "an old school member" of the NSP gang with the moniker, "Duke."

Photographs showed Conchas' tattoos, and Officer Garcia testified to their meaning. On his right arm, defendant Conchas had tattoos of the letters "NSP," and the words "Mar Vista" and "Low End," signifying

---

[8] Officer White apparently misspoke during his testimony when he stated that the encounter occurred in 2014, because by that time, appellant Conchas was incarcerated. Also, the prosecution's gang expert testified that the date of the FI card was January 1, 2013, and appellant Conchas testified about a January 1, 2013, encounter with Officer White.

the NSP gang and its Mar Vista Low Ends clique. Also on his right arm were the words, "Shady Oak Street," referring to another NSP clique.

Based on this information and "department resources," Officer Garcia believed Conchas was an NSP member using the monikers "Lil' Duke" and "Temper."

Predicate Crimes

Officer Sanchez identified a certified copy of a Los Angeles Superior Court minute order reflecting that in 2008 a defendant named Gabriel Ramirez pled no contest to assault with a deadly weapon (§ 245, subd. (a)(1)) committed on March 3, 2008, admitted a great bodily injury allegation (§ 12022.7, subd. (a)), and was sentenced to state prison. From reviewing "department resources" such as "FI cards, reports and talking with other officers that contacted him in the past," Officer Garcia knew Ramirez to be an NSP gang member nicknamed "Droopy."

Officer Sanchez also identified a certified copy of a Los Angeles Superior Court minute order reflecting that in 2010, a defendant named Adrian Valdovinos pled guilty to, among other charges, felon in possession of a firearm (former § 12021, subd. (a)) committed on June 8, 2010, and was sentenced to state prison. From reviewing "department resources," Officer Garcia knew Valdovinos to be an NSP member nicknamed "Sleepy."

Opinions on Hypothetical Facts

According to Officer Garcia, gangs tax drug sellers in their territory to make money. Thus, selling drugs in a gang-controlled area without the gang's permission can lead to "very serious repercussions" including death.

Based on a hypothetical question tracking the evidence in the present case, in which gang members arrange to rob a marijuana dealer who is selling in their territory, culminating in the dealer's death, Officer Garcia opined that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang. In short, it was his opinion that the gang members in the hypothetical situation planned to rob the dealer of his marijuana as a sanction for dealing marijuana in their territory. They were armed with a shotgun in case they met any resistance. When the planned robbery went bad and the dealer tried to escape, the gang members had to use force to demonstrate that they controlled their territory. Further, the fact that the dealer was shot "brazenly" in broad daylight in the afternoon suggested that the gang members did not care who witnessed the crime and wished to publicize that "somebody had the audacity to come in their territory to sell drugs [and] they didn't allow it to happen."

B. Defense

1. *Cabrera*

Cabrera called no witnesses.

2. *Parra*

Parra called two witnesses, Officers David Alba and Dustan Wilf, who spoke to Zachary at the scene shortly after the shooting. According to the officers' combined testimony, Zachary said the man who got in the jeep pulled out a pistol and threatened to shoot Zane. Zachary believed that man was the shooter.

3. *Conchas*

Conchas testified in his own behalf.

Conchas' father was a life-long NSP member, nicknamed "Big Duke." In 2012, he pressured Conchas to join, had him jumped in and gave him an NSP tattoo. Conchas received the nickname "Lil' Duke"; he also was called "Duke." Conchas was never active in the gang, and about nine months before the shooting, at age 23, he moved from Pasadena to Covina with Stephanie Zacquez and their two children. He was living there working construction on January 15, 2013, the date of the shooting.

On January 13, 2013, Cabrera, an NSP member whom Conchas knew as Kato, asked Conchas to drive him to Los Angeles to buy marijuana. Conchas declined because it was too far to drive from his home in Covina. At some point that day, he learned of a local dealer from John Piepoli, a "friend" with whom Conchas would smoke marijuana. Piepoli texted Conchas about Zane, using Zane's name and describing him as a white boy who sells weed. He told Conchas to use the name "Rafa" when contacting Zane to buy marijuana.

On January 14, 2013, Conchas and his family attended a birthday barbecue for Conchas' father at a park in Pasadena. Cabrera showed up and asked to borrow Conchas' cell phone. Conchas gave it to him. Later, Cabrera left without returning the phone, and Conchas, who was doing the barbecuing, forgot about it until after the party, at which time he could not find it and reasoned that Cabrera still had it. He called it from his mother's phone, but got no answer.

The next day, Conchas went to Belin's house, where Cabrera was staying, to retrieve his phone. Cabrera and Ceballos were there. After they smoked marijuana, Ceballos asked Conchas to drive her to a medical marijuana shop in Los Angeles. Conchas had other things to do, and told her he could not drive her. Instead, he told Cabrera that a friend recommended a drug dealer in Pasadena. Conchas gave Cabrera the dealer's contact information — the contact information for Zane he had received from Piepoli.

Cabrera still had Conchas' phone and used it to contact the dealer. He then asked Conchas to meet the dealer with him. They waited in the street for a few minutes, but the dealer did not appear, so they went back to Belin's house, after which Parra arrived. Conchas knew Parra as Junior and believed he was an NSP gang member, because Parra was friends with Conchas' father. That day, Conchas did not know Parra was coming to Belins'.

Cabrera, who still had Conchas' phone, said that the dealer would be showing up, so Cabrera, Parra, and Conchas went to meet him. While in the alley near the street, Cabrera said he was going to "buy the weed real quick," and told Conchas and Parra to wait. Conchas

watched as Cabrera approached the dealer's jeep. For some reason, the jeep drove down a driveway out of sight with Cabrera walking alongside. Suspicious, Conchas followed, as did Parra, and saw the jeep pull into the carport.

Before Conchas could get to it, the jeep backed up and sped out of the driveway. As it did so, Cabrera's leg and jacket were hanging out the open rear passenger door. Concerned for Cabrera's safety, Conchas ran to his car in the alley, backed out, and followed the jeep down Holliston. Parra also was in the car, in the front passenger seat.

Conchas first testified that as he turned on Maple, he saw Cabrera struggling with someone inside the jeep. Conchas drove up to the jeep, but "before [he] could put the car in park, [he] heard a pop." Cabrera jumped into Conchas' car. Conchas looked back while driving away, and saw "a big old hole in the windshield" of the jeep. Conchas did not see where the "pop" came from, because it happened too quickly. He testified that at no time that day did he see anyone with a gun. While driving back to Belin's house, however, Parra told Conchas to keep his mouth shut or he and Zacquez would be hurt.

On cross-examination by the prosecutor, Conchas admitted that when he stopped next to Zane's jeep, "the [passenger] car door opened. I heard a pop. [Parra] jumped back in. [Cabrera] jumped in the back seat, and I took off." When Parra reentered the car, he had a short barrel shotgun. As Conchas drove off, Parra pointed it at Conchas and told him to keep his mouth shut. Conchas had not seen Parra with the shotgun before the shooting.

At Belin's house, Conchas told Cabrera and Parra to get out. He picked up Zacquez, and they left.

Conchas went into hiding "because somebody had just got shot," and he had been threatened. About a week later, he turned himself in. While in a holding cell at the Pasadena court on February 7, 2013, two members of another Pasadena gang, Varrio Pasa Rifa, asked if he knew Parra. He said he did. They asked Conchas his name, and he told them. They then attacked him, breaking his leg and ankle, and told him that he should keep his mouth shut if he knew what was good for him. Parra was in a nearby holding cell. As Conchas was taken out on a gurney, Parra used hand signals to tell Conchas to keep his mouth shut.

According to Conchas, after he gave his cell phone to Cabrera on January 14, 2013, it remained in Cabrera's possession and Conchas did not use it again before the murder. During that time, the phone made calls to contacts listed as Conchas' probation testing number (he was on probation for a 2010 conviction of possession of marijuana for sale), Conchas' sister, and Conchas' unemployment bank. It also made calls to Cabrera's cell number, even though he purportedly had the phone. Conchas denied making those calls.

When shown the surveillance videos, Conchas identified himself, Cabrera, and Parra. Before Zane's jeep arrived, Conchas appeared to cradle an item in his hand, look down at it, and walk with it out of view. Conchas admitted that he "believe[d]" he was holding his cell phone in the videos, but also denied giving his phone to Cabrera after Zane arrived. He also admitted that in the surveillance videos, Parra was

walking "with a slight affect to his body," not running, when he returned after Zane's jeep left 431 Holliston with Cabrera inside. But Conchas denied noticing that Parra moved awkwardly then or at any other time, and denied that the reason Parra was walking awkwardly was because he had concealed a shotgun in his pants.

Conchas knew that a seller of marijuana in gang territory must have permission and must pay a tax to the gang. However, he professed not to know the consequences for a seller who did not pay the tax.

DISCUSSION

I. *Attempted Robbery-Murder Special Circumstance*

Each defendant argues that the evidence was insufficient to support the robbery-murder special circumstance because it failed to prove that he acted with reckless indifference to human life in aiding and abetting the attempted robbery of Zane. We disagree. Of course, we apply the applicable standard of review: "When reviewing a challenge to the sufficiency of the evidence, we ask '"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."' [Citations.] Because the sufficiency of the evidence is ultimately a legal question, we must examine the record independently for '"substantial evidence—that is, evidence which is reasonable, credible, and of solid value"' that would support a finding beyond a reasonable doubt. [Citation.] These same standards apply to

challenges to the evidence underlying a true finding on a special circumstance." (*Banks, supra,* 61 Cal.4th at p. 804.)

Here, as to each defendant, the jury found true the allegation under section 190.2, subdivision (a)(17)(A), that the murder was committed in the attempted commission of a robbery. Under section 190.2, subdivision (d), as here relevant, "every person*, not the actual killer, who, with reckless indifference to human life and as a major participant,* aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true." (Italics added.)

In *Banks, supra,* as discussed in *People v. Clark* (2016) 63 Cal.4th 522, 611, the California Supreme Court "examined the issue of 'under what circumstances an accomplice who lacks the intent to kill may qualify as a major participant . . . .' [Citation.] The ultimate question pertaining to being a major participant is 'whether the defendant's participation "in criminal activities known to carry a grave risk of death" [citation] was sufficiently significant to be considered "major" [citations].'" [Citation.] Among the relevant factors in determining this question, we set forth the following: 'What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons?

What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?"

In *Banks,* the court "discussed these factors in relation to the nonshooter aider and abettor . . . and noted that no evidence was introduced establishing his role in planning the robbery or in procuring weapons, and that during the robbery and murder he was absent from the scene, sitting in a car and waiting. [Citation.]" (*Clark, supra,* 64 Cal.4th at p. 611.) On those facts, the court determined that the defendant "was, 'in short, no more than a getaway driver,'" and ineligible for the robbery murder special circumstance. (*Id.* at p. 612; see *Banks, supra*, 61 Cal.4th at p. 805.) In *Clark*, the court reached a different result, where "substantial evidence support[ed] the inference that defendant was the mastermind who planned and organized the attempted robbery and who was orchestrating the events at the scene of the crime." (63 Cal.4th at p. 612.)

In the present case, substantial evidence supports the special circumstance finding as to each defendant.

A. *Parra*

To the extent Parra contends that he was merely an accomplice who lacked the intent to kill, and therefore the prosecution was required to prove that was a major participant in the attempted robbery

and acted with reckless disregard for life, he is mistaken. Substantial evidence proved that Parra was the actual killer. Thus, the *Banks* analysis of major participation, which applies only to accomplices and not actual killers, does not apply.

Conchas testified that Parra was the shooter. That testimony was corroborated by a wealth of independent evidence, which in itself was sufficient to prove that Parra shot Zane with a sawed-off shotgun. After Zane's jeep drove off with Cabrera inside following the aborted robbery, the surveillance videos showed Conchas, followed by Parra, returning to Tyler Alley on the way to Conchas' car. Nothing in the videos suggested that Conchas was carrying a sawed off shotgun. However, Parra was walking awkwardly, from which the jury could infer that he possessed the gun stuffed down a pant leg to conceal it. Zachary identified Conchas as the one who pointed the shotgun at Zane in the carport, but the jury could infer that at some point he gave the gun to Parra, who then concealed the weapon in his pants when he and Conchas returned to Tyler Alley to get in Conchas' car.

Conchas testified that when he stopped the car next to Zane's jeep, Parra was in Conchas' passenger seat. Then "the [passenger] car door opened. I heard a pop. [Parra] jumped back in. [Cabrera] jumped in the back seat, and I took off." According to Conchas, when Parra reentered the car, he had a short barrel shotgun. As Conchas drove off, Parra pointed it at Conchas and told him to keep his mouth shut.

Conchas' version of the shooting was corroborated by Ashley Ceballos' statements in her January 23, 2015 police interview. She told the police that when Conchas' car left in pursuit of the jeep, Conchas

was driving and Parra was the passenger. Also, after the shooting, Parra threatened to harm her and her family if she talked.

Conchas' testimony that Parra was the shooter also was consistent with Zachary's description of the shooting. According to Zachary, immediately after Zane was shot, Zachary saw a four-door tan car stopped alongside the jeep. Cabrera got in the rear passenger side of the car, and the car drove off. Zachary saw two other people in the car, seated in front. The rapid sequence of events was consistent with Parra's getting out of the passenger side while Conchas, the driver, waited in the car. Then immediately after the shooting, Parra and Cabrera got back in and Conchas drove off.

Moreover, Ashley Ceballos told the police that Parra threatened to harm her and her family if she talked, a fact consistent with Parra being the shooter, especially in the absence of any evidence that either of the other defendants made any similar threats.

There also was no real doubt that Parra shot Zane with a shotgun. Although the coroner could not say definitively that Zane's wound was from a shotgun blast, she could not exclude a shotgun blast as the cause. Significantly, the autopsy revealed several irregularly shaped grain metal fragments imbedded in Zane's brain and left hand. In addition, Zachary was wounded by a projectile, a metal pellet was found on the floorboard of Zane's jeep, and wadding from a shotgun shell was found on the ground outside the jeep.

In short, substantial evidence proved that Parra was the actual killer. Thus, the *Banks* analysis does not apply.

B. *Conchas*

Considering the *Banks* factors, the evidence was sufficient to prove Conchas was a major participant. As to his role "in planning the criminal enterprise that led to" Zane's death (*Banks, supra,* 61 Cal.4th at p. 803), the cell phone evidence proved that Conchas was the mastermind of the plan to rob Zane, the culmination of which was Zane's death. As to his role "in supplying or using lethal weapons" (61 Cal.4th at p. 803), Zachary identified him as being the one who pointed a shotgun at Zane in the carport and threatened to kill him.[9] Also, in convicting Conchas of conspiracy, the jury found true the alleged overt

---

[9] To the extent Conchas contends, and respondent appears to concede that Zachary's identification was unreliable, we disagree with the contention and do not accept the concession. "While an appellate court can overturn a judgment when it concludes the evidence supporting it was 'inherently improbable,' such a finding is so rare as to be almost nonexistent. '"To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions." [Citations.] Such cases are rare indeed.'" (*People v. Ennis* (2010) 190 Cal.App.4th 721, 728-729.) Zachary's identification of Conchas as the one who pointed the shotgun at Zane and threatened to kill him was not physically impossible: Conchas was present in the carport, and Zachary personally observed the assailant with the shotgun. Further, even though the evidence suggested that Parra carried the shotgun stuffed down a pant leg when he returned from the carport to Tyler Alley, and later used it when he shot Zane after the pursuit, it is not physically impossible that Conchas, after using the gun in the carport, gave it to Parra to conceal and carry after the robbery was interrupted. In short, Zachary's identification of Conchas as the person who used the shotgun in the carport constituted substantial evidence of that fact.

act that Conchas "pointed a loaded shotgun at the victim."[10] Considering Conchas' awareness "of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants" (*Banks, supra*, 61 Cal.4th at p. 803), the jury could infer that Conchas knew the inherent danger involved when he and fellow NSP gang members planed to rob a marijuana dealer using a sawed-off shotgun after luring him to a place of seclusion. Further, the evidence proved that Conchas was "present at the scene of the killing, in a position to facilitate or prevent the actual murder." (*Ibid.*) After Zane prevented the robbery by driving out of the carport with Cabrera in the rear seat, Conchas pursued in his car, carrying Parra, who was then armed with a shotgun. Although Conchas claimed in his testimony that he did not notice that Parra had the shotgun, Zachary testified (and the jury concluded in the conspiracy count) that Conchas was the one who pointed the weapon at Zane in the carport. Given that fact, it was unlikely that he would have been unaware of Parra's possession of the gun during the pursuit of the jeep. Conchas also "play[ed] a particular role in the death." (*Ibid.*) He drove the shooter, Parra, to the scene of the shooting, and stopped next to Zane's car, which allowed Parra to get out and shoot Zane. After the shooting,

---

[10] Contrary to Parra's contention, this finding referred to the pointing of the shotgun at Zane in the carport, not the shooting of Zane on Maple. Rather, in separate findings in the conspiracy count, the jury found true the overt act allegations that Parra and Conchas "pursued the victim to the area of Chester and Maple streets in Pasadena," and that "[o]ne of the conspirators shot the victim once in the head."

Parra got back in, Cabrera entered, and Conchas drove off with the two men he had recruited to rob Zane, leaving Zane fatally wounded.

Given this evidence, there is no question that substantial evidence showed Conchas was a major participant with the meaning of *Banks*.

C. *Cabrera*

Applying the *Banks* factors to Cabrera, Cabrera was not the mastermind of the plan to rob Zane, but he was a willing and essential participant. When Zane arrived, Cabrera pretended to be the one who had texted Zane. He then lured Zane into a secluded carport while Conchas and Parra concealed themselves behind a hedge. He got in the back seat of the jeep as directed by Zane to discuss a sale of marijuana. His conduct allowed Conchas and Parra to approach undetected until, according to Zachary, Conchas pointed a shotgun at Zane and threatened to kill him.

There was no evidence that Cabrera supplied the shotgun used by Parra to shoot Zane. But the jury could infer that Cabrera knew the obvious dangers involved in his participation with fellow gang members in a plan to rob a marijuana dealer when one of the other participants was armed. Further, after the robbery went bad and Zane drove off, Cabrera's conduct facilitated the killing. When Zane stopped on Maple and he and Zachary yelled at Cabrera to get out, Cabrera refused and demanded the marijuana. He lied, attempting to lull them into a false sense of security, saying something to the effect that the man with the shotgun was his brother, that the brother did not know who Zane and Zachary were, and that it was "cool." When Zane and Zachary

demanded the money, Cabrera then said he had a gun, and told Zane, "Give me the weed. You want your homie [referring to Zachary] to get blasted?" Although Cabrera never produced a weapon, his threat reasonably suggested that he knew lethal force might be the result of Zane and Zachary's resistance.

As Zachary pushed Cabrera out of the jeep, Cabrera resisted, holding onto the driver's headrest, thus delaying Zachary and Zane's escape. Conchas then pulled up, Parra got out and shot Zane, and Conchas drove off with Cabrera and Parra in the car.

On this record, Cabrera's "participation 'in criminal activities known to carry a grave risk of death' [citation] was sufficiently significant to be considered 'major' [citation]." (*Banks*, *supra,* 61 Cal.4th at p. 803.)

II. *Gang Evidence*

Defendants raise various issues concerning the admission and sufficiency of the gang evidence. None has merit.[11]

---

[11] Elsewhere in our opinion, we conclude that the sentence for the gang enhancement under section 186.22, subdivision (b)(1)(C) must be stricken, because only the firearm enhancement under 12022.53, subdivisions (d) and (e)(1) can be imposed. (See § 12022.53, subd. (e)(2) ["An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 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."].) Nonetheless, although the sentence for the gang enhancement must be stricken, the finding as to each defendant that the crimes were committed for the benefit of a criminal street gang under section 186.22, subdivision (b)(1)(C) was necessary for imposition of the firearm

A. *Admissibility of Expert Gang Testimony*

1. *Motion to Exclude*

Before Officer Garcia testified, Parra, joined by Cabrera and Conchas, moved under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), to exclude Officer Garcia's opinion testimony to the extent it relied on hearsay, such as "conversations that he's had with other gang members or . . . layers of hearsay from other officers as to conversations they've had with other gang members as part of [the] basis for his opinion."[12] Parra's counsel argued that Officer Garcia's reliance on such sources would violate the right of confrontation, because information from hearsay sources is not subject to cross-examination. Cabrera's attorney added "the FI [cards] and other evidence . . . are not reliable enough to be used as a basis for an opinion . . . under Evidence Code 352 or 801. . . . [E]ven if we were to say the FI [cards] were . . . reliable, [they] still [have] no relevance unless . . . submitted for the truth." Further, all of the hearsay information was testimonial under *Crawford*.

---

enhancement. (§ 12022.53, subd. (e)(1) ["The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."].) Thus, the issues concerning the admissibility and sufficiency of the evidence to support the finding under section 186.22, subdivision (b)(1)(C) must be resolved.

[12] Appellant Parra filed a written motion that is missing from the record on appeal. The parties appear to agree that the substance of the written motion was reflected in oral argument.

The prosecutor argued that "[t]he foundation for the gang evidence has already been laid through the percipient witnesses who did the FI cards. That is why we called them, to anticipate that type of objection." The prosecutor also noted that the Officer Garcia could rely on Ashley Ceballos' prior testimony and her "comment to Sergeant Devis," apparently referring to Sergeant Devis' interview of Ceballos. The prosecutor also argued that "so long as the verbatim text of these police reports or FI cards are not repeated, the expert can rely on them and say [for instance] my opinion [is] that Mr. Cabrera is Big Ups."

The trial court focused on the question whether the expert would testify concerning information learned in custodial interrogations or consensual encounters. The court ruled, "[o]ver the objection of defense counsel, the People may bring in the consensual encounters and the FI card of the gang expert."

2. *The Sanchez Decision*

After the trial in this case, the California Supreme court decided *Sanchez, supra,* 63 Cal.4th 665, in which the court held that state hearsay law permits an expert witness to refer generally to hearsay sources of information as a basis for the expert's opinion, but precludes the expert from conveying "case-specific facts" asserted in such sources, meaning facts "relating to the particular events and participants alleged to have been involved in the case being tried." (*Id*. at pp. 676,

685-686.)[13] Further, if the expert testimony relates case-specific facts asserted in a hearsay source that is testimonial within the meaning of *Crawford, supra,* 541 U.S. 36, the testimony violates the confrontation clause unless the hearsay witness is unavailable and defendant either had a previous occasion to exercise the right to cross-examine, or forfeited that right by wrongdoing. (*Sanchez*, *supra*, 63 Cal.4th at p. 686.)[14] Based on *Sanchez,* defendants challenge the admission of Officer Garcia's expert testimony. We consider the admissibility of the pertinent parts of Officer Garcia's testimony under *Sanchez*.

---

[13] As one example of the distinction between general background information and case-specific facts, the court presented a gang-related scenario: "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*Sanchez, supra*, 63 Cal.4th at p. 677.)

[14] To the extent *People v. Gardeley* (1996) 14 Cal.4th 605 permitted an expert to convey case-specific facts not based on personal knowledge as the basis for the expert's opinion, on the theory that those facts were not considered for their truth, the court disapproved *Gardeley*. (*Sanchez, supra*, 63 Cal.4th at p. 684 ["When an expert is not testifying in the form of a proper hypothetical question and no other evidence of the case-specific facts presented has or will be admitted, there is no denying that such facts are being considered by the expert, and offered to the jury, as true."]; see also *id.* at p. 686, fn. 13.) It also disapproved its "prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and confrontation concerns." (*Id.* at p. 686, fn. 13.)

3. *General Background Testimony*

Officer Garcia testified generally as to sources of information he relied on in researching Pasadena gangs: he spoke to senior gang officers, witnesses to gang crimes, informers who told him "what is going on in the streets," and gang members themselves. With respect to NSP, his expertise was similarly based on having personal contact with at least 10 NSP members, including Parra and Conchas, "reviewing department resources and reports in the crimes they committed, and speaking with senior officers who handled those incidents." Based on this background information, Officer Garcia testified that in January 2013, NSP had "a little over ten" active members, that the Mar Vista Low Ends clique of the gang controlled the area where the attempted robbery and shooting of Zane occurred, and that NSP's primary activities included "cases such as murder, attempted murder [and] robbery," That background information also formed the basis for his testimony that gangs tax drug sellers in their territory to make money, that selling drugs in a gang-controlled area without the gang's permission can lead to "very serious repercussions" including death, and that, on hypothetical facts mirroring the instant case, the attempted robbery and killing of Zane were committed for the benefit of, at the direction of, and in association with a criminal street gang.

Defendants contend that even though in giving these opinions Officer Garcia did not convey case-specific facts, and referred only in general terms to the hearsay sources he relied upon as background information, the bulk of his opinion testimony nonetheless constituted implied hearsay drawn from those sources. Therefore, defendants

contend, the prosecution had the burden of showing those sources were not testimonial, and that they did not contain any case-specific facts. However, *Sanchez* imposes no such burden.

Under state hearsay rules after *Sanchez*, "[a]ny expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. . . . There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception. [¶] What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez, supra*, 63 Cal.4th at pp. 685-686; see also *id.* at p. 685 ["Our decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. . . . [T]estimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise."].) Officer Garcia's testimony as to these matters mirrored the general background testimony of the gang expert in *Sanchez,* which

the court found admissible as a matter of state hearsay law. (*Id.* at pp. 671-672, 698;[15] see also *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175 (*Meraz*) [gang expert's "general background testimony . . . about [gang's] operations, primary activities, and pattern of criminal activities, which was unrelated to defendants or the current shooting," did not violate state hearsay rules under *Sanchez*].) In short, Officer Garcia's reliance

---

[15] The gang expert in *Sanchez* testified that "[h]is experience included investigating gang-related crime; interacting with gang members, as well as their relatives; and talking to other community members who may have information about gangs and their impact on the areas where they operate. As part of his duties, [he] read reports about gang investigations; reviewed court records relating to gang prosecutions; read jail letters; and became acquainted with gang symbols, colors, and art work. He had received over 100 hours of formal training in gang recognition and subcultures, offered by various law-enforcement agencies in Southern California and around the nation. He had been involved in over 500 gang-related investigations." (*Sanchez, supra*, 63 Cal.4th at p. 671.) Based on these hearsay sources, he testified "generally about gang culture, how one joins a gang, and about the Delhi gang in particular. Gangs have defined territories or turf that they control through intimidation. They commit crimes on their turf and protect it against rivals. Nonmembers who sell drugs in the gang's territory and who do not pay a 'tax' to the gang risk death or injury. The Delhi gang is named after a park in its territory and has over 50 members. Its primary activities include drug sales and illegal gun possession. Defendant was arrested in Delhi turf. [The expert also] testified about convictions suffered by two Delhi members to establish that Delhi members engage in a pattern of criminal activity." (*Id.* at p. 672.)

The court held this testimony admissible: "Defendant raises no confrontation claim against [the expert's] background testimony about general gang behavior or descriptions of the Delhi gang's conduct and its territory. This testimony was based on well-recognized sources in [the expert's] area of expertise. It was relevant and admissible evidence as to the Delhi gang's history and general operations." (*Id.* at p. 698.)

on hearsay sources, described only generally without relating case-specific facts, did not violate state hearsay rule.

Further, the sources relied upon by Officer Garcia were not testimonial. After reviewing *Crawford* and related authority, the court in *Sanchez* distilled the following general principles: Statements are testimonial if "made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony" (63 Cal.4th at p. 689) and if "sufficiently formal to be testimonial" (*id.* at p. 693, citing *People v. Dungo* (2012) 55 Cal.4th 608, 619.) On the other hand, "[n]ontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez, supra*, 63 Cal.4th at p. 689.)

In *Sanchez,* the gang expert gave not only general background testimony that the court found admissible, but also case specific facts. The court's discussion of the case-specific testimony is instructive in determining what sources of hearsay information are testimonial. The expert in *Sanchez* "gave the details" (*Sanchez, supra*, 63 Cal.4th at p. 672) regarding the defendant's five prior police contacts, relying solely on hearsay information "gathered during an official investigation of a completed crime" and contained in police reports (*id.* at p. 694). The court held that these case-specific facts presented through the expert's testimony constituted testimonial hearsay: "When the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness, *Crawford* teaches those hearsay statements are

generally testimonial unless they are made in the context of an ongoing emergency . . . , or for some primary purpose other than preserving facts for use at trial. Further, testimonial statements do not become less so simply because an officer summarizes a verbatim statement or compiles the descriptions of multiple witnesses." (*Id.* at p. 694.)

The expert also conveyed case- specific facts contained in the portion a STEP notice retained by the police.[16] Based on the purpose of a STEP notice (to verify facts to be later used against the defendant and give notice that he may receive enhanced punishment for a gang crime) and on its formality (a sworn attestation by the issuing officer), the court concluded that the case-specific facts contained in the notice and conveyed by the expert constituted testimonial hearsay. (*Sanchez, supra*, 63 Cal.4th at pp. 696-697.)

Finally, the expert in *Sanchez* testified to facts contained in an FI card documenting a police contact with the defendant. The circumstances under which the FI card was created were unclear. The

---

[16] The gang expert explained that "[police] officers issue what are known as 'STEP notices' to individuals associating with known gang members. The purpose of the notice is to both provide and gather information. The notice informs the recipient that he is associating with a known gang; that the gang engages in criminal activity; and that, if the recipient commits certain crimes with gang members, he may face increased penalties for his conduct. The issuing officer records the date and time the notice is given, along with other identifying information like descriptions and tattoos, and the identification of the recipient's associates. Officers also prepare small report forms called field identification or 'FI' cards that record an officer's contact with an individual. The form contains personal information, the date and time of contact, associates, nicknames, etc. Both STEP notices and FI cards may also record statements made at the time of the interaction." (*Sanchez, supra*, 63 Cal.4th at p. 672, fn. omitted.)

court stated that "[i]f the card was produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial." (*Sanchez, supra*, 63 Cal.4th at p. 697.) Because "the point was not properly clarified," and because the expert's other case-specific testimony was prejudicial regardless of whether the FI card was testimonial, the court did not decide the issue. (*Id.* at p. 697.)

In *Meraz, supra,* 6 Cal.App.5th 1162, considering *Sanchez's* analysis, the court held that none of the background information relied upon by the gang expert was testimonial. As summarized in *Meraz*, the gang expert in that case testified that "he had attended gang courses and conferences; he had trained in the field with an officer who pointed out active gang members; he had responded to gang-related crimes; and he had spoken with gang officers and detectives. He had also been assigned to a gang crime-prevention task force responding to hot spots around Los Angeles, during which he would speak to gang officers and detectives about the gangs involved. As part of the gang unit in the Foothill Division monitoring Terra Bella [defendants' gang], he had gathered intelligence on gang membership and rivalries to allow him 'to respond more effectively in response to a shooting or any other gang-related crimes.' He received the 'majority of our intelligence' by 'speak[ing] with gang members of all levels and ages, both in and out of custody, whether they're suspects, victims, witnesses, or none of the above. We conduct probation and parole services, at which time we would interview them about just general gang life.'" (*Id.* at p. 1173.)

Based on this background information, the gang expert "described the size of Terra Bella, its symbols, and its primary activities, and he identified the convictions of several Terra Bella members based on court records. He also described the rivalry between Terra Bella and Project Boys, which became heated after [a Project Boys member] murdered [a Terra Bella member] in May 2008. He further testified to the importance of respect in a gang and 'putting in work' by typically committing crimes to move up in the gang, and he believed the shooting in this case was bold because it occurred during the day in rival gang territory. When given a hypothetical question tracking the facts of the shooting, [he] opined the shooting was retaliatory for Villa's murder and was committed in association with, for, and at the direction of Terra Bella." (*Meraz, supra*, 6 Cal.App.5th at pp. 1173-1174.)

Because the sources cited by the expert contained "'out of court statements made by both police officers and other gang members," the defendants contended that "almost all aspects of [the gang expert's] general background testimony were case specific and testimonial, including his opinion that the shooting in this case was in retaliation for Villa's murder, how Terra Bella operates, the gang's primary activities, and the gang's pattern of criminal activity based on convictions of other gang members." (*Meraz, supra*, 6 Cal.App.5th at p. 1174.) The *Meraz court* rejected the contention: "[N]othing in the record suggests [the gang expert] obtained any of this information 'primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony.' [Citation.] [The gang expert] described the sources of his background information on [the gang] and the rivalry with [another

gang] in only the most general terms. He conveyed no specific statements by anyone with whom he spoke, and reached only general conclusions based on his education, training, and experience. As we explained in a case before *Sanchez*, '[d]ay in and day out such information would be useful to the police as part of their general community policing responsibilities quite separate from any use in some unspecified criminal prosecution.' [Citation.] To conclude otherwise would eviscerate the role of gang experts in gang-related prosecutions, a consequence the court in *Sanchez* neither contemplated nor likely intended." (*Id.* at pp. 1175-1176.)

In the present case, Officer Garcia's background testimony is indistinguishable in any meaningful way from that of the expert in *Meraz*. Thus, we conclude that it did not convey case-specific testimonial hearsay, and did not violate the confrontation clause.

4. *Ashley Ceballos' Prior Inconsistent Statements and Testimony*

Defendants appear to contend that Officer Garcia violated *Sanchez* to the extent he considered Ashley Ceballos' prior inconsistent statements and testimony. In relevant part, Ceballos was impeached with the following evidence. In her preliminary hearing testimony, Ceballos testified that Cabrera used the nickname "Kato," and she expressed fear of the NSP gang because she knew "about a gang like this." In her testimony at the Piepoli trial, she testified that she knew Parra as "Junior," and from her first meeting with Cabrera in 2007, he used the moniker Kato. In her police interview, Ceballos referred to

Conchas as "Duke," and Parra as "Jay" and "Junior." She also admitted that Cabrera belonged to NSP.

Consideration of this evidence did not violate *Sanchez* — it was admitted pursuant to the hearsay exception for prior inconsistent statements of a witness, and defendants had the opportunity to cross-examine Ceballos at trial.

5. *Defendants' Gang Membership*

Defendant's challenge Officer Garcia's opinion that they belonged to NSP. In identifying Cabrera, Conchas and Parra as NSP gang members Officer Garcia testified (in substance) that he relied on four sources: (1) defendants' tattoos (which he had personally observed and photographs of which were introduced into evidence), (2) "department resources," (3) insofar as Conchas and Parra were concerned, his personal contacts with them, and (4) FI cards. Three of these sources raise no issue under *Sanchez*: consideration of defendants' gang tattoos (see *Sanchez, supra,* 63 Cal.4th at p. 677 [defendant's tattoo is case-specific fact which gang expert may testify signifies gang membership]), his general reference to department resources (*id.* at pp. 685-686 [permissible to refer generally to background source], and his personal contacts with Conchas and Parra (*Meraz, supra,* 6 Cal.App.5th at p. 1176).

As to the FI cards, an expert can relate "case-specific facts asserted in hearsay statements [if] they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez*,

supra, 63 Cal.4th at p. 686.) Here, Officers Sanchez, Montiglio, and Ling testified to encounters with Cabrera in which he admitted he was an NSP member. Officer Montiglio testified to an encounter with Parra (at which Officer Garcia himself was present) in which Parra admitted NSP membership. Officer White testified to an encounter with Conchas in which he admitted being an NSP gang member, in addition to the personal contact Officer Garcia had with Conchas. It thus appears that the officers who prepared the FI cards testified at trial. Hence, there was no violation of *Sanchez* in Officer Garcia's reference to FI cards, even if they were testimonial.

Finally, the evidence of defendant's gang membership was not meaningfully disputed at trial — indeed, it was confirmed by Conchas' testimony. Thus, if there were any violation of *Sanchez* in Officer Garcia's testimony that defendants were NSP members (there was not), the error would be harmless beyond a reasonable doubt.

6. *Predicate Crimes*

Defendants also contend that Officer Garcia's testimony about the predicate crimes required to prove the gang allegation was inadmissible. Officer Garcia identified a certified copy of a Los Angeles Superior Court minute order reflecting that in 2008 a defendant named Gabriel Ramirez pled no contest to assault with a deadly weapon (§ 245, subd. (a)(1)) committed on March 3, 2008, admitted a great bodily injury allegation (§ 12022.7, subd. (a)), and was sentenced to state prison. He also identified a certified copy of a Los Angeles Superior Court minute order reflecting that in 2010, a defendant named Adrian

Valdovinos pled guilty to, among other charges, felon in possession of a firearm (former § 12021, subd. (a)) committed on June 8, 2010, and was sentenced to state prison. The records were introduced at trial. To the extent defendants contend that the records were testimonial, they are wrong. (*Meraz, supra,* 6 Cal.App.5th 1176, fn. 10 [certified records of conviction not testimonial hearsay].)

Officer Garcia also testified that from reviewing "department resources" such as "FI cards, reports and talking with other officers that contacted him in the past," he knew Ramirez to be an NSP gang member nicknamed "Droopy." From reviewing "department resources," Officer Garcia knew Valdovinos to be an NSP member nicknamed "Sleepy."

Defendants contend that Officer Garcia's identification of Ramirez and Valdovinos as NSP members violated *Sanchez.* We disagree. Officer Garcia referred only generally to the sources on which he relied: "department resources," including unspecified "FI cards," "reports," "talking with other officers." The record on appeal does not show that he referred to case specific hearsay from any of these authorities. As we have noted, in *Meraz,* the prosecution proved the gang's pattern of gang activity by testimony from the gang expert that "identified the convictions of several Terra Bella members based on court records." (*Meraz, supra*, 6 Cal.App.5th at p. 1173.) The court held in part that under *Sanchez,* the expert "was permitted to testify to non-case-specific general background information about [the gang, including] its pattern of criminal activity, even if it was based on hearsay sources like gang members and gang officers." (*Id.* at p. 1175.)

Moreover, to the extent it is possible that Officer Garcia relied on testimonial hearsay in identifying Ramirez and Valdovinos as NSP gang members, the inadequacy of the record to demonstrate that fact is due to defendants' failure to make a specific, contemporaneous objection. Before Officer Garcia's testimony, defendants objected in general under *Crawford* to the Officer Garcia's reliance on conversations with other gang members or hearsay from other officers. In ruling on that motion, the trial court was specific. The court focused on whether hearsay relied on by the gang expert would be testimonial under *Crawford*, and reasoned that "[t]he state of the law as it is right now, if it were to be a custodial interrogation, that would be testimonial. What I anticipate the evidence will be is the gang expert will testify about a consensual encounter where he has had individuals in [the] NSP gang, perhaps some of the defendants in this case, and, therefore, is going to use the testimony about those consensual encounters as a basis for his expert opinion. . . . [A]s we sit here . . . , a consensual encounter of a gang expert with a gang member does not constitute testimonial evidence and under *Crawford* will not be excluded. . . . Over the objection of defense counsel, the People may bring in the consensual encounters and the FI card of the gang expert."

Given the specificity of the trial court's ruling, which permitted testimony concerning FI cards documenting consensual encounters of the gang expert with NSP members, and which mentioned no other type of hearsay, it cannot be said that any contemporary objection to Officer Garcia's reference to the sources on which he relied would have been futile. To the contrary, defendants had the obligation to make a such

an objection to the extent they wished to clarify whether the sources on which Officer Garcia relied (including FI cards) were testimonial. They failed to do so, and thus their contention that the confrontation clause was violated fails. (See *People v. Ochoa* (2017) 7 Cal.App.5th 575, 586 [although possible that gang expert referred to admissions of gang membership from testimonial hearsay, the appellate record was unclear due to defendant's failure to object, and thus no violation of the confrontation clause was shown].)

7. *Cabrera's Teardrop Tattoo*

Cabrera contends that the trial court erred in permitting Officer Garcia to testify regarding the significance of his teardrop tattoo, over defense objection that it was irrelevant or more prejudicial than probative. We disagree.

Officer Garcia testified that in photographs depicting Cabrera in before the May 2013 preliminary hearing in this case, he had no facial tattoos. However, at the preliminary hearing, he had a facial tattoo of the name "Ashley" and a teardrop over his left eyebrow. Regarding the significance of a teardrop tattoo in gang culture, Officer Garcia testified that a teardrop usually signifies that the wearer committed a homicide or was memorializing a victim of gang violence.

From this testimony, it could reasonably be inferred that, given the timing of Cabrera's getting the tattoo (after the killing in this case, and before the preliminary hearing on the charge for that killing), the teardrop tattoo constituted an implied admission of involvement in Zane's murder. The decision in *People v. Ochoa* (2001) 26 Cal.4th 398 is

instructive. There, the trial court permitted the gang expert to testify that after the charged murder was committed, the defendant had his forehead tattooed with the number "187," the Penal Code section for murder. (26 Cal.4th at p. 437.) On appeal, the California Supreme court found no abuse of discretion in allowing the evidence: "The trial court properly found the tattoo represented an admission of defendant's conduct and a manifestation of his consciousness of guilt. The court reasonably considered the tattoo highly probative, as it would be unlikely that an innocent person would so advertise his connection to murder." (*Id*. at p. 438.) The court likewise found no abuse of discretion in permitting the expert to testify to the significance of the tattoo. (*Id*. at pp. 449-450.) The same reasoning applies here. From Cabrera's teardrop tattoo and Officer Garcia's testimony as to its significance, the jury could infer that the tattoo was a manifestation of consciousness of guilt and constituted an admission of involvement in Zane's killing. In any event, given the extensive evidence of Cabrera's gang membership and involvement in the plan to rob Zane which resulted in Zane's death, the introduction of Officer Garcia's testimony, even if erroneous, was not prejudicial.

B. *Sufficiency of the Gang Evidence*

1. *Gang Purpose*

Defendants contend that even if admissible, Officer Garcia's opinion that the attempted robbery and shooting of Zane was committed to discipline him for selling marijuana without paying a tax to the NSP gang was unsupported by any evidence. However, the evidence was

undisputed that gangs tax drug dealers in their territory — Conchas admitted that practice in his testimony. Further, the evidence showed that Conchas, having been informed by fellow NSP member John Piepoli that a marijuana dealer named Zane was operating in NSP territory, enlisted the help of defendants Cabrera and Parra, also NSP members, to rob the dealer. It was not unreasonable to infer that this plan among three NSP members was conceived and attempted as means of enforcing NSP's control over marijuana sales in its territory.

Further, the evidence that Zane was publicly executed for resisting after foiling the robbery was compelling. Conchas and Parra pursued Zane's jeep in Conchas' car and stopped next to it. In broad daylight on a city street, Parra jumped out with a shotgun, and shot Zane in the head through the windshield. Parra then got back in the car, Cabrera (who had been forced out of the back seat of the jeep by Zachary) jumped in, and Conchas drove off.

On these facts, it was certainly reasonable to infer that defendants, all admitted NSP gang members, acted for the benefit of, at the direction of, and in association with NSP.

2. *Primary Activities*

Defendants contend that evidence was insufficient to prove that one of NSP's primary activities was to commit three or more of the crimes listed in section 186.22, subdivisions (e) and (f) because Officer Garcia failed to provide any basis for his opinion that NSP's primary activities included "murder, attempted murder, robbery, possession." To the contrary, was we have explained, Officer Sanchez properly

testified to his background sources of information — senior gang officers, witnesses to gang crimes, informers, gang members themselves, including Parra and Conchas, and reports about the gang crimes. Those sources constituted sufficient background information for him to opine on NSP's primary gang activities.

III. *Accomplice Instruction*

Parra contends that the trial court erred in failing to instruct the jury sua sponte that if it determined Conchas was an accomplice, and if it considered any of his testimony as incriminating evidence against a non-testifying codefendant, that testimony must be corroborated and viewed with caution. We need not decide whether the court erred because any error was not prejudicial. (See *People v. Avila* (2006) 38 Cal.4th 491.) "A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is 'sufficient corroborating evidence in the record.' [Citation.] To corroborate the testimony of an accomplice, the prosecution must present 'independent evidence,' that is, evidence that 'tends to connect the defendant with the crime charged' without aid or assistance from the accomplice's testimony. [Citation.] Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime. [Citations.] "'[T]he corroborative evidence may be slight and entitled to little consideration when standing alone.'" [Citation.]' [Citation.]" (*Avila, supra,* 38 Cal.4th at pp. 562-563.)

In the instant case, to the extent Conchas' testimony tended to incriminate Parra, it was corroborated by a wealth of evidence,

including the telephone calls from Conchas to Parra, the surveillance videos, and Ashley Ceballos' prior statements to the police and her prior testimony. Parra focuses primarily on a supposed lack of corroboration of Conchas' testimony that Parra was the shooter and that he used a sawed-off shotgun. However, as we have discussed above in Part IA of our opinion, compelling independent evidence corroborated Conchas' testimony that Parra shot Zane with a sawed-off shotgun. On this independent evidence, which we need not repeat here, any error in the trial court's failure to instruct that Conchas' testimony incriminating Parra must be corroborated and viewed with caution was harmless. Parra argues that the error is of federal constitutional dimension. We disagree, but even if it is, given the overwhelming corroboration of Conchas' version of the shooting, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 36.)

IV. *Ineffective Assistance of Conchas' Trial Counsel*

Conchas contends that his trial counsel was ineffective for failing to object to evidence of Conchas' cultivation of marijuana as irrelevant and more prejudicial than probative. He is mistaken.

"To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'

(*Strickland v. Washington* (1984) 466 U.S. 668, 694.)" (*People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212.)

Here, out of the presence of the jury following Conchas' direct testimony, the prosecutor proposed to ask Conchas whether he was convicted of possession for sale of marijuana in 2010 (a crime of moral turpitude relevant to impeach) and whether he was on probation (a call from his cell phone having been made to his probation testing number when, according to Conchas, Cabrera had the phone). Defense counsel conceded that the prosecutor could ask about the conviction, but that "[b]eyond that, I don't believe it is proper."

The prosecutor disagreed, and represented that in 2012 police seized marijuana from Conchas' home and that his cell phone had many photographs of growing marijuana plants. The prosecutor argued that the evidence, in addition to the prior possession-for-sale conviction, was relevant to prove that Conchas was a seller and grower of marijuana, that it was unlikely he would have arranged a marijuana buy from Zane when he could have supplied it himself, and that the motive in contacting Zane was not to buy marijuana but to rob him. The trial court ruled the evidence admissible.

Thereafter, under cross-examination by the prosecutor, Conchas testified that in 2010 he was convicted of possession of marijuana for sale and was on probation. In April 2012 police seized from his home in Pasadena 10 or 12 growing marijuana plants and a plastic container of marijuana leaves, as well as a growing lamp and a grower's manual. He identified photographs of the plants. According to Conchas, he had medical marijuana permit, and had a legal operation to grow

marijuana. He was entitled to grow up to 12 plants and carry two pounds in his possession, but at the time of the search he had two "premature plants" in excess of that allotment. He admitted that he did not need to buy marijuana from Zane, but he denied contacting him to set up a robbery.

Conchas contends that his trial counsel was ineffective for failing to lodge a specific objection that the testimony concerning Conchas' cultivation of marijuana was more prejudicial than probative under Evidence Code section 352. However, because the evidence was clearly admissible, counsel's failure to lodge such an objection did not fall below an objective standard of reasonableness. That Conchas cultivated marijuana and had no need to buy marijuana from Zane was relevant to prove that when he contacted Zane on his cell phone and set up the marijuana deal, he did not intend to buy from Zane, but to rob him. Further, there was little, if any, potential prejudice from the evidence that Conchas grew marijuana under a medical marijuana permit, but in April 2012 exceeded the limit by two premature plants.

Finally, even if a successful objection under Evidence Code section 352 had been made, it is not reasonably probable that in the absence of the evidence, a more favorable result would have been reached, because the remaining evidence of Conchas' guilt of the attempted robbery and murder of Zane was overwhelming. In short, Conchas has failed to show that his trial attorney was ineffective.

V. *Sentencing*

A. *Sentence for Conspiracy*

As to each defendant on count 3, conspiracy to commit second degree robbery (§ 182, subd. (a)(1)) the court imposed a sentence of life without the possibility of parole. Defendants contend that the life-without-parole sentence was unlawful. Respondent concedes the point, and we agree.

Under section 182, subdivision (a)(6), when defendants conspire to commit a felony other than certain listed exceptions, the crime is "punishable in the same manner and to the same extent as is provided for the punishment of that felony." Second degree robbery is not one of the listed exceptions, and therefore defendants' conspiracy conviction was punishable by the same sentencing range as second degree robbery — two, three, or five years. (§ 213, subd. (a).) Thus, the life without parole sentence on count three must be stricken, and the case remanded for resentencing on that count, because the court must choose among the permissible terms.

B. *Firearm Enhancement*

As to each defendant on each count, the court imposed a consecutive term of 25-years to life for the finding under section 12022.53, subdivision (d) and (e)(1) that a principal discharged a firearm causing death, and that defendants violated section 186.22, subdivision (b)(1)(C). Firearm enhancements under section 12022.53 usually apply only to a defendant who personally uses or discharges a firearm. However, under section 12022.53, subdivision (e)(1), there is

an exception when the crime is committed to benefit a criminal street gang. Subdivision (e)(1) provides: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

Cabrera contends that imposition of the section 12022.53 enhancement on a principal in a gang crime, even though the gun was actually used by an accomplice, violates equal protection and due process. He acknowledges that in *People v. Gonzales* (2001) 87 Cal.App.4th 1, 13-15, this court rejected such a challenge. (See also *People v. Hernandez* (2005) 134 Cal.App.4th 474, 480-483 [agreeing with *Gonzales* and reaching same holding].) We see no reason to reexamine the issue, and thus reaffirm our holding in *Gonzales*.

Parra contends that the firearm enhancement on count 3, conspiracy to commit second degree robbery, must be stricken. We agree. Section 12022.53, subdivision (a) lists the crimes to which the statute applies.[17] Conspiracy to commit second degree robbery does not

---

[17] Section 12022.53, subdivision (a) provides: "This section applies to the following felonies:

"(1) Section 187 (murder).

"(2) Section 203 or 205 (mayhem).

"(3) Section 207, 209, or 209.5 (kidnapping).

"(4) Section 211 (robbery).

"(5) Section 215 (carjacking).

"(6) Section 220 (assault with intent to commit a specified felony).

"(7) Subdivision (d) of Section 245 (assault with a firearm on a peace officer or firefighter).

"(8) Section 261 or 262 (rape).

fall under any of the listed categories. Therefore, the enhancement under section 12022.53, subdivisions (d) and (e)(1) on count 3 was unauthorized as to each defendant and must be stricken.

C. *Gang Enhancement*

On each count, the court imposed a minimum parole eligibility date of 15 years pursuant to section 186.22, subdivision (b)(1)(C). Defendants contend that this enhancement must be stricken, because under section 12022.53, subdivision (e)(2), "[a]n enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 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." We agree.

As explained in *People v. Brookfield* (2009) 47 Cal.4th 583, 590: "Ordinarily, section 12022.53's sentence enhancements apply only to *personal* use or discharge of a firearm in the commission of a statutorily

---

"(9) Section 264.1 (rape or sexual penetration in concert).
"(10) Section 286 (sodomy).
"(11) Section 288 or 288.5 (lewd act on a child).
"(12) Section 288a (oral copulation).
"(13) Section 289 (sexual penetration).
"(14) Section 4500 (assault by a life prisoner).
"(15) Section 4501 (assault by a prisoner).
"(16) Section 4503 (holding a hostage by a prisoner).
"(17) Any felony punishable by death or imprisonment in the state prison for life.
"(18) Any attempt to commit a crime listed in this subdivision other than an assault."

specified offense, but when the offense is committed to benefit a criminal street gang, the statute's additional punishments apply even if, as in this case, the defendant did not personally use or discharge a firearm but another principal did. Section 12022.53(e)(2), however, limits the effect of subdivision (e)(1). A defendant who *personally* uses or discharges a firearm in the 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. In contrast, when another principal in the offense uses or discharges a firearm but the defendant does not, there is no imposition of an 'enhancement for participation in a criminal street gang . . . in addition to an enhancement imposed pursuant to' section 12022.53."

In the instant case, the prosecution alleged, and the jury found under section 12022.53, subdivisions (d) and (e)(1) that a principal in the crimes discharged a firearm causing death. There was no finding that any defendant personally discharged or used a firearm. Therefore, the gang enhancement as to each defendant must be stricken.

Respondent contends that the gang enhancement need not be stricken as to Parra, because the evidence showed that he shot Zane. Therefore, he qualified under section 12022.53, subdivision (e)(2) as a defendant who "personally used or personally discharged a firearm in the commission of the offense." However, the prosecution did not allege, and the jury did not find under section 12022.53, subdivision (e)(2), that Parra personally used or discharged a firearm. Therefore, imposition of the gang enhancement on him was unauthorized.

D. *Conchas' Credit*

Conchas was given credit for 814 days in custody, but contends that he is entitled to an additional day: he was arrested on January 28, 2013, and sentenced on April 22, 2015, which is 815 days counting both the day of arrest and sentence. Respondent agrees, as do we. The judgment must be modified to award Conchas an additional day of credit.

DISPOSITION

The sentence of life without parole on count 3, conspiracy to commit second degree robbery, is stricken, and the case is remanded for the trial court to resentence on count 3 by exercising its discretion to choose among the permissible terms: two, three, or five years (§§ 182, subd. (a), 213). On remand, the abstract shall also be amended as follows: (1) on count 3, the enhancement under section 12022.53 must be stricken; (2) on all counts, the gang enhancement under section 186.22, subdivision (b)(1)(C) (minimum parole eligibility date of 15 years) must be stricken; and (3) Conchas must be awarded 815, rather than 814, actual days of credit. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.