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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANGEL CHRISTOPHER ROJAS, Defendant and Appellant.	B240973 (Los Angeles County Super. Ct. No. VA102116)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dewey Lawes Falcone, Judge. Affirmed with modifications.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Angel Christopher Rojas was convicted, following a jury trial, of first degree murder in violation of Penal Code[1] section 187, subdivision (a), shooting at an occupied motor vehicle in violation of section 246, actively participating in a street gang in violation of section 186.22, subdivision (a), and possession of a firearm in violation of section 12021, subdivision (d)(1). The jury found true the allegations that appellant committed the murder, shooting and firearm possession for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (a). The jury also found true the allegations that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53 subdivisions (d) and (e)(1) and that appellant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (d). The trial court sentenced appellant to a total term of 50 years to life in state prison, consisting of 25 years to life for murder plus 25 years to life for personally discharging a firearm. Sentence for the section 246 conviction and other enhancements was stayed pursuant to section 654. Sentence on the active participation and firearm activity convictions was imposed concurrently.

Appellant contends the trial court's modification of CALJIC No 5.17 precluded the jury from considering his defense of an actual but unreasonable belief in the need to defend another. He asserts and the court's instruction on active participation in a street gang permitted the jury to convict him based on acts he committed alone or aiding in misdemeanor conduct, and the resulting conviction for active participation was not supported by substantial evidence. Appellant also argues the trial court erred in admitting prejudicial and irrelevant gang evidence. Finally, appellant maintains the concurrent sentences must be stayed pursuant to section 654 and his sentence of 50 years to life constitutes cruel and unusual punishment.

We hold the sentence for actively participating in a street gang should have been stayed but affirm the judgment in all other respects.

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1 All further statutory references are to the Penal Code unless otherwise stated.

I. Facts

A. Prosecution

1. Maria Hicks is shot while attempting to stop the spray-painting of gang graffiti

In the evening of August 10, 2007, sixteen-year-old appellant, Richard Rolon, Jennifer Tafolla, Cesar Lopez, fourteen-year-old David Carrillo, twelve-year-old Daniel Carrillo and Christian Lechuga gathered at Tafolla's house in Whittier.[2] Lechuga was a member of the Eastside Treece gang. David was not a member of a gang, but later became a member of Brown Authority. Everyone else was a member of the Brown Authority gang. At some point, all seven went for a drive.

As the group drove past a wall near the intersection of San Gabriel River Parkway and Woodford Street in Pico Rivera, members of the group noticed Brown Authority graffiti on the wall had been painted over with "YN X3," the initials of another gang. According to Lopez, appellant became "hyped up" and "very animated." He said he wanted to cross out the new graffiti. Rolon said Lopez should scratch out the graffiti because "he could go over there and do it and get out of there." Lopez did not want to cross out the graffiti. Lopez believed graffiti writing carried a risk of violence. Lechuga shared that belief. Rolon insisted Lopez scratch out the graffiti. Appellant was "pretty drunk and acting the fool."

While Lopez was spray-painting on the wall, a Honda Element drove up behind him and put its high beams on Lopez. Lopez kept on writing. The Honda came closer to Lopez and honked at him. Lopez started walking away. The Honda followed him.

According to Lechuga, appellant got out of Tafolla's car and fired at the Honda. Lopez ran away. Appellant got back into Tafolla's car, and Tafolla drove off, stopping briefly to pick up Lopez. Lopez was upset with appellant and kept asking him what he

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[2] Rolon, Tafolla, and Lopez were charged with appellant in this matter. Lopez pled guilty to voluntary manslaughter before trial. Rolon and Tafolla were tried jointly with appellant. The jury acquitted Rolon and Tafolla of the murder and shooting charges, but found them guilty of active participation in a street gang.

had done. Rolon and Tafolla were upset and yelling at appellant. They said he was "stupid" and an "idiot."

It was later determined the driver of the Honda was Maria Hicks, a 57-year-old woman who lived in the neighborhood. Hicks died from a gunshot wound to the head.

a. The shooting is witnessed by two individuals who knew appellant

The shooting was witnessed by Miriam Villanueva and Eric Pena. Villanueva saw a man writing on a wall and also saw the Honda flashing its lights and honking. As the "tagger" moved away from the wall, Villanueva saw appellant exit a parked car and fire a handgun. Villanueva had lived on the same street as appellant, and seen him many times. Pena, who was driving, heard gunshots, turned his head and saw appellant standing in the street with his arms extended and a gun in his hand. Pena's grandparents lived across the street from appellant, and Pena had known appellant since appellant was small boy.

b. Sheriff's deputies investigate the shooting

About 9:50 p.m., Los Angeles County Deputy Sheriff Tim Lopez went to the intersection of San Gabriel River Parkway and Woodford in response to a report of shots fired. He saw a Honda Element with bullet holes in its rear window. Maria Hicks was inside the Element, slumped over the wheel with a gunshot wound to her head.

Sergeant Jeffrey Cochran investigated the shooting. He saw white graffiti reading "BXA" which had been crossed out with red graffiti reading "YN" and "X3." He found a spray paint can near the Honda. Sergeant Cochran spoke with Pena, who told him the shooter was Pena's neighbor "Angel." Pena also knew the shooter as "Scrappy" from Brown Authority.

Appellant was arrested on August 14, 2007. That same day, Detective Weireter interviewed David Carillo. Carillo stated Lopez got out of the car to "tag." A car started honking at Lopez. Appellant got out of the car carrying a handgun. David heard three or four shots fired. The next day, Detective Weireter interviewed Daniel Carillo. Daniel also told the detective someone was "tagging" when a "box car" started honking.

Appellant got out of the car and ran toward the box car with a gun. He shot at it four or five times. Daniel added that after appellant got back into the car, everyone told appellant he "shouldn't have shot at that lady."

Sergeant Kevin Lloyd interviewed Lechuga on August 16, 2007. Lechuga admitted he was a member of the Eastside Treece gang. Lechuga knew Rolon, who worked for Lechuga's father. Lechuga stated that as the group was driving around, they stopped at some point so that someone could "write" graffiti. Lechuga saw the Honda Element, but did not see the car's lights flashing or hear its horn honking. He saw Lopez walking away. Appellant then got out of the car and stood with his arms outstretched toward the Honda. Lechuga heard two shots being fired. Appellant got back in the car and the group drove away. Lechuga agreed that it would be disrespectful for one gang to cross out another gang's graffiti.

c. Gang culture

Detective Hank Ortega testified at trial as an expert on gang culture. Brown Authority, also known as Brown Assassins, began as a tagging crew in 1995 and evolved into a gang around 2001-2003. As Brown Authority became a gang, they began feuding with Pico Viejo, an older gang. There were numerous shootings between the gangs.

By 2007, Brown Authority had approximately 40 to 50 members. Appellant, Rolon and Tafolla were known to Detective Ortega to be members of Brown Authority in 2007. The gang's primary activities included vandalism, robbery, possession of firearms and narcotics. Brown Authority claimed a territory in Pico Rivera. The southern boundary of the territory, which was near Woodford, was disputed with Pico Viejo. Detective Ortega would not expect a member of either Brown Authority or Pico Viejo to travel through the area of Woodford and the San Gabriel Parkway unarmed. This was particularly true if the gang member were planning to write graffiti. In gang culture, crossing out another gang's graffiti shows "complete disrespect to the gang" and "creates hostile feelings."

In response to a hypothetical based on the facts of this case, Detective Ortega opined that the shooting was committed for the benefit of and in association with the Brown Authority street gang. The crime would enhance the gang's reputation among its rivals and inhibit people in the community from reporting gang crimes. The detective further opined the shooting was a foreseeable result of crossing out gang graffiti. Detective Ortega knew of incidents where gang members were shot or killed while writing graffiti.

B. Defense

Dr. Timothy Collister, a licensed psychologist, evaluated appellant in January, 2009. Dr. Collister administered a number of tests and concluded appellant was mildly retarded. Appellant's ability to reason abstractly was that of a nine-year old. Appellant had been in special education classes since he was seven years old.

Dr. Collister also opined that appellant had Attention Deficit Hyperactivity Disorder ("ADHD"). This condition causes impulsivity. Collister did not expect appellant to process danger or risk the same way as a normal person who did not have ADHD. A person with ADHD typically has an impulsive response to the first thing that captures their attention rather than thinking about the consequences of their actions.

Dr. Collister acknowledged reviewing a 2008 evaluation of appellant prepared by Dr. Douglas Allen. Dr. Allen concluded appellant was feigning cognitive deficits.

Dr. Collister was also familiar with a 2009 evaluation of appellant prepared by Dr. Gerald Plotkin. Dr. Plotkin opined that appellant was malingering during his evaluation by Dr. Collister.

II. DISCUSSION

1. Defense of Another Instruction

Appellant contends the trial court erred by omitting the last paragraph of CALJIC No. 5.17, the jury instruction explaining the defense of an actual but unreasonable belief in the need to defend, and the error abridged his federal constitutional right to have a jury

determine every material issue presented by the evidence.[3] Appellant has not shown prejudice from this omission.

CALJIC No. 5.17 was given to the jury as follows:

"A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] manslaughter."

"As used in this instruction, an 'imminent' [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer."

The standard version of CALJIC No. 5.17 contains two additional optional paragraphs, both of which were omitted in this case. Appellant's claim of error involves only the omission of the last paragraph, which states: "[This principle applies equally to a person who kills in purported self-defense or purported defense of another person.]" Appellant contends the average juror would have been familiar with the concept of self-defense and unfamiliar with the concept of defense of another and so would have understood the modified version of CALJIC No. 5.17 as applying only to self-defense.

As appellant implicitly acknowledges, the instruction was not expressly limited to self-defense. At most, the instruction was ambiguous. In reviewing an ambiguous instruction, the test is "whether there is a 'reasonable likelihood' the jury misunderstood and misapplied the instruction." (*People v. Avena* (1996) 13 Cal.4th 394, 417; *Boyde v. California* (1990) 494 U.S. 370, 380-381.) Here, there is no reasonable likelihood the

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3 Appellant's counsel agreed to the modification. Respondent contends appellant review is precluded under the doctrine of invited error. "The invited error doctrine will not preclude appellate review if the record fails to show counsel had a tactical reason for requesting or acquiescing in the instruction. [Citations.]" (*People v. Moon* (2005) 37 Cal.4th 1, 28.) Respondent does not identify a tactical reason for counsel's acquiescence and the record shows none. The doctrine does not apply.

jury misunderstood the trial court's instruction on an actual but unreasonable belief in the need to defend in the manner argued by appellant, and thus no federal constitutional error occurred.

The instruction referred to the need to defend "against imminent peril to life or great bodily injury." This phrase could have applied equally to the life of the defendant or to the life of another. Arguments by the prosecutor and defense counsel recognized defense of another was an issue in the case. Tafolla's counsel argued: "Unreasonable belief in defense of another. Again, it's another jury instruction." The issue of self-defense was not raised by the evidence or arguments of counsel. (See *People v. Avena*, *supra*, 13 Cal.4th at p. 417 [jury would not have misunderstood instruction in part because arguments of counsel did not mislead jury].) In this context, jurors could not reasonably have understood CALJIC No. 5.17 to apply only to self-defense. There was no violation of appellant's constitutional rights.

2. Active participation in a criminal street gang

Appellant contends the trial court erred by instructing the jury he could be convicted of active participation in a criminal street gang based on (1) acts he committed alone or (2) aiding and abetting misdemeanor vandalism. He also contends there was insufficient evidence to support his conviction for this offense. The claims are inter-related and we consider them together.

In enacting section 186.22, subdivision (a), the "Legislature . . . sought to avoid punishing mere gang membership . . . by requiring that a person commit an underlying *felony* with at least one other gang member." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1134, italics added.) "The plain meaning of section 186.22(a) requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member." (*Id.* at p. 1132.)

a. Vandalism instruction

The trial court instructed the jury that the predicate offense to a section 186.22, subdivision (a) violation was the commission of "the crime of vandalism, murder or shooting at an occupied motor vehicle." The court instructed the jury on the elements of "misdemeanor" vandalism, as follows:

Every person who maliciously defaces with graffiti or other inscribed material [or] damages or destroys any real or personal property not his own is guilty of vandalism in violation of section 594, subdivision (a).

In order to prove this crime, each of the following elements must be proved:

1. A person defaced with graffiti or other inscribed material damaged [or] damaged or destroyed any real or personal property belonging to another person; and

2. The person acted maliciously in doing so.

The plain language of section 186.22, subdivision (a) requires felonious conduct. (See *People v. Rodriguez, supra,* 55 Cal.4th at pp. 1132, 1134.) The trial court erred by instructing the jury appellant could be convicted of active participation for aiding and abetting vandalism, and then instructing the jury on misdemeanor vandalism.[4]

b. Active participation instruction

The trial court used CALJIC No. 6.50 to instruct the jury on the requirements of active participation in a street gang, modified only by inserting the names of specific alleged crimes. The instruction read as follows:

"Every person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, is guilty of a violation of Penal Code section 186.22, subdivision (a), a crime."

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4 Vandalism may be punished as a felony if the amount of the damage caused is $400 or more. (§ 594, subd. (b)(1). The court did not instruct the jury on this theory of vandalism.

[¶] [¶] [¶]

"In order to prove this crime, each of the following elements must be proved:

1. A person actively participated in a criminal street gang;

2. The members of that gang engaged in or have engaged in a pattern of criminal gang activity;

3. That person knew that the gang members engaged in or have engaged in a pattern of criminal gang activity; and

4. That person either *directly and actively committed* or aided and abetted another member of that gang in committing the crime of . . . murder or shooting at an occupied motor vehicle." (Italics added.)

Appellant contends italicized language in the active participation instruction permitted the jury to convict him of that crime if he directly committed a felony while acting alone. (See *People v. Rodriguez, supra*, 55 Cal.4th at p.1139 [a defendant does not violate section 186.22, subdivision (a) if he/she acts alone in committing the predicate felony.])

The instruction is, at most, ambiguous. We consider "whether there is a 'reasonable likelihood' the jury misunderstood and misapplied the instruction." (*People v. Avena, supra,*13 Cal.4th at. p 417; *Boyde v. California, supra*, 494 U.S. at pp. 380-381.) The challenged paragraph cannot be read in isolation. (See *People v. Bolin* (1998) 18 Cal.4th 297, 328.)

The first paragraph sets forth the requirement that a defendant must "willfully promote[], further[], or assist[] in any felonious criminal conduct by members of that gang." "'In common usage, "promote" means to contribute to the progress or growth of; "further" means to help the progress of; and "assist" means to give aid or support. (Webster's New College Dict. (1995) pp. 885, 454, 68.)'" (*People v. Rodriguez, supra*, 55 Cal.4th at p. 1132.) This phrase clearly conveys the requirement that a defendant cannot act alone.

Nothing in the last paragraph negates or contradicts the requirements of the first paragraph. The last paragraph is simply a particularization of an earlier general

instruction on culpability which informed the jury a person is guilty of a crime if the person "directly and actively commit[s] the act constituting the crime" or "aid[s] and abet[s] the commission of the crime."

The prosecutor's theory of the case was appellant, Rolon, Tafolla, and Lopez were all criminally liable for Hicks's death. Before trial, Lopez pled guilty to voluntary manslaughter. At trial, the prosecutor sought to hold appellant and his two remaining co-defendants responsible for shooting at an occupied motor vehicle and Hick's murder. There was no argument by counsel that a defendant could be liable for active participation if he acted alone. (See *People v. Avena*, *supra*, 13 Cal.4th at p. 417 [jury would not have misunderstood instruction in part because arguments of counsel did not mislead jury].)

c. Prejudice

Appellant contends the combined effect of the two instructional errors was to permit the jury to convict him of active participation for a crime he committed alone. Alternatively, he contends there was no evidence showing he aided another gang member in committing a murder or shooting at an occupied motor vehicle. The jury found Rolon and Tafolla not guilty of murder and shooting at an occupied motor vehicle.[5]

We are required to assess whether a misinstruction on an element of the offense was harmless beyond a reasonable doubt. (*People v. Wilkins* (2013) 56 Cal.4th 333, 350.) Given the uncontroverted evidence that at least one of appellant's confederates was also culpable for the felonious killing of Hicks, we conclude the error was not prejudicial.

Appellant overlooks Lopez's guilty plea to and subsequent conviction for voluntary manslaughter for the killing of Hicks, a felony. Lopez testified at trial, and the jury was aware of his plea.[6] Appellant and Lopez were both principals in the commission of a felonious killing. This alone satisfied the statute. (See *People v. Rodriguez*, *supra*,

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5 There was no evidence at all of the amount of damage caused by the vandalism.

6 A copy of that plea agreement was entered into evidence as People's Exhibit 27.

55 Cal.4th at p. 1138 [gang member who aids and abets shooting by providing gun to gang leader for a shooting and gang leader who subsequently directly commits the shooting are both principals and are both guilty of violating section 186.22, subdivision (a)].)

Because two defendants were convicted of the felonious killing of Hicks, we conclude, beyond a reasonable doubt that the instructional error did not contribute to the verdict. Based on the record before us, the jury could not have found appellant acted alone when he shot Hicks.

3. Evidence Code section 352

The trial court admitted rebuttal evidence of a 2011 jailhouse call from appellant to Daniel Carrillo for the purpose of impeaching appellant's 2009 statement to Dr. Collister that he was no longer an active gang member. Appellant argues the evidence had little probative value because it did not show he was a gang member in 2009, was cumulative of other evidence he was a gang member in 2007 and at most impeached him on a collateral matter. He contends the evidence was highly inflammatory because it showed him as a hard core gang member and a cold-blooded killer who planned the murder in this case. Appellant concludes the trial court abused its discretion in failing to exclude the evidence pursuant to Evidence Code section 352, and the erroneous admission violated his federal constitutional right to due process, a fair trial and a reliable determination of penalty.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

a. Telephone call

The transcript of the telephone call is five pages long. We excerpt only one key paragraph: "All these, those other fools go home late at night, fool. Where is my home,

fool? I was walking around the Circle everywhere, looking for motherfuckers. To me, selling motherfuckers out, we - - I wanted them to get the point that I, we ain't fuckin' playing homie, we're not playing around, homie. We went this far with this shit and we're not going to stop homie, that the way I look at it, fool. We're hood, fool. We made ourselves a hood, we want a hood of course, you know that right?"

b. Forfeiture

Appellant's counsel did not make any Evidence Code section 352 claims in the trial court. Cocounsel did argue appellant might have claimed a gang affiliation while in jail simply for protection. He also argued the evidence was cumulative. With the exception of these two claims, appellant's claims are forfeited.[7] "A general objection to the admission or exclusion of evidence, or one based on a different ground from that advanced at trial, does not preserve the claim for appeal." (*People v. Marks* (2003) 31 Cal.4th 197, 228.)

As for cocounsel's claims, there was no evidence to show appellant in fact claimed gang allegiance for protection. The tone of the telephone conversation does not suggest reluctance to be affiliated with a gang; it suggests enthusiasm. The evidence may have been cumulative on some points, but it was not so on other points, as we discuss below.

c. Prejudice

Even if appellant had raised his claims in the trial court, his objection lacked merit. The statements had significant probative value and did not have the prejudicial effect claimed by appellant. The evidence was properly admitted.

i. Probative value

Appellant contends Dr. Collister's opinion was based on cognitive tests and observations, not appellant's statements about gang membership. He concludes any

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[7] The court and all parties agreed objection by one counsel would be deemed joined by all counsel unless counsel told the court otherwise.

dishonesty on the collateral topic of gang membership did not undermine that opinion. Appellant is mistaken.

Dr. Collister acknowledged questioning appellant about his gang involvement during his evaluation. He agreed appellant was "compliant" during this questioning. Dr. Collister also agreed a person's compliance level and "level of honesty in completing whatever tasks or whatever tests that [he] had for them" was "an important component of getting an accurate measure of someone's intelligence. Appellant's honesty, or lack thereof, during his evaluation was quite relevant.[8]

ii. Prejudicial effect

Appellant contends the telephone call was highly inflammatory and prejudicial because it "painted a picture" of him as a "cold-blooded killer" and was "the only real evidence suggesting a planned killing." He argues the reference to "walking around the Circle" while "strapped" described the shooting in this case.

We do not accept appellant's interpretation of this statement. The "Circle" was a term used to describe the area of Greenglade and Chappelle, a location which at one time was "like the headquarters" of Brown Authority. The shooting occurred elsewhere, at San Gabriel River Parkway and Woodford. Appellant was not "walking around" before shooting. He arrived in a car, got out to shoot and then was driven away. The phrase "strapped" was redacted.

The significant probative value of the evidence outweighed any small prejudicial impact from the evidence. The telephone call was properly admitted.

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[8] Further, Dr. Collister's ability to discern if appellant was malingering during the evaluation was an issue in the case. Dr. Gordon Plotkin concluded appellant was "feigning his answers" to Dr. Collister's questions. On the other hand, Dr. Collister opined appellant was not "feigning" during his evaluation.

4. Concurrent sentencing

Appellant contends the trial court erred in failing to stay his sentences for active participation in a street gang (count four) and unlawful firearm activity (count five) pursuant to section 654. We agree the sentence for active participation must be stayed, but not the sentence for unlawful firearm activity.

When a defendant is convicted of multiple offenses that are part of an indivisible course of conduct, the defendant may be punished for only one offense; the sentences on the remaining offenses must be stayed. (§ 654, subd. (a); *People v. Deloza* (1998) 18 Cal.4th 585, 591-592.) Whether a course of criminal conduct is divisible so as to allow multiple punishment under section 654 depends on whether the defendant had a separate objective for each offense. (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.)

a. Active participation in a street gang

Appellant contends his sentence for active participation in a street gang must be stayed under the holding of *People v. Mesa* (2012) 54 Cal.4th 191. He is correct.

"'[S]ection 654 precludes multiple punishment for both (1) gang participation, one element of which requires that the defendant have "willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of th[e] gang," [citation] and (2) the underlying felony that is used to satisfy this element of gang participation.' [Citation.] Section 654 applies where the 'defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself.' [Citation.]" (*People* v. *Mesa, supra,* 54 Cal.4th 191 at pp. 197-198.)

Appellant was sentenced to a term of 25 years to life for his murder conviction. The murder was the underlying felony for the active participation conviction. The active participation sentence must be stayed pursuant to section 654.

b. Firearm possession

Appellant contends his conviction for possession of a firearm (§12021, subd. (a)(1)) must be stayed under the reasoning of *People v. Jones* (2012) 54 Cal.4th 350. He is mistaken.

"Commission of a crime under section 12021 is complete once the intent to possess is perfected by possession. What the [perpetrator] does with the weapon later is another separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon. [Citations.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1146.)

Section 654 bars punishment for both possession and the greater offense where the defendant comes into possession of the firearm just as he commits the greater offense. (*People v. Bradford* (1976) 17 Cal.3d 8, 13 [patrol officer stopped defendant for a moving violation; defendant took the officer's gun and shot the officer]; *People v. Venegas* (1970) 10 Cal.App.3d 814, 821 [evidence suggested the defendant obtained the gun during a struggle moments before the shooting].)

Section 654 does not bar punishment for both offenses where the defendant arrives at the scene of the greater offense with the firearm. (*People v. Jones*, *supra*, 103 Cal.App.4th at pp. 1141-1142 [ex-felon went to his ex-girlfriend's house, left when he learned she was not there and returned 15 minutes later and began shooting into the home]; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1414 [ex-felon used a gun to commit two robberies about ninety minutes apart and still had the gun when police arrested him thirty minutes after the second robbery].)

The evidence in this case indicates appellant possessed the firearm well before the shooting. Appellant was at Tafolla's house for an hour before he and the others went for a drive. His companions did not see him with a handgun while in the car. At a minimum, this suggests appellant did not obtain the gun immediately before firing it. Under these circumstances, appellant was properly sentenced separately for firearm possession, murder, and shooting at an occupied motor vehicle.

5. Cruel and unusual punishment

Appellant was 16 years old at the time of the murder in this case. He contends his sentence of 50 years to life is a de facto sentence of life without the possibility of parole which violates the prohibition against cruel and unusual punishment in the United States and California Constitutions. We do not agree.

a. Life without parole

The Eighth Amendment to the United States Constitution states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const., 8th Amend.)

Sentencing a juvenile to life without the possibility of parole for a non-homicide offense violates the Eighth Amendment's prohibition of cruel and unusual punishment. (*Graham v. Florida* (2010) 560 U.S. — [130 S.Ct. 2011, 2034, 176 L.Ed.2d 825].) This is so because there are "fundamental differences between juvenile and adult minds" and juveniles are "more capable of change than are adults." (*Id*. at p. 2026.)

Imposition of a mandatory life without parole sentence on a juvenile convicted of murder also violates the Eighth Amendment. (*Miller v. Alabama* (2012) 567 U.S. — [132 S.Ct. 2455, 2467-2468, 183 L.Ed.2d 407].) Such penalties "preclude[ ] consideration of [an offender's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." (*Id*. at p. 2468.) Consideration of these factors is required for any life without parole sentence for a juvenile, even when the sentence is imposed for a homicide. (*Id*. at p. 2458.)

Following the decisions in *Graham* and *Miller*, the California Supreme Court held a 110-year-to-life sentence imposed on a juvenile convicted of non-homicide offenses was the functional equivalent of a life sentence without the possibility of parole and was invalid in light of the decisions in *Graham* and *Miller*. (*People v. Caballero* (2012) 55 Cal.4th 262, 268–269.)

At sentencing, the trial court addressed appellant's claim that 50 years to life was a de facto sentence of life without the possibility of parole. The court found parole was a

possibility. Appellant did not present any evidence regarding his life expectancy in the trial court. Absent such evidence, we cannot evaluate whether his sentence is a de facto sentence of life without the possibility of parole. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27 [both holding issue of cruel and unusual punishment is a fact intensive one which is forfeited if not raised in the trial court].)[9]

b. Disproportionality

Appellant contends that even without reference to the holdings of *Graham* and *Miller*, his sentence is grossly disproportionate to the offense and offender.

The appropriate standard for determining whether a particular sentence for a term of years violates the Eighth Amendment is gross disproportionality. That is, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime. [Citations.]" (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001, [111 S.Ct. 2680, 115 L.Ed.2d 836] (conc. opn. of Kennedy, J.), citing *Solem v. Helm* (1983) 463 U.S. 277, 288, [103 S.Ct. 3001, 77 L.Ed.2d 637].) Successful grossly disproportionate challenges are "'exceedingly rare'" and appear only in an "'extreme'" case. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73 [123 S.Ct. 1166, 155 L.Ed.2d 144].)

Article I, section 17 of the California Constitution prohibits infliction of "[c]ruel or unusual punishment." A sentence may violate this prohibition if "'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Dillon* (1983) 34 Cal.3d 441, 478.) Reviewing courts use a three-pronged test to determine whether a particular

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9 We note, three years ago, another division in this district pointed out the life expectancy of an average 18 year old American male is 76 years. (*People v. Mendez* (2010) 188 Cal.App.4th 47, 63.) Appellant will be eligible for parole when he is 64 years old. Thus, there is a strong probability he has not received a de facto life without parole sentence.

sentence is disproportionate to the offense for which it is imposed. First, we examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." [Citation.] Second, we compare the punishment imposed with punishments prescribed by California law for more serious offenses. [Citation.] Third, we compare the punishment imposed with punishments prescribed by other jurisdictions for the same offense. [Citation.] (*People v. Em* (2009) 171 Cal.App.4th 964, 972.) A defendant must overcome a "considerable burden" to show the sentence is disproportionate to his level of culpability. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) For this reason, "[f]indings of disproportionality have occurred with exquisite rarity in the case law." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.)

The offense in this case was the premeditated killing of a 57-year-old woman who posed no threat of physical danger to appellant or his fellow gang members. Her decision to attempt to dissuade Lopez from spray painting graffiti was, in effect, a gesture of kindness to him. She could have called the police, which may have resulted in Lopez's arrest. Her attempted kindness was met with death. This is a very serious crime.

Appellant had a limited criminal record at the time of the murder. He argues he also suffered from mental deficits. There was conflicting evidence on this point. Dr. Collister concluded appellant had mental deficits and lacked impulse control. Two other psychologists concluded appellant was malingering and feigning the alleged mental deficits. The trial court acted within its discretion in discounting Dr. Collister's conclusions.

Appellant does not contend his sentence is disproportionate when compared to the sentences imposed in other cases involving murders committed by young defendants with limited prior criminal records, and so we need not consider these factors. We note, however, his sentence is comparable to sentences for similarly situated juveniles in California. (*See, e.g.*, *People v. Em, supra*, 171 Cal.App.4th at pp. 972–977 [upholding sentence of 50 years to life for 15-year-old gang member who committed murder during a robbery and whose prior record was not extensive]; *People v. Demirdjian* (2006) 144 Cal.App.4th 10, 14 [15-year-old's sentence of two consecutive terms of 25 years to life

for two special circumstance murders did not violate state or federal Constitutions]; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1230-1231 [upholding sentence of 40 years to life for 17-year-old gang member who committed attempted murder with a firearm]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 17 [upholding sentence of 50 years to life for 14-year-old gang member who committed murder].)

In sum, appellant has not shown the statutory sentence "'"is so disproportionate to the crime for which it is inflicted that it shocks the conscience,"'" the California standard, or that it "is 'grossly disproportionate' to the severity of the crime," the federal standard. (*People v. Russell* (2010) 187 Cal.App.4th 981, 993.) Thus, there is no constitutional violation.

c. Mandatory sentences

Appellant also asserts California's mandatory sentencing scheme is flawed because it fails to allow the trial court discretion to impose an appropriate sentence.

Appellant points out, correctly, that the penalty provisions of section 12022.53 will result in a mandatory sentence of 50 years to life for a juvenile defendant who is convicted of murder with a firearm. He contends this violates the reasoning of *Graham* and *Miller*, which require individualized "consideration of [an offender's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." (*Miller*, *supra*, at p. 2468.)

Appellant is incorrect. The mandatory penalty provisions of section 12022.53 do not on their face result in cruel or unusual punishment. (*People* v. *Martinez* (1999) 76 Cal.App.4th 489, 494-496 [considering challenge to section 12022.53, subdivision (d)'s mandatory penalties].)

III. DISPOSITION

The two year term for active participation in a street gang in violation of section 186.22, subdivision (a), is ordered stayed pursuant to section 654. The judgment of conviction is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KUMAR, J.*

We concur:

MOSK, Acting P.J.

KRIEGLER, J.

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